REPORTS

OF THE

SUPREME COURT

OF

CANADA.

REPORTER

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1909.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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

" Désiré Girouard J.

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

" John Idington J.

" James Maclennan J.

" Lyman Poore Duff J.

" Francis Alexander Anglin J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Allen Bristol Aylesworth K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Jacques Bureau K.C.

MEMORANDA.

On the twelfth day of February, 1909, the Honourable James Maclennan, one of the Puisné Judges of the Supreme Court of Canada, resigned that office.

On the twenty-sixth day of February, 1909, the Honourable Francis Alexander Anglin, one of the Justices of the Exchequer Division 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 James Maclennan, resigned.

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOL. 40 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Attorney-General of Quebec v. *Fraser and Adams* (37 Can. S.C.R. 577). On the application of one of the heirs of Fraser, special leave to appeal was granted by the Privy Council, 12th May, 1909 (Cf. 38 Can. S.C.R., p. ix.).

Bow McLachlan Co. v. *The "Camosun"* (40 Can. S.C.R. 418). Appeal *de plano* to the Privy Council pending.

Byron N. White Co. v. *The Star Mining and Milling Co.* (41 Can. S.C.R. 377). Leave to appeal refused by Privy Council, 29th June, 1909.

Farrell v. *Manchester et al.* (40 Can. S.C.R. 339). Leave to appeal refused by Privy Council, 24th Feb., 1909.

Granby, Village of, v. *Ménard* (31 Can. S.C.R. 14). Leave to appeal refused by Privy Council, 13th July, 1901.

(NOTE.—This information was only recently received by the reporters.)

Grand Trunk Railway Co. v. *Robertson* (39 Can. S.C.R. 506). Appeal to Privy Council dismissed with costs, 17th Feb., 1909; ([1909] A.C. 325).

Iredale v. *Loudon* (40 Can. S.C.R. 313). Leave to appeal to Privy Council refused, 9th July, 1909.

McLellan v. *Powassan Lumber Co.* (not yet reported). Special leave to appeal granted by Privy Council, 29th June, 1909.

"Nanna," The, v. *The "Mystic"* (41 Can. S.C.R. 168). Appeal *de plano* to Privy Council pending.

"Prescott," The, v. *The "Havana"* (not yet reported). Appeal *de plano* to Privy Council pending.

Red Mountain Railway Co. v. Blue et al. (39 Can. S.C.R. 390). Appeal to Privy Council allowed; judgment of Supreme Court of Canada reversed with costs and judgment of Supreme Court of British Columbia, *in banco,* restored with costs; 31st March, 1909, ([1909] A.C. 361).

"Rosalind," The, v. *The "Senlac"* (41 Can. S.C.R. 54). Appeal *de plano* to Privy Council pending.

Rosenthal v. *The Slingsby Manufacturing Co.* (not reported). Leave to appeal refused by Privy Council, 26th Feb., 1909.

Stuart v. *Bank of Montreal* (41 Can. S.C.R. 516). Leave to appeal to Privy Council granted, 9th July, 1909.

"Tordenskjold," The, v. *The "Euphemia"* (41 Can. S.C.R. 154). Appeal *de plano* to Privy Council pending.

Vaughan v. *Eastern Townships Bank* (41 Can. S.C.R. 286). Leave to appeal to Privy Council granted, 9th July, 1909.

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CASES

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FROM

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AND FROM

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IN THE MATTER OF
THE ATLANTIC AND LAKE SUPERIOR RAILWAY COMPANY.

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*Oct. 6.
*Oct. 7.

THE NORTH EASTERN BANKING COMPANY (CLAIMANTS) ..... } APPELLANTS;

AND

THE ROYAL TRUST COMPANY (PLAINTIFFS) AND GEORGE BALL AND OTHERS (CLAIMANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Appeal—Jurisdiction—Final judgment—Time for appealing—Exchequer Court Act, R.S.C. (1906) *c.* 140, *s.* 82—*Exchequer Court rules.*

Notwithstanding that no appeal has been taken from the report of a referee within the fourteen days mentioned in sections 19 and 20 of the General Rules and Orders of the Exchequer Court of

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IN RE ATLANTIC AND LAKE SUPERIOR RY. CO.

Canada (12th December, 1899), an appeal will lie to the Supreme Court of Canada from an order by the judge confirming the report, as required by the said sections, within the thirty days limited by section 82 of the Exchequer Court Act, R.S.C. (1906) ch. 140.

MOTION to quash an appeal from the judgment of the Exchequer Court of Canada, confirming the report of the referee appointed to take the accounts and determine the amounts due to the creditors of the railway company, and to fix the amounts due and the priority of the claims.

Upon an order of reference to the registrar of the Exchequer Court of Canada to take the accounts and determine the claims of the creditors of the railway company, fix the amounts due to the respective creditors and determine the order of priority in which such claims, respectively, should rank upon the proceeds of the sale of the railway, the referee filed his report on the 4th of May, 1908. Notice of the filing of the report was duly given and there was no contestation thereof by any of the parties interested in the proceedings affecting the sale of the railway and the distribution of the proceeds of such sale. On the 10th of June, 1908, upon motion on behalf of the plaintiffs, the judge of the Exchequer Court made an order confirming the report, in the terms therein stated. The present appeal was taken on the 10th of July, 1908, by the North Eastern Banking Company, one of the creditors and claimants.

T. Chase-Casgrain K.C. for the motion. The appellants had notice of the filing of the referee's report, but did not contest it within the time allowed by sections 19 and 20 of the General Rules and Orders of the Exchequer Court, of 12th December, 1899. They

also had notice of the motion to have the report confirmed, but did not appear for the purpose of opposing the order made, on that motion, by the judge of the Exchequer Court, which is now appealed from. They must, therefore, be held to have acquiesced in the report and also in the confirmatory order. The report became final and non-appealable on the lapse of the 14 days allowed for appealing, and the judge's order was unnecessary, the report having become, under the rules, the final judgment, upon the matters with which it dealt, by mere lapse of time, on the 28th of May, 1908. When the appeal was taken, on the 10th of July, 1908, the thirty days limited by section 81 of the "Exchequer Court Act" for appealing to this court, had expired, and, therefore, this court can have no jurisdiction to entertain the present appeal.

Spencer Harris contra. Acquiescence in the report cannot be implied from mere failure to contest it within the time prescribed by the rule nor by failure to oppose the confirmatory order. Rules of practice cannot take away the statutory right of appeal; the rule in question does not, by its terms, assume to do so. The report by the referee is not, of itself, the judgment of the court; it is not now absolute as under the former rules, and it is not executory until confirmed by a judge's order. The judge's order was the only final judgment and the inscription of the appeal, on the 10th of July, was within the time limited by the statute.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This appeal is from a judgment of the Exchequer Court and the respondents

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move to quash on the ground that the appeal was not taken within thirty days from the date of the judgment appealed from. See section 82, "Exchequer Court Act." The dates of the different proceedings are important. The referee's report, made pursuant to the judge's order of 13th February, 1908, was filed on the 14th of May, 1908 (section 18). The judgment confirming the report was delivered on the 10th of June, 1908, and the appeal to this court was taken on the 10th of July, 1908.

It was argued by Mr. Casgrain that the report not having been appealed from within the fourteen days fixed by the General Rules and Orders of the Exchequer Court was confirmed by lapse of time, and that a subsequent motion for judgment was unnecessary. We cannot accept this construction of the rules. The judgment from which an appeal is given by section 82 of the "Exchequer Court Act" is the judgment on the report required by section 20 of the rules and orders and, from this judgment, the appellants appealed within the delay of thirty days.

The motion is dismissed with costs.

Motion dismissed with costs.

IN RE CHARLES SEELEY.

1908

*Oct. 14.
*Oct. 27.

ON APPEAL FROM MR. JUSTICE GIROUARD IN CHAMBERS.

Criminal law—Indictable offence—Summary trial—Jurisdiction of magistrate—Offence committed in another county.

If a person is brought before a justice of the peace charged with an offence committed within the Province, but out of the limits of the jurisdiction of such justice the latter, in his discretion, may either order the accused to be taken before some justice having jurisdiction in the place where the offence was committed (Cr. Code [1892] sec. 557; Cr. C. [1906] sec. 665) or may proceed as if it had been committed within his own jurisdiction.

S. was brought before the stipendiary magistrate of the City of Halifax charged with having committed burglary in Sydney, C.B.

Held, that the stipendiary magistrate could, with the consent of the accused, try him summarily under Cr. C. [1892] sec. 785 as amended in 1900. (Cr. C. [1906] sec. 777).

APPEAL from a decision of Mr. Justice Girouard in Chambers refusing an application for a writ of *habeas corpus*.

The applicant, Seeley, is confined in the penitentiary at Dorchester, N.B., on conviction by a stipendiary magistrate for Halifax, N.S., of having committed burglary at Sydney, Cape Breton. He was at the same time convicted of burglary in Halifax and sentenced to the penitentiary therefor, such sentence to run from the termination of that imposed for the first-mentioned offence.

Seeley applied to a judge of the Supreme Court of New Brunswick for a writ of *habeas corpus*, which

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application was referred to the full court and the writ was finally refused(1). He then applied to Mr. Justice Girouard, who, following *In re White*(2), refused to interfere with the decision of the provincial court. He then appealed to the Supreme Court from such refusal.

O'Hearn, for the appellant.
J. J. Power K.C., for the Crown.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This is an appeal from an order made by Mr. Justice Girouard in Chambers refusing a writ of *habeas corpus*(3).

It may be convenient to state now briefly the mode in which the courts in England have administered the law in relation to the writ of *habeas corpus.* Lord Herschel, in *Cox* v. *Hakes*(4), at page 527, says:

> It was always open to an applicant for it, if defeated in one court, at once to *renew* his application to another. No court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed *from court to court* until he obtained his liberty. And if he could succeed in convincing any of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question. There was no power in any court to review or control the proceedings of the tribunal which discharged him. I need not dwell upon the security which was thus afforded against any unlawful imprisonment. It is sufficient to say that *no person* could be detained in custody if any one of the tribunals having power to issue the writ of *habeas corpus* was of opinion that the custody was unlawful.

(1) 13 Can. Cr. Cas. 259.
(2) 31 Can. S.C.R. 383.
(3) Sec. 62 S.C. Act.
(4) 15 App. Cas. 506.

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In this statement of the law as applicable to Canada we desire to express our full concurrence.

The facts of this case summarily stated are:

The prisoner was convicted at Halifax on the 23rd December, 1903, by George H. Fielding, stipendiary magistrate in and for the City of Halifax, in the Province of Nova Scotia, of the offence of burglary, alleged to have been committed at the City of Sydney, in the County of Cape Breton, also in Nova Scotia. It is submitted in support of the application that the magistrate had no jurisdiction to convict on the short ground that the offence was not committed within his territorial jurisdiction, the limits of which are made by virtue of the provisions of the Nova Scotia statutes co-terminus with the area of the City of Halifax.

There is no doubt that the powers of a justice of the peace are all derived from statute and being purely statutory must be construed strictly. It must also be conceded, I think, that a magistrate must exercise his powers within the local limits of his jurisdiction. In England, the Criminal Acts (Indictable Offences Act, 1848, and Criminal Law Amendment Act, 1867) empower a justice of the peace to issue a warrant upon information in writing on oath against any person charged with having committed an indictable offence within his jurisdiction, or against any person residing or being or suspected to reside or be within the limits of his jurisdiction and who is suspected to be guilty of having committed any offence elsewhere (11 & 12 Vict. ch. 42, sec. 1); and in the case of a man apprehended in one county for an offence committed in another it is provided that the magistrate shall examine such witnesses and receive such evidence in proof of the charge as shall be pro-

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duced before him within his jurisdiction, and if, in his opinion, the evidence shall be sufficient proof of the charge he shall commit the accused to the gaol, or house of correction, for the county, borough or place where the offence is alleged to have been committed, or admit to bail; and if the evidence is not deemed sufficient to put the accused upon his trial, the justice binds over the witnesses and sends the accused back to the county where the offence is alleged to have been committed to be dealt with by a justice there (11 & 12 Vict. ch. 42, sec. 22), so that in the result the offence is finally dealt with and the offender tried within the district in which the alleged offence was committed, in accordance with the common law rule. This proceeding is plain, intelligible and consistent with the general principle that the authority of a justice of the peace or of a magistrate is limited to the county or district for which he is appointed.

We must, however, consider this application in connection with sections 554 and 557 of the Criminal Code (Canada, 1892), which re-enact in part only those provisions of the Imperial Act to which I have just referred. Section 554 gives a magistrate jurisdiction to issue his warrant and compel for the purpose of preliminary inquiry the attendance of an accused charged with an indictable offence who resides or is found or apprehended or is in custody in the justice's county. Section 557 provides that the magistrate holding the preliminary inquiry where the accused is charged with an offence committed out of the limits of the jurisdiction of such magistrate may, after hearing both sides, order the accused, at any stage of the inquiry, to be taken before a justice having jurisdiction in the place where the offence was

committed. Whereas the "Imperial Act," as already pointed out, is imperative, our section is permissive(1), and makes no special provision for the commitment or trial, as the English Act does, of a prisoner charged with an offence committed in another county *in the same province.* Must we not therefore assume that in such a case, provided the offence is *triable in the province,* the prisoner is to be dealt with as if the offence had been committed within the territorial limits of the magistrate's jurisdiction, unless, in the exercise of his discretion, he chooses to send him before a justice of the county where the offence was committed. I am confirmed in this opinion by the terms of section 554:

> Every justice may issue a warrant or summons, as hereinafter mentioned, to compel the attendance of an accused person before him, for the purpose of preliminary inquiry in any of the following cases:—
>
> (*a*) If such person is accused of having committed in any place whatever an indictable offence triable in the province in which such judge resides, or is, or is suspected to be, within the limits over which such justice has jurisdiction, or resides or is suspected to reside within such limits;
>
> (*b*) If such person, wherever he may be, is accused of having committed an indictable offence within such limits;
>
> (*c*) If such person is alleged to have anywhere unlawfully received property which was unlawfully obtained within such limits;
>
> (*d*) If such person has in his possession, within such limits, any stolen property.

The words *preliminary inquiry* in the first paragraph, which specially confer jurisdiction in the cases enumerated in sections (*a*), (*b*), (*c*), (*d*), must carry the same meaning throughout the whole section. It would be contrary to the general rules of construction to give a different meaning to these words in

(1) *Reg.* v. *Burke,* 5 Can. Cr. Cas. 29.

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The Chief Justice.

different portions of the same section(1), and there is no doubt that construed with special reference to sections (*b*), (*c*) and (*d*), they must be held to confer on the magistrate power to inquire and commit for trial in the cases provided for in these sections, that is to say, where the accused is charged with an offence committed in the justice's county or with unlawfully receiving. I can see no reason why these words should receive a more limited meaning when used in connection with sub-section (*a*) where the accused is charged in the justice's county with an indictable offence committed elsewhere in the province. Article 785 of the Code, as amended by the statute of 1900, (2), gives the magistrate jurisdiction to try summarily with his consent any person *charged* before him with having committed any offence for which he may be tried at a Court of General Sessions of the Peace and undoubtedly the offence of burglary is triable at sessions(3). There are certain offences enumerated in the latter section with respect to which a magistrate can hold a preliminary inquiry only. What is the meaning of the word *charged* as used here? The charge is contained in the information sworn to and lodged with the magistrate and upon which he issues his warrant, as well as in the depositions taken at the preliminary inquiry, if an inquiry is held; but if the prisoner waives the inquiry and consents to be tried summarily, then the magistrate makes the charge for the purpose of that proceeding on the sworn complaint and information then before him and, when read to the prisoner for the purpose

(1) *Ex parte County of Kent & Borough of Dover*, [1891] 1 Q.B. 389, at p. 393.

(2) 63 & 64 Vict., ch. 46.

(3) Secs. 539 and 540.

of enabling him to make his option, he is charged within the meaning of this section and the magistrate has jurisdiction to deal with him. Some stress was laid upon the point that to be clothed with jurisdiction under section 785 the magistrate must be acting within the local limits of his jurisdiction. I have endeavoured to point out that section 554 does not distinguish and that with respect to an offender found within the county charged with an offence committed beyond, but within the province, the jurisdiction of the magistrate is as complete as if the offence had been committed within his territory. The legislation is somewhat elliptical, but our duty is to give effect to what is apparently the intention of the Act if we can do so on a proper construction of the words used. If the Canadian Parliament had intended to adopt the procedure followed in England, it would have been easy to use the language of the "Imperial Act," and as this was not done I conclude that the intention was to establish the principle that mere presence in the county will subject even a passing stranger to the jurisdiction of the magistrate if charged with an indictable offence wherever committed within the limits of the province, and I can see no reason why on the principle of effectiveness and considerations of convenience we should not give effect to what apparently was the intention of the legislature. I construe sections 554, 557 and 785, taken together, to mean that when an offence is committed *within the limits of a province* any presence, however transitory, of the accused in any part of that province will justify the exercise of as full and complete jurisdiction as if the offence was committed where the offender is apprehended, leaving to the magistrate a dis-

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cretionary power to send the prisoner for further inquiry or for trial before the justice having jurisdiction over the locus where the offence was committed. It has been suggested that difficulty may arise out of the clashing of jurisdiction; but we can only concur in the opinion expressed by Lord Watson in the *Orr-Ewing Case*(1), that wherever a real conflict of jurisdiction does arise between two independant tribunals, the better course for each to pursue is to exercise its own jurisdiction so far as it can and not to issue judgments proclaiming the incompetency of its rival.

Application dismissed.

(1) *Ewing* v. *Orr Ewing*, 10 App. Cas. 453, at p. 532.

UNION BANK OF HALIFAX (PLAINTIFFS) ..... } APPELLANTS;

AND

ALFRED DICKIE (DEFENDANT) ..... RESPONDENT.

1908
*Oct. 19.
*Oct. 27.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Jurisdiction—Final judgment.

In 1903 the United Lumber Co. executed a contract for sale to D. of all its lumber lands and interests therein the price to be payable in three instalments at fixed dates. By a contemporaneous agreement the company undertook to get out logs for D. who was to make advances for the purpose. The agreement for sale was carried out and two instalments of the purchase money paid. At the time these contracts were executed the Union Bank had advanced money to the company and shortly after the contract for sale was assigned to the bank as security for such and for future advances. The company having assigned in insolvency the bank brought action against D. for the last instalment of the purchase money to which he pleaded that he had paid in advance to the company and the bank more than the sum claimed. The trial judge held that the bank had no notice of the second agreement under which D. claimed to have advanced the money and gave judgment for the bank with a reference to ascertain the amount due. The full court set aside this judgment and ordered a reference to ascertain the amount due the bank and, if anything was found to be due, to ascertain the amount due to D. from the company. The bank sought to appeal from the latter decision.

Held, that the judgment of the full court was not a final judgment from which an appeal would lie under the Supreme Court Act to the Supreme Court of Canada.

APPEAL from a decision of the Supreme Court of Nova Scotia setting aside the judgment at the trial in favour of the plaintiffs and directing a reference to

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

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ascertain the amount due the plaintiffs and also that due the defendant from the United Lumber Co.

The facts are stated sufficiently in the above headnote.

Mellish K.C. for the respondent, moves to quash the appeal for want of jurisdiction.

W. B. A. Ritchie K.C. contra.

The judgment of the court was delivered by

IDINGTON J.—The appellants sued for certain instalments of the price of some land sold by the United Lumber Company to respondent and claim to recover the same by virtue of an assignment made by the company as collateral security for debts due to the appellant.

The learned trial judge held the defendant liable and so adjudged with costs, but referred the question of the amount of liability to a referee.

On appeal to the Supreme Court of Nova Scotia that judgment was set aside and instead thereof the referee was directed to find and report the amount of the advances made by the appellants to the company before the 21st day of December, 1903, and still remaining unpaid and was further directed in the event of the referee finding any of the said advances are still unpaid to inquire and report the amount, if any, due and payable to the company under and by virtue of the agreements in writing between the said company and defendant dated the 10th December, 1903, and meantime the court reserved further directions

and costs. It is from this judgment an appeal is sought here.

It is conceded that the report of the referee when made can have no other effect than to inform the court to which it may be made and before having the effect of a judgment settling the rights of the parties must be followed by an order of a judge or a judgment of the court.

It is nevertheless contended by the appellant that the court below had no right to set aside the judgment inasmuch as the learned judges gave in support of this judgment reasons therefor which it is alleged appear to have been in accord with the opinion of the learned trial judge in regard to the liability of the respondent. There are two or three answers to this.

In the first place the record itself does not shew on its face any concurrent declaration either way as to the liability.

In the next place the judgment of record as the result of the trial by no means clearly defines where the lines are to be drawn in taking the accounts.

The respondents contend that the assignment to the appellant was only for securing certain debts due the appellant and that those debts had been discharged, long before this action, by payments, and thus the right in appellant to sue terminated.

If these contentions are correct or either fairly arguable on the true construction of the collateral security there are important matters left by the trial judgment of record undisposed of for the referee to wrestle with according as he might happen to construe the judgment of reference and then if need be the collateral security.

The judgment directed as follows:

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Idington J.

It is ordered, adjudged and decreed that the plaintiff bank do recover from the defendant the amount due to the plaintiff bank from the said United Lumber Company, Limited, under the assignment from the said United Lumber Company, Limited, to the plaintiff bank, set out in the statement of claim.

It is further ordered, that it be and it is hereby referred to Mr. F. H. Bell, barrister, to hear the parties and their witnesses and to inquire and report the balance due to the plaintiff bank from the United Lumber Company, Limited, for moneys advanced by the plaintiff bank to the said United Lumber Company, Limited, and secured by the said assignment.

It is further ordered, that judgment be entered for the plaintiff bank for the amount found by the said referee on his report being confirmed or varied and confirmed, together with its costs of action to be taxed.

If that judgment had stood uncorrected and the referee had gone on and ruled that it was not open upon this reference to the respondent, to give evidence in support of these contentions relative to the limited nature of the assignment and the discharge of the debts it (when so construed) secured, a miscarriage of justice or much confusion might have followed.

The effect of the judgment of record now appealed from setting aside and varying the trial judgment is a matter of procedure, and simply to substitute a clear and explicit judgment purely and simply of reference for a judgment that is by no means clear, but claimed to be one for costs with a reference therein virtually to find out whether it was right or wrong. Obviously all the court has done is to enable the parties to have every phase of their case presented properly for a final adjudication and upon that being arrived at and passed upon by the appellate court of Nova Scotia, the case will be ripe for an appeal here if either of the parties desire then to come here.

Whatever final judgment is given upon the referee's findings will be appealable here if worth while.

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Idington J.

The motion is allowed and appeal quashed with costs.

Appeal quashed with costs.

Solicitor for the appellant: *W. A. Henry.*

Solicitor for the respondent: *W. H. Fulton.*

1908

*Oct. 14, 15.
*Oct. 27.

WILLIAM NISBET PONTON (PLAINTIFF) ..... APPELLANT;

AND

THE CITY OF WINNIPEG (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Municipal corporation—Powers—Land tax sales—Purchase by corporation—Vesting of title—Manitoba Real Property Act—Agreement to re-convey—Necessity of by-law.

After the City of Winnipeg had become purchaser of lands within the city, sold for arrears of overdue taxes, and had obtained a certificate of title therefor under the Real Property Act, a resolution of the city council was passed agreeing that the land should be re-conveyed to the former owner on payment of the taxes in arrears with interest and costs.

Held, that the corporation was not bound by the resolution as the re-conveyance of the lands could be made only under the authority of a by-law as provided by the city charter. *Waterous Engine Works Co.* v. *The Town of Palmerston* (21 Can. S.C.R. 556) and *District of North Vancouver* v. *Tracy* (34 Can. S.C.R. 132) followed.

Judgment appealed from (17 Man. R. 497) affirmed.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), affirming the judgment of Mathers J., at the trial, by which the plaintiff's action was dismissed with costs.

The circumstances of the case are stated in the judgment now reported.

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

(1) 17 Man. R. 496.

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PONTON
v.
CITY OF
WINNIPEG.

Armour K.C. and *R. S. Cassels* for the appellant.

Theodore A. Hunt for the respondent.

The judgment of the court was delivered by

MACLENNAN J.—This is an appeal by the plaintiff from a judgment of the Court of Appeal for Manitoba, affirming a judgment of the trial judge, who dismissed the action with costs.

The plaintiff had been the owner of 170 vacant lots of land situate within the defendant's municipality, except so much thereof as was taken by the Canadian Pacific Railway Co. for their roadway, and, on the 25th November, 1892, his title was duly registered under "The Real Property Act" of Manitoba.

The plaintiff had allowed the taxes imposed by the defendant in respect of these lands, to fall in arrear and remain unpaid for a number of years, the last payment made by him having been of those for the year 1893.

In the year 1897 the defendant caused the lands to be sold for the arrears of taxes, and as authorized by the law of the province, became the purchasers thereof.

The validity of this sale and purchase is not impeached or questioned in the pleadings, and was expressly admitted at the trial. But the defendant did not, by the mere sale, become the indefeasible owner of the land. To have that effect, it had to be followed by a certificate of title obtained from the district registrar of titles.

The defendant did not take the necessary steps to obtain a certificate of title until the 22nd October,

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Maclennan J.

1900, when the prescribed notice bearing that date was prepared and was served upon the plaintiff on the 3rd of November following. This notice intimated to the plaintiff that, as the law permitted, he might redeem the land within six months from the day of service, or at any time before the issue of a certificate of title to the applicant, by payment to the district registrar of the arrears of taxes, together with a bonus of twenty per cent., but that in the event of non-payment a certificate of title under "The Real Property Act" would be issued to the applicant.

The plaintiff did not, either within the six months named in the notice, or afterwards, pay the taxes in arrear, or any part thereof, although the defendant delayed in applying for a certificate of title until the 7th of April, 1902.

On the last mentioned day payment not having been made a certificate issued to the defendant, and no attempt had been made to impeach its regularity or validity.

It is true that the plaintiff says that he treated a demand for taxes for the year 1901, made by the defendant, as an abandonment of the notice of application which had been served on him in 1900. One can hardly listen seriously to this suggestion, coming from a barrister, who had been distinctly notified that until certificate obtained he might still redeem, when in fact the land was still his own, at his option, and, therefore, continued liable to taxation against him, at all events provisionally.

By section 387 of the defendant's charter taxes may be sued for as a debt. The taxes due prior to the sale were satisfied by the sale, unless the plaintiff chose to redeem within the time limited, and if the

sale became absolute by certificate of title, the subsequent taxes were merely provisional, on the defendant's own land and could not be recovered from the plaintiff. There is, therefore, in my opinion, no question of the validity of the certificate of title.

By section 71 of "The Real Property Act" it is declared as follows:

> Every certificate of title, hereafter or heretofore issued, shall as long as the same remains in force, and uncancelled, be conclusive evidence at law and in equity, as against His Majesty and all other persons whomsoever, that the person named in such certificate is entitled to the land described therein, for the estate or interest therein specified, subject to the right of any person to shew (certain things including fraud not material in this case).

The effect therefore of the certificate obtained by the defendant was to extinguish the plaintiff's title, both at law and in equity. From that time he had no right, legal or equitable, to the land any more than any other of His Majesty's subjects, and unless the defendant has dealt with the plaintiff, in relation to this land, in some way, which under the like circumstances, would give a right either legal or equitable to any other person, he cannot succeed in this appeal.

The defendant's title then being such as I have indicated, by virtue of the sale and the certificate, has anything happened, or has the defendant done anything, since obtaining it, to entitle the plaintiff to maintain this action?

One thing relied on is this: that after the date of the certificate, the 7th of April, 1902, the defendant's assessment commissioner served the plaintiff with a notice of assessment of the lands dated 3rd of May, 1902. I think that fact is of no importance. Section 325 of the city charter, section 10 of the "Assessment Act," requires that

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as early as practicable in each year the assessment commissioner shall report to the council the completion of the assessment rolls.

And the learned trial judge has pointed out that the plaintiff was the proper person in whose name to assess the lands up to the time that the certificate of title was issued to the defendant.

The assessment proceedings were commenced, and properly commenced, before the issue of the certificate, and were continued afterwards by the officer, without any special directions from the council.

Under these circumstances I think the assessment of the plaintiff for the year 1902 necessarily became and was quite nugatory, and could confer no right of redemption on the plaintiff.

The only serious question in the appeal in my opinion is the resolution of the finance committee of the 11th December, 1903, and its adoption by the defendant's council on the 14th of the same month, in the presence of the solicitor for the plaintiff.

The resolution is as follows:

> That all lots formerly owned by W. N. Ponton acquired by the city at tax sale be conveyed to the said Ponton on payment of all costs, interest and taxes to date.

And it was signed by the mayor and city clerk.

Nothing was done by the plaintiff or his solicitors in the way of accepting or availing himself of this resolution for more than four months, and on the 4th of April following a member of the council gave notice of a motion to rescind the resolution at its next meeting, and the council advertised the lands to be sold by public sale on the 20th of April.

This roused the plaintiff's solicitors to action and, on the 16th April, a clerk of the plaintiff's solicitors made a tender to the treasurer of the defendant of

a sum of money accompanied by a letter offering to accept the resolution of the 14th December, but the tender was refused, and on the 18th of April the resolution of the 14th of December was rescinded.

The present action was commenced two days afterwards on the 20th of April.

It is upon this resolution of council, the offer to accept it, and the tender made to the treasurer, that the principal reliance of the plaintiff is placed, both in pleading and in argument.

It is said that the resolution and acceptance constitute a contract between the defendant and the plaintiff; and that the resolution is an offer which was accepted by the plaintiff by his solicitors' letter to the city treasurer, of the 16th of April, accompanied by the tender of the taxes, interest and costs.

The evidence of the assistant treasurer is that the sum tendered was considerably less than what was then due for taxes, interest and costs; but however that may be, I am clearly of opinion that the resolution, even though accepted, was not a contract or engagement which bound the defendant. The Statute of Frauds was pleaded, if that was necessary, and a contract in writing was necessary to bind the defendant.

Section 472 of the city charter is express that the powers of the council shall be exercised by by-law when not otherwise authorized or provided for, and I have looked in vain for any authorization or provision in the charter enabling it to sell land by mere resolution. A by-law authorizing a sale and a contract under seal were essential, in my opinion, to bind the defendant, and for want of these essentials, the alleged contract was inoperative.

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I refer to *Waterous Engine Works Co.* v. *Town of Palmerston* (1), and *District of North Vancouver* v. *Tracey* (2).

For these reasons, and the reasons of the learned judges of the Court of Appeal, I think the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Tupper, Galt, Tupper, Minty & McTavish.*

Solicitor for the respondent: *Theodore A. Hunt.*

(1) 21 Can. S.C.R. 556. (2) 34 Can. S.C.R. 132.

ARBUTHNOT BLAINE AND OTHERS LICENSE COMMISSIONERS FOR CITY OF SAINT JOHN, NEW BRUNSWICK ..... APPELLANTS;

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*Nov. 24.

AND

WILLIAM JAMIESON ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Appeal—Jurisdiction—Stated case—Final judgment—Origin in Superior Court—Supreme Court Act, ss. 35 and 37.

An information was laid before the police magistrate of St. John, N.B., charging the License Commissioners with a violation of the Liquor License Act by the issue of more licenses in Prince Ward than the Act authorized. The informant and the Commissioners agreed to a special case being stated for the opinion of the Supreme Court of New Brunswick on the construction of the Act and that court, after hearing counsel for both parties, ordered that "the Board of License Commissioners for the City of Saint John be, and they are hereby, advised that the said Board of License Commissioners can issue eleven tavern licenses for Prince Ward in the said City of Saint John and no more (38 N.B. Rep. 508). On appeal by the Commissioners to the Supreme Court of Canada:

Held, that the proceedings did not originate in a superior court, and are not within the exceptions mentioned in sec. 37 of the Supreme Court Act; that they were *extra cursum curiæ;* and that the order of the court below was not a final judgment within the meaning of sec. 36; the appeal, therefore, did not lie and should be quashed.

APPEAL from a decision of the Supreme Court of NewBrunswick(1) on a stated case.

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

(1) 38 N.B. Rep. 508.

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The appellants as License Commissioners for the City of St. John, N.B., were charged with the duty of issuing licenses for the sale of liquor in the city under the provisions of the Liquor License Act, C.S.N.B. 1903, ch. 22. An information was laid against them in the police court of the city by the respondent charging them with violation of the Act by granting more licenses than were authoribed in Prince Ward. The prosecution on the information was stayed, the informant and the Commissioners agreeing to state a case for the opinion of the Supreme Court of the province on the question raised thereby. The stated case set out various facts affecting the matter and concluded as follows:

"The opinion of this honourable court is desired and is respectfully asked to the following question, namely:

"How many tavern licenses are the said commissioners authorized by law to issue in Prince Ward, in said City of St. John, the population of said ward being four thousand seven hundred and sixty, as herein stated?"

The case was argued before the Supreme Court of New Brunswick and the formal order taken out after judgment was pronounced was that the court, having taken time to consider, doth now order that the Board of License Commissioners for the City of Saint John be, and they are hereby advised that the said Board of License Commissioners can issue eleven tavern licenses for Prince Ward, in the said City of Saint John, and no more.

The Commissioners appealed from this order to the Supreme Court of Canada.

Skinner K.C. and *Earle K.C.* for the appellants.

Hazen K.C., Attorney-General of New Brunswick, for the respondent.

The objection to the jurisdiction taken by respondent in his factum was not urged at the outset, but was raised by the court and then discussed by counsel.

THE CHIEF JUSTICE.—The respondent, in his factum, takes exception to the jurisdiction of this court. This objection should have been raised by a motion to quash the appeal presented on the first day of the present session of the court (rule 4), and although not insisted upon now the objection cannot be overlooked, as this appeal should never have been taken. The proceedings originated by way of information laid against the defendants, now appellants, in the police court at St. John, and came to the Supreme Court of New Brunswick *"extra cursum curiæ"* by consent of the parties on a special case stated by Mr. Justice McLeod for the purpose of obtaining the opinion of that court on the construction of a New Brunswick statute (the Liquor License Act, ch. 22, Consolidated Statutes, 1903). The defendants by the said information were charged before the police magistrate of the City of St. John with having issued more tavern licenses for the year 1907 in Prince Ward, in that city, than are allowed by the License Act; and it was by the parties thought desirable that the magistrate, before disposing of the complaint, should be instructed as to the meaning of the Act by the Supreme Court of New Brunswick; and, by these proceedings, we are asked to revise the instruction or

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advice given by that court. I do not know that, under ordinary circumstances, it would be necessary to do more than to state these facts to justify the dismissal of the appeal. It is apparently necessary, however, for me to say, for the benefit of the parties in this case, that an appeal lies here from the final judgment of the highest court of final resort of the province when the court of original jurisdiction is a superior court (sec. 36) and in the class of cases provided for by section 37 of the Act of which this is not one; and it is difficult to conceive how it could be argued, not successfully, but with any shew of reason, that the instruction or advice given to the magistrate on this special case can be called a final judgment; or that the police magistrate can be described as a superior court (section 36) or a court of first instance possessing concurrent jurisdiction with a superior court (section 37). The Supreme Court *en banc* advises that, under the statute, the Board of License Commissioners of the City of St. John can issue eleven tavern licenses for Prince Ward and no more. What the effect of that advice may be on the magistrate we are not in a position to say, nor should we be concerned to know. We have been urged to consider and decide the question submitted, or, to state the position more accurately, we are asked to say that we agree with or dissent from the advice given to the magistrate by the Supreme Court of New Brunswick on the ground that a question affecting the public is involved. Our jurisdiction cannot rest on such a foundation, and if there was any doubt as to our jurisdiction, which there is not, we could not entertain this appeal: *Cully* v. *Ferdais* (1).

(1) 30 Can. S.C.R. 330.

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The Chief Justice.

By consent of the parties no costs will be granted, although, personally, I would have been of opinion to give effective sanction to rule 4 by condemning the respondent to pay a portion of the costs here.

GIROUARD J.—We have no jurisdiction for two reasons. First, the proceedings did not originate in a superior court as required by section 36 of the Supreme Court Act. Secondly, the appeal is not from a final judgment within the meaning of that term in the same section.

DAVIES, IDINGTON and DUFF JJ. concurred with the Chief Justice.

Appeal quashed without costs.

Solicitor for the appellants: *C. N. Skinner.*
Solicitor for the respondent: *J. Douglas Hazen.*

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*Oct. 20, 21.
*Nov. 10.

JAMES FARQUHAR (PLAINTIFF) . . . . APPELLANT;

AND

F. GORDON ZWICKER (DEFENDANT), RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract—Novation — Sub-contractor — Order from contractor on owner—Evidence.

T. was contractor for building a house and F. sub-contractor for the plumbing work. When F.'s work was done he obtained an order from T. on the owner in the following terms: "Please pay F. the sum of $705, and charge to my account on building, Lucknow Street." F. took the order to the owner who agreed to pay if the architect certified that the work had been performed. F. and T. saw the owner and architect together shortly after and on being informed by the latter that the account was proper and there were funds to pay it the owner told F. that it would be all right and retained the order when F. went away. F. filed no mechanic's lien, but other sub-contractors did the next day, and T. assigned in insolvency. In an action by F. against the owner:

Held, Davies J. dissenting, that there was a novation of the debt due from the owner to T.; that it was not merely an agreement by the owner to answer to F. for T.'s debt nor was the order to be treated as a bill of exchange and accepted as such.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment for the plaintiff at the trial and dismissing the action.

The facts are sufficiently stated in the above headnote.

Mellish K.C. for the appellant.

F. H. Bell, for the respondent.

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

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The judgment of the majority of the court was delivered by

Idington J.

IDINGTON J.—I think this appeal should be allowed with costs and the judgment of the learned trial judge be restored.

Accepting as he did implicitly the appellant's version of the facts, in which finding I agree, the inferences to be drawn therefrom permit of holding what took place to be a novation.

It would have puzzled the appellant to have maintained an action against Thompson after leaving his order with the respondent and accepting in its stead his undertaking to pay the amount.

If Zwicker instead of Thompson had become insolvent shortly after what transpired, it would have been most unjust to have held Thompson liable.

What was intended by all the parties was that Zwicker should assume the debt and Thompson be no longer liable. Their language and their acts make this abundantly clear.

There was never any purpose or intention of appellant or the others that he should look to Zwicker as a surety to answer the debt, default or miscarriage of another; nor did any one expect him to treat the order as a bill of exchange and accept it in the sense of accepting such a bill.

He was to receive and accept it as a voucher for the purposes of the future adjustment of accounts between himself and Thompson, and so accepted and retained it.

The order might well be held also as an equitable assignment of part of the debt due or accruing due from respondent to Thompson and as having been

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assigned by appellant to and accepted by respondent as the consideration for his promise to pay the appellant the amount it represented.

The retention by respondent of the order is consistent with either of these conclusions and apparently inconsistent with any other except speculations receiving but little support in the evidence.

DAVIES J. (dissenting).—It is quite clear, I think, that unless the conversations between plaintiff and defendant can be so construed as to amount to a "novation" the action cannot be maintained. As I differ from my colleagues on the point I have gone again most carefully over the evidence and am more fully confirmed in the impression made on my mind by the oral argument that there never was any such clear and unequivocal promise made by the defendant as is necessary to found a novation upon. I cannot see when or how Thompson, the contractor, was released from his liability to Farquhar, his sub-contractor, nor am I able to understand on what evidence it can be held that Thompson released the defendant.

So far from the promise made by Zwicker to the plaintiff being a clear, absolute and unequivocal one to pay the money it seems to me to have been clearly a conditional one dependent upon the money being found to be due to Thompson, the contractor. The order drawn upon Zwicker by his contractor Farquhar reads: "Pay Farquhar Bros. $705 and *charge to my account on building* Lucknow St." The statement of plaintiff which the trial judge accepted and relied upon was that defendant after consulting with his architect told him "it was all right." Now, I can only understand that statement as at the utmost

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amounting to a promise to pay the money in terms of the order, namely, out of the moneys coming to Thompson. As a fact, it appeared that there was not any money then actually due and payable by Zwicker to his contractor owing to the condition in which the work then was, and the architect on being asked the question how much money was due on the contract at the time Thompson and Farquhar applied to him for a certificate, answered: "Presuming the contract had to be completed which it was not there would be I think somewhere between $200 and $300 due, that is on the whole contract." The day following the giving of the alleged promise Thompson's sub-contractors filed mechanics' liens for the several amounts due them. Thompson assigned, and consequently the fund out of which the order requested defendant to pay plaintiff and which all parties clearly must have understood the promise such as it was to relate to, never existed.

Apart from the question of novation the action is clearly one which cannot be maintained because the promise was merely one to pay another man's debt and there was no consideration for it and it was not in writing. An attempt was made to shew some consideration by reference to a few words of conversation relating to the filing by plaintiff of a mechanic's lien and a postponement by him of doing so, but as all such conversation was subsequent to the alleged promise it was clear it could not be treated as the consideration for the promise, and even if so treated the absence of writing would be fatal. If authority was needed on this branch of the case I should think *Liversidge* v. *Broadbent*(1) conclusive.

(1) 4 H. & N. 603.

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Davies J.

On the whole, I would confirm the judgment of the Supreme Court of Nova Scotia agreeing, as I do substantially, with the reasons of Mr. Justice Meagher and would dismiss the appeal.

Appeal allowed with costs.

Solicitor for the appellant: *W. H. Fulton.*

Solicitor for the respondent: *F. H. Bell.*

THE GRIMSBY PARK COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

WILLIAM H. IRVING (PLAINTIFF) .. RESPONDENT.

1908
*Nov. 12.
*Dec. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Jurisdiction—Supreme Court Act—Duty or fee—Interest in land—Future rights.

Under a by-law of the defendant company every person desiring to enter the park was required to pay a fee for admission. An action was brought for a declaration as to the right of the company to exact payment of such fee from the lessee of land in the park.

Held, that the matter did not relate to the taking of a "customary or other duty or fee" nor to "a like demand of a general or public nature affecting future rights" under sub-sec. (*d*) of sec. 48 R.S.C. [1906] nor was "the title to real estate or some interest therein" in question under sub-sec. (*a*). There was, therefore, no appeal to the Supreme Court of Canada from the judgment of the Court of Appeal in such action (16 Ont. L.R. 386).

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

The plaintiff is lessee of certain land in Grimsby Park under a lease from the company and brought this action to have it declared that he is entitled to access to the premises demised without payment of the fee for admission exacted, under a by-law of the

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

(1) 16 Ont. L.R. 386.

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company, from all persons desiring to enter the park. The trial judge and Court of Appeal held that the company could not compel him to pay such admission fee and the company sought to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal to that effect.

Shepley K.C., for the appellant on the question of jurisdiction being raised by the court, referred to *Chamberland* v. *Fortier*(1); *Rouleau* v. *Pouliot*(2); and *Larivière* v. *School Commissioners of Three Rivers*(3), contending that the matter in question related to "a customary or other duty or fee" and was appealable under sec. 48, sub-sec. (*d*), of R.S.C., [1906]. He claimed, also, that the appeal would lie under sub-sec. (*a*) as title to an interest in land was in question.

The court reserved judgment on the question of jurisdiction and the merits of the appeal were argued.

Kilmer K.C., appeared for the respondent.

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Davies.

DAVIES J.—The appellant company, incorporated under the Ontario Companies Act, own and control a tract of land called "Grimsby Park," which they had sub-divided into lots according to a registered plan and upon which plan streets and avenues are laid out.

The respondent, plaintiff, is the assignee of the

(1) 23 Can. S.C.R. 371. (2) 36 Can. S.C.R. 26.
(3) 23 Can. S.C.R. 723.

lessee for 999 years of one of these lots and has his summer residence upon it. The lease was dated in 1885.

The park is surrounded by a fence, and access to it can only be had from outside through certain gates.

The company, claiming to act under a statute amending their charter enacted before the lease under which the plaintiff claims was granted, passed, in 1902, a by-law exacting the admission fee now in dispute which was in the nature of a toll at the gate or entrance to the park, and claimed that the plaintiff and his family were liable to pay such fee or toll.

At the close of the trial brought to test the claim,

it was agreed on both sides that the whole question to be determined in this action is whether the plaintiff is entitled to an entrance at the place originally indicated in the plan or at the new entrance of Grand Avenue, or at some other place,

and, as I understand it, entitled to such entrance without payment of fees.

The question arises whether or not, in such a case, we have any jurisdiction to hear the appeal.

Two sub-sections of the section 48 of our "Supreme Court Act," R.S.C., 1906, ch. 139, defining the appeal to this court in cases from the Province of Ontario, were relied upon: First, where

(*a*) the title to real estate or some interest therein is in question:—

Secondly, where

(*d*) the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights.

We were all of opinion at the argument that the right of appeal could not be maintained under sub-

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section (*d*). The fee in this case demanded as an admission fee was, obviously, not of a "general or public nature affecting public rights" within the meaning of those words in the Act. It was, on the contrary, simply an entrance fee to a private park, and stands on the same ground as fees charged for entrance to music halls and theatres or to athletic or sporting grounds or courses. Compare *Larivière* v. *School Commissioners of Three Rivers*(1), at p. 726.

The more serious question was whether it could be held as coming within the cases where the title to real estate or some interest therein was in question.

But, in this appeal, there was no question directly involving the title of either the plaintiff or defendant to the respective lands they claimed to own or of their interest in those lands.

The sole question was whether the defendant company was entitled, under the statute, to pass a by-law charging their lessees entrance or admission fees to their leased premises within the defendants' park.

Did the statute permit them to pass a by-law exacting such a fee and, on proper construction of the by-law they had passed, did it extend to the plaintiff?

Such questions, which are the substantial ones on this appeal, may involve indirectly a determination of the plaintiff's rights of access as a lessee to the lands leased to him. They could not, in my opinion, be fairly said to present a case where "the title to real estate or some interest therein was in question."

His right of access to his lands was not denied any more than his title. It was the right of the company, under the statute and by-law, to impose the burden of a fee upon that right of access.

(1) 23 Can. S.C.R. 723.

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I would quash the appeal for want of jurisdiction but, under the circumstances, no motion to quash having been made, without costs.

Idington J.

IDINGTON J.—The appellants seek, by virtue of alleged legislative authority given them, to prevent the respondent reaching a house he has in the appellants' park, unless he or those going there pay an entrance fee to help to support the keeping up of the park in which the respondent has, in common with others, some privileges.

The question is raised whether or not, when the Court of Appeal for Ontario has held the appellants' contention unfounded, an appeal will lie to this court.

The title of the respondent to the house is unquestioned.

It was held in this court, so long ago as the case of *Wineberg* v. *Hampson*(1), that the merely raising of a question of a right of servitude would not give it jurisdiction.

It was observed in coming to that decision that, in the earlier case of *Wheeler* v. *Black*(2), such a case had been heard, because no attention had been called to the question of jurisdiction.

This case raises a claim on the part of the respondent of free entry over another's land to reach his own and seems, therefore, to fall within the rule thus laid down so far as the right to appeal might be rested on sub-section (*a*) of section 48, which deals with title to real estate or interest therein.

It is true that the words "interest therein" did not appear in the same connection, in relation to appeals from Quebec definitely settled by the said decision, as

(1) 19 Can. S.C.R. 369. (2) 14 Can. S.C.R. 242.

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in this section, but I do not think, as used in this section, they cover or were intended to cover cases of servitude or easement.

Then, can the jurisdiction to entertain this appeal be rested on the ground that future rights will be bound?

The jurisdiction to entertain cases of servitude arising in Quebec was later (when the "Supreme Court Act" had been amended), recognized as falling within the amended words

and other matters or things where rights in future might be bound.

So long as the Act remained unamended and, in this regard read "on such like matters," etc., instead of, as now, "and other matters," etc., the prevailing rule was to reject appeals based on mere right or denial of right of servitude.

Since that small but important amendment was made, questions arising in Quebec and turning upon a right of servitude, have been held appealable as simply concerning "matters or things *where rights in future* might be bound."

But, can we, in Ontario cases, turn to and rest the right upon section 48, sub-section (*d*) of the "Supreme Court Act," where the language is so different? I do not think, having regard to the ruling in *Wineberg* v. *Hampson*(1), that section (*d*) helps the appellants.

We find therein the expression "or a like demand" which refers us to the preceding part of the sub-section as the key to what is intended. The sub-section reads as follows:—

48(*d*).—The matter in question relates to the taking of an annual or other rent, customary or other duty or fee, *or a like* demand of a general or public nature affecting future rights.

(1) 19 Can. S.C.R. 369.

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GRIMSBY PARK CO. v. IRVING.

Idington J.

Can we say this case raises a question of an annual or other *rent*? Or, can we assert it to be a claim of customary or other duty or fee?

It does not seem to fall, when we have regard to its origin, within any of these, and still less when we try to see if it is

of a like demand of a general or public nature affecting future rights.

The cases of local assessments, annuities and future financial results incidentally flowing from, but not directly the result of, a judgment seem to deny this. See, amongst others, the following: *O'Dell* v. *Gregory*(1); *McKay* v. *Township of Hinchinbrooke* (2); *Waters* v. *Manigault*(3); *Macdonald* v. *Galivan* (4); *Banque du Peuple* v. *Trottier*(5); *Raphael* v. *Maclaren*(6).

The words used are identical with those which define in R.S.O. [1897] ch. 48, sec. 1, the right to appeal to the Privy Council—certainly never meant to support such an appeal as this.

Our jurisdiction must be clear and, being statutory, must be made by the words of the statute to appear clear.

There is less reason to put a strained meaning on its words to give a jurisdiction in order to determine something fancied to be of great importance, when we find such ample provision as in sub-section (*e*) for appeal here by way of leave, either here or in the Ontario Court of Appeal.

It seems the appeal must be quashed, but without costs, as the objection was not taken earlier.

(1) 24 Can. S.C.R. 661.
(2) 24 Can. S.C.R. 55.
(3) 30 Can. S.C.R. 304.
(4) 28 Can. S.C.R. 258.
(5) 28 Can. S.C.R. 422.
(6) 27 Can. S.C.R. 319.

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MACLENNAN J.—I agree with Mr. Justice Davies.

DUFF J.—I concur in the judgment of Mr. Justice Idington.

Appeal quashed without costs.

Solicitors for the appellants: *Macdonald, Shepley, Middleton & Donald.*

Solicitors for the respondent: *DuVernet, Raymond, Jones, Ross & Ardagh.*

L. J. LABROSSE AND ANOTHER (PLAINTIFFS) ..... APPELLANTS; 1908 *Oct. 12. *Oct. 27.

AND

GODFROY LANGLOIS (DEFENDANT) . RESPONDENT.

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

Appeal—Amount in dispute—Interest—Costs—Collateral matter.

An action having been brought against the maker and indorser of a note for $2,000 the makers sued the indorser in warranty claiming that no consideration was given for the note and asking that the indorser guarantee them against any judgment obtained in the main action. They also asked that an agreement under which the makers were to become liable for $3,000 be declared null. The two actions were tried together and judgment given for the plaintiff in the action on the note while the action in warranty was dismissed. On appeal from the latter judgment:

Held, that the amount in dispute was $2,000, the value of the note sued on; that the costs of the action in warranty could not be added and without them the sum of £500 was not in controversy even if interest and costs in the main action were added; the appeal, therefore, did not lie.

Held, also, that the agreement which the plaintiffs in warranty sought to avoid was only a collateral matter to the issues raised on the appeal and could not be considered in determining the amount in dispute.

Interest after the commencement of the action, unless specially claimed as damages, cannot be added to the amount claimed in the declaration in determining the amount in controversy for the purposes of giving jurisdiction upon an appeal to the Supreme Court of Canada.

MOTION for approval of security and to affirm the jurisdiction of the court to entertain the appeal.

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

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The motion was by way of appeal from the decision of the registrar in chambers denying the right of appeal.

The circumstances of the case are stated in the judgments now reported.

In refusing the application in chambers the registrar stated the reasons for his decision, as follows:

"THE REGISTRAR.—This is an application to me as a judge in chambers to allow the security upon an appeal to the Supreme Court from a judgment of the Court of Review. A similar application to a judge of the court appealed from was refused and I understand from the counsel it includes a motion to affirm the jurisdiction of the court under rule one. The proceedings commenced by a writ issued on the 3rd of August, 1907, by the Bank of Hochelaga against the present plaintiffs and defendant who were made defendants in that action. A promissory note for $2,000 was made by the present plaintiffs in favour of the present defendant and by him discounted with said bank. Upon the action being instituted by the Bank of Hochelaga, the present plaintiffs, on the 17th of August following, issued a writ against the present defendant in an action *en garantie;* and subsequently the two actions were joined by an order of the court. In the present action, the plaintiff's declaration is as follows:

"Les demandeurs en garantie déclarent:—

"1° Qu'ils ont reçu signification ces jours derniers d'une action de la part de la Banque d'Hochelaga, corps politique et incorporé de Montréal, demandant le recouvrement d'une somme de $2,000, montant réclamé pour un billet promissoire signé par les deman-

deurs en garantie, en date du 24 avril, 1907, à l'ordre de Godfroy Langlois, à deux mois de date, avec $2.54 frais de protêt, ainsi qu'il appert à une copie de la déclaration du bref portant le No. 3271 des dossiers de la dite cour supérieure;

"2° Que le dit billet qui a été consenti et livré par les demandeurs en garantie au présent défendeur en garantie par erreur et sans considération aucune d'une manière illégale, le défendeur en garantie ayant reçu le billet en paiement partiel pour céder des droits dans une certaine compagnie appelée The Quebec & Ontario Cobalt Mining Co., alors qu'il n'avait aucun droit valable et légal et qu'il a ainsi rien cédé aux demandeurs en garantie;

"3° Que le dit défendeur en garantie n'a aucun droit au paiement du dit billet, qu'il n'était pas justifiable de négocier le dit billet ni d'en obtenir le recouvrement;

"4° Que de défendeur en garantie est tenu de rembourser le montant du dit billet et de rembourser et garantir les demandeurs en garantie au cas, où ces derniers seraient condamnés et forcés d'acquitter le dit billet envers la demanderesse principale;

"Pourquoi les demandeurs en garantie concluent à ce que l'action soit maintenue et à ce que le défendeur en garantie soit tenu d'intervenir dans l'action intentée contre les dits demandeurs en garantie pour la demanderesse principale; à ce que le défendeur en garantie soit tenu d'acquitter et d'indemniser les demandeurs en garantie de toute condamnation qui pourrait être portée contre eux par suite de la dite action en principal, intérêt et frais, tant en demandant qu'en défendant, accrus et à accroître, et en particulier à ce que le défendeur en garantie soit con-

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damné aux dépens de la présente action; et de plus à ce que le billet susdit soit déclaré nul, obtenu irrégulièrement et sans considération; à ce que les conventions qui ont pu intervenir entre les parties au sujet du dit billet y faisant partie soient déclarées illégales et faites sans considération.

"To this the defendant filed the following defence:

"Pour défense à la déclaration des demandeurs en garantie, le défendeur en garantie dit:

"1° Il admet l'allégation 1ère de la déclaration des demandeurs en garantie;

"2° Il nie l'allégation 2e de la dite déclaration;

"3° Il nie l'allégation 3e de la dite déclaration;

"4° Il nie l'allégation 4e de la dite déclaration; du reste l'action en garantie ne compète pas aux demandeurs en garantie.

"Pourquoi le défendeur en garantie conclut au renvoi de la dite action des demandeurs en garantie avec dépens.

"The judgment of the Honourable Mr. Justice Martineau sets out the facts which were adduced in the evidence, and from his judgment it would appear that the note in question was given pursuant to an agreement for the transfer by the defendant to the plaintiffs of certain rights in a mining company for the sum of $3,000, and the dispute between the parties was as to the nature of the rights so transferred. It was alleged that these rights were set out in a document which had been in the possession of the plaintiff Labrosse. Labrosse denied having the writing and desired at the trial to give parol evidence of its contents. This was objected to by the defendant on the ground that the plaintiff had not sufficiently accounted for

its non-production, and the objection was maintained by the court.

"After hearing evidence the trial judge upheld the agreement and consequently dismissed the action *en garantie,* and his judgment was affirmed by the Court of Review.

"It is from the latter judgment that the plaintiffs now desire to appeal.

"The question then is: Does an appeal lie to the Supreme Court in this case under section 40 of the "Supreme Court Act," which reads as follows:

"40. In the Province of Quebec an appeal shall lie to the Supreme Court from any judgment of the Superior Court in Review where that court confirms the judgment of the court of first instance, and its judgment is not appealable to the Court of King's Bench, but is appealable to His Majesty in Council ?

"An appeal to His Majesty in Council under article 69 of the Code of Civil Procedure is given by sub-section 3, 'in all cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling.' In the present action the plaintiffs claim that the amount in dispute is $3,000 payable by them to the defendant under said agreement, and in the alternative claim that by adding interest and costs to the $2,000 judgment obtained against them by the Banque d'Hochelaga, the amount in dispute exceeds five hundred pounds sterling.

"As to the first contention I am of the opinion that looking at the pleadings the amount of the dispute is the note for $2,000 upon which judgment was obtained by the Banque d'Hochelaga against the parties to this action. No distinct issue is raised on the record as to the validity of the agreement; in fact it is

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not referred to in the pleadings; and even if the plaintiffs are correct in alleging that the result of the present judgment is to preclude them from setting up in any other action the invalidity or illegality of the agreement, this is a matter collateral to the present issue and an incident resulting therefrom which cannot be taken into consideration in determining the amount in dispute. A statement of the law on this point contained in the decision of *Toussignant* v. *County of Nicolet*(1), it appears to me, applies. There the court said:

" 'It is settled law that neither the probative force of a judgment nor its collateral effects nor any contingent loss that a party may suffer by reason of a judgment are to be taken into consideration when our jurisdiction depends upon the pecuniary amount or upon any of the subjects mentioned in section 29 (now 46) of the 'Supreme Court Act.'

"I am of the opinion that the plaintiffs did not establish that the interest and costs added to the $2,000 note brings their claim up to five hundred pounds sterling.

"The costs in the action of the Bank of Hochelaga against them would have been trifling had they not set up a special defence that the bank was simply a *prête-nom* for the present defendant. The amount in dispute in the present action cannot be more than the amount of the judgment obtained by the Bank of Hochelaga and there cannot be added thereto any costs of the present action for the purpose of bringing the amount in dispute up to five hundred pounds sterling.

"On the whole, therefore, I am of opinion, as was

(1) 32 Can. S.C.R. 353.

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the judge below, that this case is not appealable to the Supreme Court."

On renewal of the application, before the court, by way of appeal from the registrar's decision.

J. A. Ritchie, supported the motion.

Auguste Lemieux K.C. *contra.*

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This is a motion by way of appeal from a judgment of the registrar in chambers refusing, on the ground that the sum involved was below the appealable amount, to allow the appellant to give security (sec. 75 "Supreme Court Act") and also declining to affirm the jurisdiction of this court, under Rule 1.

The facts, so far as we can gather them from the material before us, are briefly these.

Langlois sold to Labrosse and another his rights in a mining company called "The Quebec and Ontario Cobalt Mining Company," and, in connection with that sale, received their promissory note for $2,000, which he apparently discounted with the Hochelaga Bank. The note not being paid at maturity, the bank brought action against the makers and payee and, during the pendency of that suit, Labrosse *et al.* sued their co-defendant, Langlois, in warranty and, by their conclusions, prayed that he, having obtained the note without consideration, be condemned to guarantee them in debt, interest and costs against any judgment that

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might intervene in the suit of the bank. On the application of the parties, the two suits were joined and tried together and, in the result, judgment was rendered in favour of the bank against all the defendants and the action in warranty by Labrosse et al. was dismissed with costs. This judgment was affirmed by the Court of Review. The amount of the condemnation in the main action, according to the figures set out by the appellant in his petition, is for capital $2,002.50; interest from July, 1907; and costs to the bank, $182.79, and of Labrosse et al. $146.55. To these sums the appellant adds the costs of the action in warranty in the Superior Court and the Court of Review, which bring the amount up to $2,970.59. It nowhere appears and we have no means of ascertaining how much costs were incurred or how much interest had accrued at the date of the institution of the action in warranty, August 27th, 1907.

By section 40 of the "Supreme Court Act," and article 68, section 3, of the Quebec Code of Procedure, as it read before the recent amendments, there is an appeal here if the matter in dispute exceeds the sum of £ 500 sterling, and the question to be decided now is: In ascertaining the appealable amount, are interest and costs to be included in the computation?

This question has not, so far as I have been able to ascertain, been previously considered by this court, except as to interest in *Dufresne* v. *Guevremont*(1), and *Bresnan* v. *Bisnaw*(2).

Whatever may be said as to the costs in the main action and the interest on the note sued for in the action in warranty, it is quite certain that the costs

(1) 26 Can. S.C.R. 216. (2) Cout. Cas. 318.

in the action in warranty in the Superior Court and the Court of Review cannot be added to the amount of the note in estimating the principal sum. *Bank of New South Wales* v. *Owston*(1); and *Quebec Fire Assurance Co.* v. *Anderson*(2). In *Doorga Doss Chowdry* v. *Ramanauth Chowdry*(3), Lord Chelmsford said:

> The costs of a suit are no part of the subject matter in dispute and cannot be used for the purpose you seek; if they were allowed to be added to the principal sum claimed, it would be in the power of every litigant, by swelling the costs, to bring any suit up to the appealable value.

Again, in *Great Western Ry. Co. of Canada* v. *Braid*(4), it was held that costs incurred by a losing party cannot be taken into account. To the same effect, Fuzier-Hermann, vo. *"Appel en matière civile,"* nos. 268 *et seq.*

With respect to the interest accrued on the note from maturity there seems to be some uncertainty as to whether it should be added. Apparently the Privy Council, in *Voyer* v. *Richer,* referred to but not reported in 2 Legal News, at page 313, held on the application for leave that interest should be added to the principal in computing the amount demanded; but the Court of Appeal in Quebec, on the ground that it was a statutory court, as this court is, and could not exercise the discretionary power which the Privy Council has to allow appeals, refused to follow this judgment in *Stanton* v. *Home Insurance Co.*(5).

In France, the question seems to have been definitely settled. Rosseau-Laisney, Dictionnaire de Procédure Civile, vo. "Appel," nos. 80, 81 and 82:

(1) 4 App. Cas. 270.
(2) 13 Moo. P.C. 477.
(3) 8 Moo. Ind. App. 262.
(4) 1 Moo. P.C. (N.S.) 101, at pp. 114, 115; 1 N.R. 527.
(5) 2 Legal News 314.

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Les intérêts accrus depuis l'introduction de l'instance ne doivent pas être compris dans l'évaluation de la demande pour déterminer si le jugement est en premier ou en dernier ressort.

Fuzier-Hermann, vo. "*Appel (mat. civ.)*," nos. 435, 436, makes a distinction as to interest accrued before and since the institution of the action, and the conclusion is that the latter cannot be taken into account because it is only consequential and incidental to the sum claimed by the declaration and cannot be considered as forming part of the principal demand.

In the Supreme Court of the United States, it has been held that interest cannot be added to give jurisdiction unless claimed as damages. *Udall* v. *The "Ohio"*(1), and *Western Telegraph Co.* v. *Rogers*(2).

The interest accrued on the note before the institution of the action in warranty and the costs incurred in the main action, so far as we can ascertain from the figures supplied by the appellant, if added to the face value of the note and costs of protest would not bring the appellant's claim within the appealable amount, five hundred pounds sterling.

As to the costs in the action in warranty, and interest, we hold that they are not to be added to the principal sum in estimating the appealable value, except that portion of the costs in the main action and of the interest on the note which are covered by the conclusions of the action in warranty and form part of the demand in that action.

By their conclusions in the action in warranty the appellants ask that the agreement in connection with which the note sued on was given should be declared null and void, but no distinct issue was raised on the record as to the validity of this agreement and the

(1) 17 How. 17.

(2) 93 U.S.R. 565.

money value of Labrosse's interest, stated here to be $3,000, is not set out in the pleadings and I agree with the registrar that, on the pleadings, this is a matter collateral to the present issue and an incident resulting therefrom which cannot be taken into consideration in estimating the amount in dispute. The words "matter in dispute" have reference to the matter which is directly in dispute in the particular cause (here, the action in warranty), in which the judgment sought to be reviewed had been rendered; and do not permit this court, for the purpose of determining such sum or value, to estimate its collateral effects. *Elgin* v. *Marshall*(1). This point is put in Fuzier-Hermann, vo. "*Appel (mat. civ.)*," no. 421:

> C'est dans la demande principale et non dans les accessoires de la demande, qu'il faut chercher le détermination de taux du ressort. Dès lors il convient de dégager la demande de tous les éléments qui ne sont pas le *principal* et qui, conséquemment, ne doivent pas servir à la supputation du ressort.

Vide Toussignant v. *County of Nicolet*(2).

In *New Jersey Zinc Co.* v. *Trotter*(3), and in *Starin* v. *The "Jessie Williamson, Jr."*(4), it was held that reference can only be had to the matter actually in dispute in the particular cause in which the judgment is rendered for the purpose of estimating the value on which the jurisdiction of the court depends and the collateral effect of the judgment is not to be taken into account.

The motion is dismissed with costs taxed at $50.

Motion dismissed with costs.

(1) 106 U.S.R. 578.
(2) 32 Can. S.C.R. 353.
(3) 108 U.S.R. 564.
(4) 108 U.S.R. 305.

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*Oct. 19, 20.
*Dec. 1.

THE STEAMSHIP "ROSALIND" (DEFENDANT) ..... } APPELLANT;

AND

THE STEAMSHIP SENLAC COMPANY AND OTHERS (PLAINTIFFS) .. } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY DISTRICT.

Maritime law — Collision — Negligence—Failure to hear signal — Evidence.

The S.S. "Senlac" was coming out of Halifax harbour taking the eastern side of the channel. There was a dense fog at the time and the fog signals were sounded at regular intervals. She was making about six knots and having passed George's Island heard the whistle of an incoming steamer. Fog signals were given in reply and when the incoming vessel the "Rosalind" was estimated to be about half a mile off the "Senlac" gave a single short blast and directed her course to starboard. The "Rosalind" replied to this signal and stopped her engines. Within a few seconds the "Senlac" was seen about a ship's length away on the port bow and almost at the same moment the latter gave two short blasts on her whistle and swung to port threatening to cross the "Rosalind's" bow. The "Rosalind's" engines were immediately put "full speed astern" but too late to avoid a collision in which the "Senlac" was seriously damaged. At the trial of an action by the latter reliance was placed on the failure of the "Rosalind" to respond to her signals but the first signal admitted to have been heard on the "Rosalind" was the one short blast when the "Senlac" went to starboard. The result of the trial was that both vessels were found in fault and on appeal by the "Rosalind":

Held, that the "Senlac" was in fault in continuing on her course when the vessels were quite near together instead of stopping and reversing and was alone to blame for the collision, and that the failure to hear her signals was not negligence on the part of the "Rosalind" and did not contribute in any material degree to the accident.

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

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APPEAL from a decision of the local judge for the Nova Scotia Admiralty District of the Exchequer Court of Canada dividing the damages resulting from a collision equally between the parties.

The material facts are stated in the above headnote.

Mellish K.C., for the appellant. The only negligence charged against the appellant is that of failure to keep a proper look-out which would have enabled her to hear the earlier signals from the "Senlac." But there is no finding that they were heard and no rule of law making failure to hear them negligence. Marsden on Collisions, p. 34; *The Campania*(1), at p. 292; *The Koning Willem I.*(2); *The Lepanto*(3).

The "Senlac" by going to starboard instead of stopping and reversing brought the ships into danger of collision, and is alone to blame, the "Rosalind" having done all that was possible to avert the disaster. See Marsden on Collisions, p. 416.

W. B. A. Ritchie K.C., for the respondents. From the findings and evidence it is clear that signals were given on the "Senlac" which should have been heard on board the "Rosalind," and whether heard or not the latter was guilty of negligence. Moore on Facts, vol. 1, p. 287; *The Saginaw*(4), at p. 711; *The Rondane*(5).

Even if the "Rosalind" had a right to cross the channel her speed was excessive. See *The Magna Charta*(6); *The Ebor*(7).

(1) [1901] P. 289.
(2) [1903] P. 114.
(3) 21 Fed. R. 651.
(4) 84 Fed. R. 705.
(5) 9 Asp. N.S. 106.
(6) 1 Asp. N.S. 153.
(7) 11 P.D. 25.

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As to the necessity for the "Senlac" to stop after hearing the "Rosalind's" whistle see *The Chinkiang* (1).

THE CHIEF JUSTICE.—I am inclined to think that there was some negligence in that the rate of speed at which the "Rosalind" passed Chiboucto Head (6 knots), and Meagher's Beach Lighthouse, and the Middle Ground buoy (about four knots), was, under the circumstances, excessive and I am also of opinion that the proper sound signals were not given by those on board the "Rosalind." But to succeed in this case it was necessary to go further and shew that this negligence materially contributed to the collision, and, in this respect, the evidence fails. On the contrary, I think, the evidence shews that, with ordinary care, the "Senlac" would have avoided the collision. I agree with the nautical assessor that, while the lack of care in the frequency and duration of the signals may have given rise to confusion or misunderstanding, they cannot be said to have contributed in a material degree to the coll'sion. The captain of the "Senlac" (McKinnon) interpreted these signals as ordinary fog-blasts, so that he was not deceived by them.

As to the rate of speed, it is, in my opinion, proved that when the vessels came in sight of one another, at about 300 feet distant, the engines of the "Rosalind" had been stopped and were then immediately put full speed astern, whereas the speed of the "Senlac" was then about six knots and, instead of stopping and reversing and thus probably avoiding a collision, she kept on her course across the bows of the "Rosalind"

(1) [1908] A.C. 251, at p. 259.

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and made the collision inevitable. If, instead of thus proceeding recklessly on her way, the "Senlac" had stopped, reversed and gone full speed astern when the "Rosalind" was first sighted, there is every probability, as found by the nautical assessor, that the collison would have been avoided or, at most, if the vessels had come into contact, no material damage would have been caused to either.

In view of the very carefully prepared judgments of my brothers Davies and Duff, I do not think it necessary to discuss the facts at greater length.

DAVIES J.—This is a case of collision which occurred near the Middle Ground buoy in Halifax Harbour, on the afternoon of 1st July, 1907, between the screw steamer "Senlac," of 1,010 tons, outward bound on a coasting voyage, and the screw steamer "Rosalind," of 2,517 tons, bound inward from New York. It is admitted that the weather, during the day and at the time of the collision, was very foggy, with a light south-west wind.

The learned judge of the Nova Scotia Admiralty District had no difficulty in finding that the "Senlac's" breaches of the regulations for preventing collisions in Canadian waters had occasioned the collision, but he also found that the earlier fog-blasts given by the "Senlac," on her way out, and which the "Rosalind" contended had not been heard by her, should have been heard, and

that, if they were not heard, it was due to the negligence of the "Rosalind" and that the negligence contributed to the disaster.

He, therefore, found both vessels at fault and decreed accordingly.

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It was from this finding and the decree against her that the "Rosalind" appealed.

The "Senlac" did not appeal or question the finding as against her.

The question for us, therefore, is whether or not the decree can, under the evidence, as against the "Rosalind" be sustained.

It does not appear to me that it can.

The "Senlac" was, beyond any doubt, in fault, not only in proceeding in a fog at such an excessive speed down the narrow channel as six miles an hour, but in failing to stop her engines and reverse when she sighted the "Rosalind" and the danger of collision was imminent.

The nautical assessor says, in his report,

> in view of the fact that she sighted the "Rosalind" at a distance not too great to have stopped her way by going full speed astern she was at fault in continuing her course across the "Rosalind's" bow.

She was also on her wrong side of the narrow channel forming the entrance to the harbour. It would almost appear as if she had done everything possible to occasion the collision.

The immediate and direct cause of the collision, however, was the manœuvre adopted by the "Senlac" immediately she saw the "Rosalind," and, as her captain says, "in consequence of seeing her," of starboarding her helm and attempting to cross the "Rosalind's" bows.

Had he ported her helm instead of starboarding, or stopped and reversed her engines instead of continuing on at his six mile speed, the probabilities are strong that the collision would have been avoided.

The trial judge finds that the "Rosalind" was not proceeding up the harbour as cautiously as she might

have been, "and that negligence" was the cause of her not hearing the earlier fog-blasts of the "Senlac."

A close perusal of the evidence, part of which was taken by commission and was not given before the learned judge, has failed to satisfy me that the finding of negligence in not hearing the earlier fog-blasts of the "Senlac" could be sustained. The decided cases referred to before us, alike in England and the United States, collected in Marsden on Collisions at Sea (ed. 1904), at page 34, shew that the courts are unwilling to infer negligence from the mere fact that a fog-signal which is proved to have been sounded in the vicinity was not heard. It has been held by Sir James Hannen, in *"The Zadok"* (1), at p. 118, that

> proof that a fog-horn was blown yet was not heard at the distance it might be expected to be heard cannot be accepted as proof that there was negligence on the part of those who did not hear it.

In the case of *The "Campania"* (2), at p. 292, Gorrell Barnes J. says:

> But the fact that the sound of the fog-horn does not appear to have reached the ears of those on board the "Campania" is not sufficient to override the positive evidence of the witnesses from the barque that it was being properly sounded. The Elder Brethren advise me that, as a matter of experience, sound signals in a fog are not always to be heard as they might be expected to be, and especially by persons on steamers approaching at considerable speed and sounding their own fog-whistles, and that this makes it all the more necessary that the speed of vessels in a fog should be moderate.

In the Channel Pilot (9 ed.), art. 18, cited by Bucknell J. in *The "Koning Willem I."* (3), at p. 121, it is stated that:

> Apart from the wind, large areas of silence have been found in different directions and at different distances from the origin of sound, even in clear weather.

(1) 9 P.D. 114. (2) (1901) P. 289.
(3) [1903] P. 114.

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Davies J.

I am assuming, of course, cases where there is credible evidence on both sides. It may well be that the evidence from both ships may be true. Now, in the case before us, there is credible evidence on both sides. The fog-horn of the "Senlac" was, undoubtedly, blown several times as she was proceeding down the harbour and was heard by others than those aboard of her. On the other hand, the evidence of many witnesses on the "Rosalind," including the captain, the third officer, the man at the wheel, the "Hell Gate" pilot from New York, who was on the bridge, and the first mate, who was at the bow on the look-out, all concur that they were keeping a vigilant look-out and they did not hear any of these earlier fog blasts of the "Senlac."

The finding of the learned judge of negligence because they did not hear is very general. He does not say how far the ships were apart when the fog-signals should have been heard, or whether all those sounded or only some of them should have been heard, or what their apparent bearing from the "Rosalind" would have been had they been heard, nor does it appear that, if heard, the danger apparent of a possible collision would have been such as to call for other manœuvres being adopted by the "Rosalind" than those which were adopted. Perhaps, however, any more specific finding could not, under the circumstances, have been made. I will not, however, press the point further, because I am of opinion that, under our statute, R.S.C. ch. 113, sec. 916, copied from the Imperial Statute 17 & 18 Vict. ch. 104, sec. 298, which governs this case, where the collision took place in Canadian waters, in order to hold the "Rosalind" liable, the collision must appear

to the court to have been *occasioned by the non-observance on her part of some regulation she was bound to observe. The Cuba* v. *McMillan*(1). It was incumbent on the "Senlac" to prove that the negligence complained of and found, which I assume to have been not keeping a proper look-out so as to have heard the "Senlac's" earlier fog-signals, in part contributed to the collision. Nowhere is there any evidence from which we could draw such a conclusion. The collision was directly caused by the "Senlac" wrongfully starboarding her helm, without attempting to stop or reverse, when the "Rosalind" was first seen by her in the fog, and so throwing herself right across the latter's bows. This manœuvre was taken "in consequence of seeing her," as the "Senlac's" captain states. It was quite inexcusable and everything was done by the "Rosalind" to avoid its consequences that reasonably could be done.

Such being the case, I am quite unable to see how the "Rosalind" can be held in fault under our Canadian statute as in part contributing to the collision, even if she, at any earlier time, negligently failed to hear the fog signals.

As to the contention of Mr. Ritchie, that the "Rosalind" was in fault in crossing from Meagher's Beach to pick up the light on the Middle Ground of the channel, it is sufficient to say that I quite agree with the finding of the assessor that

> the "Rosalind," having passed Meagher's Beach, was navigated with due caution and was justified in her endeavour to make the Middle Ground buoy.

In doing so she did not break the rule requiring her to keep the eastern side of the channel. She did

(1) 26 Can. S.C.R. 651.

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keep to such eastern side of the channel in the sense that the Middle Ground light was about the centre of the channel and her course was to the eastward of that light. She was not obliged, in such a fog, to hug the eastern shore line.

I think the appeal should be allowed with costs and the judgment holding the "Rosalind" liable reversed.

IDINGTON J.—I concur in the opinion stated by Duff J.

MACLENNAN J.—I concur in the opinion stated by my brother Davies.

DUFF J.—The action out of which this appeal arises is the result of a collision which took place in Halifax Harbour near the Middle Ground buoy, on the 1st of July, 1907, between the "Senlac," a wooden ship of 1,010 tons, going out of the harbour, and the "Rosalind," a steel ship of 2,517 tons, going in. The collision occurred in daylight, in a thick fog. The "Senlac" was seriously damaged and beached in a sinking condition, the "Rosalind" being uninjured.

The action was tried by the local judge in admiralty, in Nova Scotia (assisted by an assessor), who found both ships to blame. The "Rosalind" appeals.

The account given by the captain and pilot of the "Senlac" shews that, after leaving the wharf in Halifax, the "Senlac" proceeded down the harbour under full steam, making, however (for reasons which need not be discussed), only about six knots an hour. For some time before the collision occurred they heard distinctly the fog-blasts of the "Rosalind" and

recognized them as the signals of an incoming steamer; but, notwithstanding this, the "Senlac" did not moderate her speed. As the vessels approached one another there seems to have been no misapprehension on board the "Senlac" respecting the direction in which the "Rosalind" was moving. The captain says:

Q.—After you made that observation, did you hear his fog-blasts again? A.—Yes.

Q.—How far away did you judge they were from you? A.—It was, I judged, about a mile and a quarter away. Over a mile.

Q.—What did you do when you heard them close to the course of your vessel? A.—I did not do anything just then.

Q.—Did you hear another one soon after? A.—Yes; soon after. About a minute or two after.

Q.—How far did you judge that was away? A.—I judged it was a little nearer. I did not do anything then. Then I heard a third one. I judged that it was from half to three-quarters of a mile away. I then gave one short blast of the whistle and directed my course to starboard.

And the pilot:

We blew the regulation blasts until we got pretty well towards their ship. The captain said he appeared to be getting closer, then he blew one short blast indicating a course to starboard.

There is no dispute that this blast was given by the "Senlac" and heard by the "Rosalind;" and it is admitted that a blast from the "Rosalind" followed it. What occurred immediately afterwards is the subject of direct contradiction. Those on board the "Senlac" say that, within a very short time—estimated at about a minute—the "Rosalind" came in sight and, almost simultaneously, blew two short blasts, which they took to be a helm signal indicating a course to port; and that the "Senlac" (answering with the same signal), accordingly starboarded her helm. The captain and crew of the "Rosalind," on the other hand, deny that this signal was given by her, and state that she

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gave no further signals except a short blast as the vessels came together. There is also a dispute respecting the relative positions of the two vessels when they came in sight. The "Rosalind" people say that the "Senlac," when first seen, was coming head on, masts in line bearing about a point on the port bow and distant between 200 and 300 feet. The captain of the "Senlac," on the other hand, says the vessels were on parallel courses, the "Rosalind" on his starboard bow. The assessor, in a report furnished by him to the learned trial judge, accepts, substantially, the account given by the "Rosalind" of the relative positions of the ships, and on this point (which, however, in the view I take of the case, is not of much importance), I agree with him. The other question—whether the "Senlac" was misled into taking a course to port by the blasts of the "Rosalind"—is a more difficult question; and, in this case, we have not the assistance of any definite finding. The evidence of those aboard the "Senlac" is supported by that of some persons on shore at a place of about half a mile from the place of collision; there is a great deal of force in Mr. Mellish's contention that these witnesses would not be expected to distinguish with accuracy between a double blast from one of the steamers and two single blasts delivered successively from the "Senlac" and the "Rosalind" with only a momentary interval between them. Two such blasts were delivered, and they were admittedly very shortly followed by two short blasts from the "Senlac." In these circumstances I do not attach much corroborative weight to this evidence.

Whether the signal indicating a course to port was or was not heard on board the "Senlac" I do not think the evidence justifies the conclusion that this manœu-

vre of the "Senlac," which in the view of the assessor was the immediate cause of the collision, was the result of that signal. The captain of the "Senlac" does not say that it was, and the absence of a distinct affirmation by him to that effect is rather strikingly significant. His account, indeed, of the relative position of the ships when the "Rosalind" hove in sight—that the "Rosalind" was on his starboard bow—would indicate that the manœuvre was the result of his own observation of her position, and this accords entirely with his statement, made more than once at the trial, that he starboarded in consequence of "seeing the 'Rosalind.'" Balancing the probabilities as best one can, I think the "Senlac" fails to make out that the "Rosalind" was responsible for this manœuvre.

Apart from the contention I have just been considering the principal fault charged against the "Rosalind" is that she failed to observe article 16 of the regulations, which is in these words:

> Every vessel shall, in a fog, mist, falling snow, or heavy rainstorm, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

The particular disobedience charged is that she did not take the course prescribed by the regulations on hearing the fog signals of the "Senlac." The evidence of those on board the "Rosalind" is that (with the exception of the signal given by the "Senlac" shortly before the collision, with the object, as her captain says, of indicating a course to starboard, and subsequent signals), these signals were not heard by them. The learned trial judge does not distinctly

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find whether they were or were not heard. The view expressed by him is that if they were not heard it must have been because the attention of those on board the "Rosalind" was not sufficiently on the alert for such signals; and, on that view, he found the "Rosalind" in fault. The facts in evidence upon which this opinion is based are simply these: the whistle of the "Senlac"—a powerful whistle, which in ordinary circumstances could be heard at a distance of two miles or more—was unquestionably sounded (at intervals not greater than three minutes), for the twenty minutes preceding the collision; these signals were distinctly heard in Halifax up to the time of the collision, a distance of nearly two miles from the place where the collision occurred; the whistles of both steamers were heard, as already mentioned, at a place about half a mile away, immediately before the collision; the signals of the "Rosalind" were (except during a short interval), heard on board the "Senlac" for a considerable time previous to the collision, and as to that interval the evidence does not enable us to judge with any confidence whether it was due to an omission on the part of the "Rosalind" to sound her whistle or to the noises on the "Senlac" (such, for example, as the sound of her own whistle), or, as suggested by Mr. Mellish, to exceptional atmospheric conditions. The captain of the "Rosalind," the look-out, and several other witnesses, two of whom were examined on commission, positively state that the "Senlac's" signals were not heard. The learned trial judge has, as I have said, not expressly refused to accept the statements of these witnesses; and, in the absence of such a finding, there really does not appear to be any good ground upon which this court can refuse to hold

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that these signals were not heard. Then there is really no direct evidence of lack of proper attention on the part of the officers and crew of the "Rosalind;" and I am not by any means free from doubt upon the question whether the facts I have mentioned are sufficient, in themselves, to support the inference the learned trial judge has drawn from them. Eminent and experienced judges have frequently, on the advice of experienced assessors, in the trial of admiralty actions, refused to accept credible testimony that a signal was not heard as sufficient evidence to shew that it was not given in the face of positive evidence that it was given; and it may be accepted that the vagaries and uncertainties of sounds in certain atmospheric conditions make it, as a rule, unsafe to infer that a signal was not given on one ship at sea because it was not heard upon another. On the other hand, it is, I think, impossible to lay down as a rule that in no circumstances would the fact that a signal proved to have been given on one ship was not heard by another be evidence of culpable inattention on the latter; and, in the circumstances here, I am unable to say that I am satisfied that the learned trial judge was wrong in finding, with the concurrence of the nautical assessor, that the signals given by the "Senlac" would have been heard by those on board the "Rosalind" if they had been on the alert for such signals.

A failure in the attending to the possibility of fog signals would, in the circumstances, clearly amount to a neglect of the direction contained in article 16, to act with "careful regard to existing circumstances and conditions;" but it does not follow that the "Rosalind" was in fault within the meaning of the statutory enactment applicable to this case. The language of

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the statute (which is that of the earlier English Act, 17 & 18 Vict. ch. 104) is as follows:

> If in any case of collision it appears to the court * * * that such collision was occasioned by the non-observance of any of the rules prescribed by this Act, the vessel * * * shall be deemed to be in fault unless it can be shewn, to the satisfaction of the court, that the circumstances of the case rendered a departure from the said rules necessary (R.S.C. ch. 113, sec. 916).

In *The Ship "Cuba"* v. *McMillan*(1), this court held, following the decisions upon the English Act referred to, that where non-observance of the regulations *per se* is relied upon as constituting fault within this enactment, it is necessary to consider whether the non-observance did or did not in fact contribute to the collision. King J., who delivered the judgment of the court, uses these words, at page 661:

> Apart from statutory definitions of blame or negligence, there seems no difference between the rules of law and of admiralty as to what amounts to negligence causing collision. *Per* Lord Blackburn, in *Cayzer* v. *Carron Co.*(2); *The Khedive*(3). As applied to the case before us, the principle is that a non-observance of a statutory rule by the "Elliott" is not to be considered as in fact occasioning the collision, provided that the "Cuba" could, with reasonable care exerted up to the time of the collision, have avoided it. *The Bernina*(4).

The rule was also applied by the court of appeal in *H.M.S. "Sans Pareil"*(5).

We need not, I think, concern ourselves with the question whether, if the "Rosalind" had heard the "Senlac's" signals and committed no breach of article 16, the ships would or would not have been brought into danger of collision. Assuming they would not, the "Rosalind" is, I think, still entitled to succeed on

(1) 26 Can. S.C.R. 651.
(2) 9 App. Cas. 873.
(3) 5 App. Cas. 876.
(4) 12 P.D. 36.
(5) [1900] P. 267.

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the principle stated in the passage I have quoted; because I think the evidence shews that she being where she was when the "Senlac" gave the first signal, admittedly heard on board the "Rosalind," the "Senlac" could, by the exercise of reasonable care have avoided the collision. The evidence is conclusive that the "Rosalind," on hearing the signal mentioned, stopped her engines and, when the "Senlac" came in sight, reversed them; and there can be no doubt that had the "Senlac" done the like, the collision could not have happened. Apart from any rule, knowing that she was in the vicinity of the "Rosalind"—an incoming ship—the slightest regard for the safety of the two ships demanded that the "Senlac" should at least take the precaution of stopping her engines until the position of the "Rosalind" should be accurately known. It is the opinion of the assessor that, when the "Rosalind" came in sight, the "Senlac" (though still under full steam ahead), had time by reversing her engines (as the "Rosalind" did), if not to avert the collision, at least so to lessen the force of the impact as to escape substantial injury.

But it is not, I think, necessary that the "Rosalind" should rely upon this view. The most ordinary attention to the obvious risks of the situation would have led the "Senlac," at the time she gave the starboard signal, to take such measures as might be necessary to avoid a collision; and this could easily have been done by simply stopping her engines. The truth seems to be that, at the moment the ships were in a position involving risk of collision, but no actual peril if both ships should be navigated with the caution which such a situation required; but that, while the "Rosalind" was navigated with care, the "Senlac"

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was navigated with a reckless disregard of the safety of both ships. It was this recklessness that was the proximate cause of the collision.

The appeal should be allowed.

Appeal allowed with costs.

Solicitor for the appellant: *W. H. Fulton.*

Solicitor for the respondents: *H. C. Borden.*

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

AND

AMANDA DESROSIERS (SUPPLIANT) ..... RESPONDENT.

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*Oct. 27.
*Dec. 1.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Negligence—Tort—Liability of the Crown—Demise of the Crown—Personal action—Release—Operation of railway—Common employment—Exchequer Court Act, 50 & 51 V. c. 16, s. 16(c)—Appeals to Privy Council.

Under sub-sec. (*c*) of sec. 16 of the "Exchequer Court Act" (50 & 51 Vict. ch. 16) an action in tort will lie against the Crown, represented by the Government of Canada.

Under the Civil Code of Lower Canada, in case of death by negligence of servants of the Crown, an action for damages may be maintained by the widow of the deceased on behalf of herself and her children. The action of the widow is not barred by her acceptance of the amount of a policy of insurance on the life of deceased from the Intercolonial Railway Employees' Relief and Insurance Association, under the constitution, rules and regulations of which the Crown is declared to be released from liability to make compensation for injuries to or death of any member of the association. *Miller* v. *Grand Trunk Railway Co.* ((1906) A.C. 187) followed.

The doctrine of common employment does not prevail in the Province of Quebec.

The right of action for compensation for injury or death by negligence of Government employees does not abate on demise of the Crown. *Viscount Canterbury* v. *The Queen* (12 L.J. ch. 281) referred to.

The Judicial Committee of the Privy Council refused leave to appeal from a judgment of the Supreme Court of Canada in accord with a long series of decisions in the Dominion. *Armstrong Case* referred to by the Chief Justice at page 76 *post.*

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

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APPEAL from the judgment of the Exchequer Court of Canada (1) maintaining the suppliant's petition of right, and awarding her the sum of $3,000 for her own use, and the further sum of $1,000 in the right of her minor child, together with costs.

The suppliant, on behalf of herself and as tutrix of her minor child, claimed damages from the Crown on account of the negligent operation of the Intercolonial Railway by its servants and officers whereby Achille DeChamplain, the deceased husband of the respondent, who was a brakesman employed on the said railway, was fatally injured whilst on duty at Sayabec Station, in the Province of Quebec, on the 22nd of May, 1900.

At the time of the accident the deceased was assisting in carrying out some shunting operations, and was run over by a moving car, sustaining such injuries that he died shortly after. No one witnessed the accident, and there was no evidence to shew how it actually occurred, but it was suggested that the deceased got his foot caught between the rail and the guard rail; that the space between these should have been filled with packing; that it was not so filled, and that, if it had been, the accident would not have occurred.

Chrysler K.C., for the appellant. The findings of the learned trial judge are entirely against the weight of evidence.

The provisions of section 262 of the "Railway Act, 1888," relating to packing, are not in the Government Railway Act," but the suppliant put in, as an exhibit, the rules for the guidance of Intercolonial trackmen, rule 82 of which reads: "The foreman must see that

(1) 11 Ex. C.R. 128.

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all spaces less than five inches between rails, frogs, crossings, switches, guard rails, et cetera, are filled and kept filled in with wood packing, or other suitable material; such packing not to reach higher than the underside of rail head."

It is submitted: (1) That the evidence does not shew how the accident happened or what was its cause. (2) That no negligence is shewn on the part of any of the railway servants. (3) That the weight of the evidence shews that so far as the regulations as to packing have any bearing on the case they were duly complied with.

The occupation of a brakesman is necessarily hazardous. The deceased was well acquainted with the Sayabec district, in which he had worked for years. He had been actually working at the very place where the accident occurred for several days previously, assisting with the loading operations which were going on at the time when it happened. There was nothing unusual in the conditions there on that day, and it is impossible to acquit him of imprudence and carelessness without which the accident could not have occurred.

The learned trial judge has decided this case, so far as the law is concerned, by reference to the case of *The King* v. *Armstrong*(1), which was tried at the same time, and we crave leave to refer to so much of the factum in that appeal as deals with the law of the case(2), and the argument at bar, as given in the Supreme Court report at pages 232 *et seq.*

There is, however, the further legal objection to the present suit that the cause of action arose in the

(1) 40 Can. S.C.R. 229; 11 Ex. C.R. 119.

(2) See *per* C.J., at p. 75 *post.*

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lifetime of Her late Majesty Queen Victoria, that an action would only lie against Her Majesty, and that the same abated on her death. See *Viscount Canterbury* v. *The Queen*(1), in which it was sought to make the late Queen liable upon a petition of right for a wrong done by a servant of William IV., and it was objected, first, that the Queen was not the personal representative of the late King, and, secondly, that if she was, the case was within the rule *actio personalis moritur cum personâ*. There was no decision on the point, though it was referred to by Lord Lyndhurst, who, in terms clearly indicating his opinion that it was a fatal objection to the suit, said:

> Another objection has been urged against the claim of the petitioner. If the case were one between subject and subject this objection would be fatal, and it is admitted on the part of the petitioner that he can only expect success if he had a right to redress in an action against a private individual. Now, the cause of action arose in the time of the late King, and it is clear that had this been a case between subject and subject, an action could not be supported on the principle that *actio personalis moritur cum personâ*. It is contended that a different rule prevails where the Sovereign is a party, but some authority should be adduced for such distinction. It is true, indeed, that the King never dies—the demise is immediately followed by the succession, there is no interval, the Sovereign always exists, the person only is changed. But if there be a change of person, why is the personal responsibility arising from the negligence of servants, (if indeed such responsibility exists), to be charged on the successor, ceasing as it does altogether in the case of a private individual? In the case of a subject the liability does not continue in respect of the estate; it devolves on neither the heirs nor the personal representative; it is extinct. I should find it difficult, therefore, in the case of the Crown, to say with any confidence that the liability continued, and was transferred to the successor, unless some distinct authority were shewn in support of such a doctrine. Several cases were referred to for this purpose in the argument at the bar, but they were cases of grant, covenant, debt, or relating to the right of property, in which, from the analogy to the case of a subject, the Crown might be liable in respect to succession, and do not, I think, sufficiently establish the principle for which they were cited.

(1) 12 L.J. ch. 381; 1 Phillips, 306.

Auguste Lemieux K.C., for the respondent. The respondent relies upon the reasons for judgment stated by the learned trial judge, and also contends that the right of action conferred by articles 1054 and 1056 of the Civil Code is not representative, but a direct and independent right accruing to the persons therein mentioned for the recovery of damages from the party responsible for the injury. The deceased had no control over this right of action, which came into existence only on account of his death, and no agreement as to the indemnity entered into by him can limit or affect the remedy given to his widow and child by art. 1056, C.C. We refer, on this point, to *Miller* v. *The Grand Trunk Railway Co.* (1).

THE CHIEF JUSTICE.—I would confirm the judgment with costs. As to the facts connected with the accident, I accept, although with some hesitation, the conclusion reached by the trial judge that the death of DeChamplain, husband of the respondent, was caused by the negligence complained of.

In his factum, at page 6, under the head of "the law of the case," the Attorney-General says:

> The learned judge of the Exchequer Court has given judgment in this case so far as the law is concerned by reference to the case of *Marguerite Henrietta Jane Armstrong* v. *The King*, which was tried at the same time. The judgment in the latter case is now under appeal to this honourable court, and the Attorney-General craves leave to refer to so much of his factum in that appeal as commencing at page 8 deals with the law of the case.

At the page referred to I find the points of law raised by the defence to that suit thus summarized:

> (*a*) The action is in tort and no such action will lie against the Crown.

(1) [1906] A.C. 187.

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(*b*) The right of action, if any, given by the statute (The Supreme and Exchequer Courts Act, 50 & 51 Vict. ch. 16, sec. 16(*c*)), is a personal one, and the action will only lie at the suit of the personal representatives of the deceased H. C. Goddard.

(*c*) The deceased, by his contract of employment, released and discharged the appellant from any claims of the nature of the present claim.

(*d*) The negligence alleged to have been the cause of the accident was that of a fellow servant of the deceased.

All these questions were decided by this court against the appellant in the *Armstrong Case*(1) on the ground that the law had been settled in a long series of cases; and, on the application for leave to appeal to the Privy Council from that judgment, Lord MacNaghton said as a ground for refusing the application, referring to the decisions of this court:

This seems to have been the law for eighteen years.

(See report of argument in Privy Council, p. 17.) (2). In these circumstances, we are of opinion that the judgment in the *Armstrong Case*(1) is conclusively binding on this court.

The appellant, however, urges the further legal objection that the cause of action arose in the lifetime of Her Majesty Queen Victoria; that an action would only lie against Her Majesty; and that the same abated on her death. In view of all the circumstances connected with the institution and subsequent conduct of these proceedings it is doubtful whether such a defence should be raised; but if we must deal with it we are of opinion that the principle *actio personalis moritur cum personâ* has no application here. This is an action for money reparation to the widow and children of a party injured who was killed as a result of the injuries and the Crown is—within the limita-

(1) 40 Can. S.C.R. 229.

(2) Cf. *per* Girouard J. in *Abbott v. City of St. John* (40 Can. S.C.R. 597) at p. 602.

tions prescribed in section 16 of the "Exchequer Court Act"—liable in any case in which a subject would, under like circumstances, be liable. *The Queen* v. *Fillion*(1). There is no doubt under the old French law, which is now the Quebec law, the principles of which are applicable here, that if this was a case between subject and subject the wrongdoer's representative would be liable, in which we follow the rule of the canon rather than of the old Roman law. Pothier, No. 675, par. 7 (Bugnet ed.); Pandectes Françaises, *vo.* "Responsabilité civile," Nos. 1824 *et seq.* Nos. 1869 and 1870; Beaudry-Lacantinerie—Obligations, vol. 3, 2nd part, No. 1884, No. 2886; Sourdat, No. 53, 53 *bis* & 58.

Further the law of reparation applicable to cases like the present is expressed in article 1056 of the Quebec Code, which gives in express terms an independent direct right of action to the plaintiffs against the person who commits the offence or quasi-offence or his *representatives*. Why should we make an exception to this general rule in a case where the Sovereign is a party? If under the law the liability continues in the case of a subject in respect of his estate and devolves upon his heirs or personal representatives, why in a case against the Crown should the liability not continue and be transferred to the successor? The King never dies, the demise is immediately followed by the succession; there is no interval, the Sovereign always exists; the person only is changed, as Lord Lyndhurst said, in *Viscount Canter-*

(1) 24 Can. S.C.R. 482.

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bury v. *The Queen*(1). The doubt expressed by His Lordship could not exist here because it is based entirely on the assumption that there would be, in the circumstances of the case, no liability if a subject was defendant and, as I have attempted to shew, here the subject would undoubtedly be liable.

Since the judgment in *Armstrong* v. *The King*(2), it must be considered as settled law that the "Exchequer Court Act" not only creates a remedy, but imposes a liability upon the Crown in such a case as the present and that such liability is to be determined by the laws of the province where the cause of action arose. *The King* v. *Armstrong*(2), at p. 248. See also *Monaghan* v. *Horn*(3), *per* Taschereau J. at pp. 441 *et seq.* and R.S.C. (1906), ch. 101, sec. 5.

GIROUARD J. agreed with the Chief Justice.

DAVIES J.—I concur in the judgment of the Chief Justice, but with great hesitation as regards the conclusion reached by the trial judge upon the facts.

IDINGTON J. agreed that the appeal should be dismissed with costs.

MACLENNAN J.—I agree that the appeal should be dismissed for the reasons stated by Burbidge J. in delivering the judgment appealed from.

(1) 12 L.J. Ch. 281. (2) 40 Can. S.C.R. 229.
(3) 7 Can. S.C.R. 409.

DUFF J. concurred in the dismissal of the appeal.

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Appeal dismissed with costs.

Solicitor for the appellant: *E. L. Newcombe.*

Solicitor for the respondent: *Louis Taché.*

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*Oct. 28.
*Dec. 1.

SIMEON LAMOTHE (PLAINTIFF).....APPELLANT;

AND

ADOLPHE DAVELUY (DEFENDANT).RESPONDENT.

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

Appeal—Actio Pauliana—Controversy involved — Title to land — R.S.C. [1906] *c.* 139, *s.* 46.

In the Province of Quebec, the *actio Pauliana*, though brought to set aside a contract for sale of an immovable, is a personal action and does not relate to a title to lands so as to give a right of appeal to the Supreme Court of Canada.

APPEAL from a decision of the Court of King's Bench, reversing the judgment of the Court of Review in favour of the plaintiff, and restoring the judgment of the Superior Court, District of Arthabaska.

The appellants, creditors of an insolvent for a claim of $53.50, brought the suit, *actio Pauliana,* on behalf of themselves and all other creditors of the insolvent, to set aside a sale of land by the insolvent to the defendant, as having been made in fraud of creditors and asking that the land in question should be attached as their common pledge and sold for their common benefit. At the time of the sale complained of, the land had not been granted by the Crown, but was held under location and the letters patent of grant were subsequently issued in the name of the transferee.

A motion was made, on behalf of the respondent, to quash the appeal, for want of jurisdiction, on the

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

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grounds that the action was, in its nature, merely personal and for an amount insufficient to give jurisdiction to the Supreme Court of Canada to hear the appeal, and that there was no controversy involved affecting title to or any interest in real estate.

On the part of the appellants, it was contended that the effect of the proceedings, if the action were maintained, would be to set aside the title to the land which the defendant held under the letters patent of grant in virtue of the alleged fraudulent transfer by the debtor to him, and that, therefore, a title or interest in the land was in controversy, and an appeal would lie.

J. A. Ritchie, supported the motion.

G. G. Stuart K.C. contra.

THE CHIEF JUSTICE.—This is an action *Pauliana* and the respondent moves to dismiss for want of jurisdiction. I would grant the motion on the ground that the amount of the plaintiff's claim is not within the appealable limit and no question of title to land, in the sense in which that term is used in section 46 of the Act, is involved in this appeal. It is quite true that the plaintiff in such an action brought under the Quebec Code represents not only himself, but all the other creditors of the fraudulent debtor prejudicially affected by the sale (art. 1036 C.C.), but it does not appear, and there is some evidence to the contrary, that the total amount of Leclerc's indebtedness would exceed $500; and the value of the property is certainly not of the appealable amount. *Labelle* v. *Meunier* (1), and *Leclaire* v. *Coté*(2).

(1) Q.R. 3 S.C. 256. (2) Q.R. 3 S.C. 331.

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In a very learned essay on the nature of the action *Pauliana,* in "La revue trimestrielle de droit civil," vol. 5, p. 85 (1906), a distinguished French writer, Mr. Jean Acher, says:

> La controverse sur la nature de l'action paulienne a rapport aux plus anciens et aux plus ardus problèmes du droit civil;

and even the most superficial examination of the jurisprudence in France and of the text books of those who write with most authority, such as Laurent, Demolombe and Aubry & Rau, brings home the conviction that M. Acher does not overstate the difficulties with which this question is surrounded. There are two judgments of the "cour de cassation," S. V. 1844, 1, 122, and S. V. 1885, 1, 77, in which diametrically opposite conclusions are reached. In the first the "action paulienne" is held to be an "action mixte" and in the second it is said to be "une action personnelle." There are also judgments of the court of appeal in France in which it was decided that it was an "action réelle"; and in the courts of the Province of Quebec we have the same diversity of opinion. *Beaulieu* v. *Lévesque*(1), and *Leduc* v. *Tourigny*(2). In *Beaulieu* v. *Lévesque*(1) it was held by Casault C.J., Caron J., and Andrews J., a very strong court, that the action *Pauliana* is a real action because what is sought by the conclusions is the annulling of a title to an immovable; and consequently such an action, affecting title to land, is of the exclusive jurisdiction of the Superior Court and would be appealable here. See Mignault, vol. 5, p. 306. In *Leduc* v. *Tourigny*(2), it was held by the Court of King's Bench, Dorion C.J. presiding, that the action *Pauliana*

(1) Q.R. 2 S.C. 193 (2) 17 Q.L.R. 385.

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is a personal action and that the amount claimed in the action was solely to be considered in determining the question of jurisdiction, in which case no appeal would lie.

As to the doctrine in France compare Demolombe, vol. 25, No. 248, and Laurent, vol. 16, No. 483, *et seq.* In presence of such a conflict of authorities one might well be tempted to say with Johannes Faber: *"Super hoc teneas quidquid volueris non est magnus effectus."*

I have gone over the cases decided in this court and have not been able to find one in which the question now in issue has been considered.

In the conclusion that I have reached I adopt the opinion of Planiol as to the nature of the action: Vol. 2, No. 327:

L'action paulienne (Planiol says) a pour but de procurer aux créanciers la réparation du préjudice que leur a causé le fraude commise contre eux par le débiteur. Tel est le but pratique de l'action.

And at No. 328 he says:

Il n'y a d'action réelle que celle qui garantit les droits réels, tels que la propriété, les servitudes, les hypothèques; et ici il n'y a rien de semblable. *L'action paulienne est une action personnelle qui naît d'un fait illicite.* Elle tend à réparer le préjudice subi par le créancier. Elle rentre donc dans la famille des actions délictuelles. La nullité qui en est la conséquence n'est qu'un moyen de donner au créancier la réparation à laquelle il a droit sous la forme la plus directe et la plus simple.

See Dalloz, "codes annotés," art. 1167 C.N., no. 10 and at no. 367. Also note by Esmein to Sirey, 1875, 2, 146. *Vide* S. V. 1904, 1, 136.

The Quebec Code differs from the French Code in this respect; by art. 1036 the defendant creditor is compelled to restore the thing received or the value thereof for the benefit of the creditors of the insolvent debtor according to their respective rights, and

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not exclusively, as in France, for the benefit of the plaintiff in the action. Comp. Vigié, vol. II., no. 1250. Vol. 5, Revue Trimestrielle, at p. 111. Nothing, however, turns on this difference in this case because as before stated the total amount of the alleged fraudulent debtor's indebtedness does not exceed $500.

I do not deny that in the final result the title of the defendant to the property with respect to which he is alleged to have acquired a fraudulent title may be affected; but I may safely say that the settled jurisprudence of this court is that in dealing with the question of jurisdiction reference can only be had to the matter actually in dispute in the particular case and the collateral effect of the judgment is not to be taken into account.

Motion granted with costs fixed at $25.

GIROUARD and DAVIES JJ. concurred in the opinion stated by the Chief Justice.

IDINGTON J.—The test of the jurisdiction of this court in any such case as this ought to be whether or not "the matter in controversy" falls within the range of subject matters that give a right to appeal.

Section 46 of the "Supreme Court Act" provides that

> no appeal shall lie to the Supreme Court from any judgment rendered in the Province of Quebec in any action suit cause matter or other judicial proceeding unless the *matter in controversy* * * * relates to any fee, etc. * * * or to any title to lands, tenements, etc., * * * where rights in future might be bound.

This question has been passed upon time and again and it has been decided that no adjudication gives rise to the jurisdiction when relative merely

to any assessment or other basis for or imposition of taxation, although in the ultimate result the enforcing thereof might affect and even change the ownership and thus the title; or to a *procès-verbal* of council though it would affect the ownership of land either alleged to be a right of way, or needed for a highway, and to be expropriated for such a purpose; or the right to enforce a mortgage, or affecting the amount of such charge on lands or relieving lands from such charge; or the validity of a by-law on the mere ground that its being held valid would affect lands or the title thereto; or removing a guardian or tutor entrusted with lands; or to restrain the execution of an award or direction of engineer under the Ditches and Watercourses Act; or order in a decided *bornage* case defining how the line should be established; or in a suit where right of way had been adjudged, but dispute had arisen over whether settlement had or had not been made that averted need of execution; or the price of real estate sold with warranty even though a plea of fear of future troubles from a prior hypothec; or a lease within this sub-section by reason of the title to land coming in question.

In this case no one disputes the title. Everything relative thereto is admitted.

Therefore there is no title to land as such in controversy.

The only question is whether or not there has been a fraud upon creditors.

If there has not there can be no disturbance of the title. If there has the present holder of the title must either pay the creditors or submit to the lands being made answerable therefor.

The case seems to me clearly to fall within the

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principle upon which the numerous cases I have referred to proceeded.

Indeed, the case of *Flatt* v. *Ferland*(1) seems in point though no one appears to have had the courage to raise the question and claim such a ground of jurisdiction as claimed here. The suit was just as this to set aside a sale as fraudulent against creditors whose united claims were less than $2,000, and hence the court refused to entertain the appeal.

The defendant in that case had offered to consent to set aside the attacked sale to him on receiving a stated sum of money.

I fail to see how that could make any difference when his offer was rejected and the issue tried. *The Canada Carriage Co.* v. *Lea*(2), examined closely, implies the same thing; for if the title to land had been held to have been involved the statute gave an appeal as of right.

The future consequences of the decision on the controversy count for nothing.

See *Dubois* v. *Village of Ste. Rose*(3), which turned upon the question of future rights.

Talbot v. *Guilmartin*(4), which is analogous to that in principle.

The authorities referred to and others are all collected in the R.S.C. 1907, ch. 139, p. 2328 of vol. 3.

I find, however, reason to doubt the classification of the cases in that list, and therefore refer to the following out of the list which furnish one or more authorities for each of the respective points I refer to above as decided: *McKay* v. *Township of Hinchin-*

(1) 21 Can. S.C.R. 32.
(2) 37 Can. S.C.R. 672.
(3) 21 Can. S.C.R. 65.
(4) 30 Can. S.C.R. 482.

brooke(1); *The Bank of Toronto* v. *Le Curé et les Marguilliers de L'Œuvre et Fabrique de la Paroisse de la Nativité de la Sainte Vierge*(2); *Toussignant* v. *County of Nicolet*(3); *Leroux* v. *Parish of Ste. Justine*(4); *Noel* v. *Chevrefils*(5); *Waters* v. *Manigault* (6); *Cully* v. *Ferdais*(7); *City of Hull* v. *Scott & Walters*(8); *Jermyn* v. *Tew*(9); *Canadian Mutual Loan & Investment Co.* v. *Lee*(10); *Carrier* v. *Sirois* (11); *Fréchette* v. *Simmoneau*(12).

I think the appeal should be quashed with costs.

MACLENNAN and DUFF JJ. concurred in the opinion stated by the Chief Justice.

Appeal quashed with costs.

Solicitor for the appellant: *Louis P. Crépeau.*
Solicitor for the respondent: *J. E. Méthot.*

(1) 24 Can. S.C.R. 55.
(2) 12 Can. S.C.R. 25.
(3) 32 Can. S.C.R. 353, at p. 355.
(4) 37 Can. S.C.R. 321.
(5) 30 Can. S.C.R. 327.
(6) 30 Can. S.C.R. 304.
(7) 30 Can. S.C.R. 330.
(8) 34 Can. S.C.R. 617.
(9) 28 Can. S.C.R. 497.
(10) 34 Can. S.C.R. 224.
(11) 36 Can. S.C.R. 221.
(12) 31 Can. S.C.R. 12.

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*Oct. 13.
*Dec. 15.

S. J. CASTLEMAN (PLAINTIFF) ..... APPELLANT;

AND

WAGHORN, GWYNN AND COMPANY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Sale of stock—Evidence of title—Duty of vendor—Defective certificate.

When shares in the stock of a company are sold for cash and a certificate delivered with a form of transfer indorsed purporting to be signed by the holder named therein who is not the seller, the latter must be taken to affirm that a title which will enable the purchaser to become the legal holder is vested in him by virtue of such certificate and transfer.

A transfer was signed by the wife of the holder at his direction but not acted upon until after his death.

Held, that the authority of the wife to deal with the certificate was revoked by the holder's death and on a cash sale of the shares the purchaser who received the certificate and transfer so signed being unable, under the company's rules, to be registered as holder had a right of action to recover back the purchase money from the seller.

The fact that the purchaser endeavoured to have himself registered as holder of the shares was not an acceptance by him of the contract of sale which deprived him of his right of action to have it rescinded. Nor was his action barred by loss of the defective certificate by no fault of his nor of the seller.

Judgment appealed from (13 B.C. Rep. 351) reversed.

APPEAL from a decision of the Supreme Court of British Columbia(1) affirming the judgment at the trial by which the plaintiff's action was dismissed.

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

(1) 13 B.C. Rep. 351.

The circumstances of the case are stated in the judgments now reported.

Wallace Nesbitt K.C. and *Livingston,* for the appellant. The judgment appealed from is wrong in following respects: (1) in holding that there was a transfer of the stock in question in due and proper form; (2) in failing to hold that it was the duty of the seller of the shares to give the purchaser such a transfer as would vest in him a present, absolute and unconditional right to have the shares registered, as between himself and the company; (3) in failing to hold, inasmuch as the transfer of the shares purported to be made by James Boecher, who died three years before the transfer was negotiated, that under the articles of association of the company the only person who could make title or transfer the shares was the executor or administrator of the said Boecher, that the transfer by the indorsement of Mrs. Boecher was incapable of passing any title to the shares, and that neither the plaintiff nor the defendants were or had been in a position at any time to compel the company to register the transfer; and (4) that, as between the company and any person seeking a transfer, the by-law of the company provided that in the case of the death of a member the executors or administrators of the deceased shall be the only person recognized by the company as having any title to his shares. The company, therefore, was not bound to register except title was made by the executors or administrators, and, therefore, as the company was not bound to register the consideration as between the plaintiff and defendants failed and the plaintiff is entitled to recover.

The plaintiff was unaware when he accepted the

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certificate of stock in question that the indorsement thereon was not in the proper handwriting of the transferor, James Boecher, and did not become aware of this fact until he presented it for transfer to the managing director of the company. He was, therefore, unable to reject the certificate on this ground prior to payment therefor. By article 25 of the company the transferor shall be deemed to remain the holder of the shares until the name of the transferee is entered in the register in respect thereof, and the effect of the word "deemed" in this article was to make the said Boecher the only person who could be recognized as holder of the shares. *Nunes* v. *Carter* (1); *Campbell* v. *Barrie* (2), at p. 292. By article 29, the executors or administrators of Boecher were, at the time the said shares were purchased by the plaintiff, the only persons recognized or whom the company could recognize as having any title to the shares, and thus the only persons who could make title to the shares, and as the shares did not purport to be transferred by Boecher's executors or administrators and as the notice called for by article 31, which is to be deemed to be a transfer, had not been given, the company correctly considered that no transfer of the shares to the plaintiff had been made, and the plaintiff was never in a position to compel them to register the document received by him from the defendants, purporting to be a transfer of the shares to him. The defendants became liable to him for the loss occasioned by reason of their having given him no title to the shares. Cook on Corporations (4 ed.), p. 651; *Wil-*

(1) L.R. 1 P.C. 342.

(2) 31 U.C.Q.B. 279.

kinson v. *Lloyd*(1); *Stray* v. *Russell*(2), is distinguished, at p. 284, from *Wilkinson* v. *Lloyd*(1) as being under the rules of the Stock Exchange by which on a certain day the seller's broker hands over the transfers and certificates, and the other broker pays and is bound to pay.

The company had a right to delay making the transfer so as to make inquiries and avoid liability. *Société Générale de Paris* v. *Walker*(3), at p. 41; *Ireland* v. *Hart*(4), at p. 528; Cook on Corporations (4 ed.), p. 651; *East Wheal Martha Mining Co.* (5), pp. 119-121; *Bermingham* v. *Sheridan*(6); Buckley, Company Law (8 ed.), p. 41. The company would be liable if the indorsement was irregular. *In re Bahia and San Francisco Railway Co.*(7). If the plaintiff had persuaded the company to register the irregular transfer the company would have had an action of indemnity against him. *Sheffield Corporation* v. *Barclay*(8). The company exercised their right of delay and notified the defendants of the irregularity, and it was the duty of the defendants to furnish the evidence required or otherwise make the transfer regular. *Re East Wheal Martha Mining Co.*(5), pp. 119-121. This they failed to do and the plaintiff then became entitled to a return of his money. *Ireland* v. *Hart*(4).

Ewart K.C., for the respondents. James Boecher was at one time the owner of the shares. The day before his death, his wife at his request signed his name to a blank transfer of them, in the presence of his

(1) 7 Q.B. 27.
(2) 28 L.J.Q.B. 279.
(3) 11 App. Cas. 20.
(4) (1902) 1 Ch. 522.
(5) 33 Beav. 119.
(6) 33 Beav. 660.
(7) L.R. 3 Q.B. 584.
(8) (1905) A.C. 392.

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sons, one of whom attested the signature. James Boecher left a will by which he bequeathed all that he had, including the shares, to his wife. Three years afterwards the shares were sold to the defendants, who accepted the transfer, believing it to be in perfect order; and they then clearly became entitled, as against the wife and everybody else, to be registered as holders of the shares. The defendants, while thus holding the certificate and transfer, sold the shares to one Amess. The plaintiff says that Amess, in purchasing the shares, was acting as his agent. But that is not true. The defendants, admittedly, believed, and had good reason to believe, that Amess was purchasing for himself, and selling over again to the plaintiff, The defendants and Amess live in Vancouver. The plaintiff lives in Ottawa; and, in order to close the transfer, Amess and the defendants drew upon the plaintiff in Ottawa, attaching the certificate and transfer to the draft. This was on the 29th November, 1905. The plaintiff accepted the documents and paid the draft. At this stage the plaintiff could elect whether to rest satisfied with the documents which he had received or to send them to the company for registration. He could not retain the documents indefinitely, and then raise as against the defendants some unsubstantial, or even substantial objection to them, or to their form. He did nothing until between the 7th and 10th of December, when he presented the documents to the president of the company. He did nothing further till the 6th January, meanwhile keeping a sharp lookout upon the share market, and saying nothing to the defendants from whom he had obtained, as he then thought, a great bargain. He had bought at 35c. a share and wrote to Amess (15th

Nov.): "I can place them here at 50; and I will share the rake-off with you when I get back." On the 6th January he sent the documents to the president at Vancouver to be put in proper form; and in connection with that action makes, in his evidence, two misstatements: (1) He says that he sent the documents to the company "for transfer to myself." In reality he sent them for correction to the president, who had volunteered to get them put in form for him; (2) he says that the reason for delaying to send the documents was "to give the president time to reach" Vancouver. That is not true. He reached Vancouver on the 20th or 21st November.

Boecher, living and in possession of his faculties, authorized and witnessed his wife's signature to the transfer in question in this action. The signature so made was the signature of Boecher: *The King* v. *Inhabitants of Longnor*(1).

Amess went outside any authority given him, and therefore cannot be considered plaintiff's agent at time of purchase: Wright on Principal and Agent, 72; *Watson* v. *Swann*(2).

The defendants were not required to do more on sale of shares than deliver share certificate and transfers in common form, and abstain from interfering with registration of transfer: *Stray* v. *Russell*(3); *London Founders Association* v. *Clarke*(4); *Hooper* v. *Herts*(5); *Skinner* v. *City of London Marine Insurance Corporation*(6).

(1) 4 B. & Ad. 647; 1 Nev. & M. 576.
(2) 11 C.B. (N.S.) 756.
(3) 28 L.J.Q.B. 279.
(4) 20 Q.B.D. 576.
(5) (1906) 1 Ch. 549.
(6) 54 L.J.Q.B. 437.

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THE CHIEF JUSTICE.—I agree with Mr. Justice Duff.

The obligation of the seller, Waghorn, was to deliver the shares into the possession of the buyer, Castleman. Can it be said that, in the circumstances, he fulfilled that obligation? All that he gave was a certificate of shares on which was indorsed a transfer in blank. The indorsation, which was not signed by Boecher, the registered owner of the shares, but by his wife for him, may have been regular if the wife was authorized to sign, but it does not appear that there ever was a transfer to Waghorn that would vest in him the property in the shares, which, so far as I can gather from the record, remained in the estate of the deceased Boecher and could not be dealt with except by the executors. The action was brought *en temps utile,* and respondent has not been prejudiced in any way by the loss of the original certificate or by the delay in forwarding to the office of the company for registration the alleged transfer.

DAVIES J.—I concur in the judgment allowing the appeal.

IDINGTON J.—It seems to me this appeal should be allowed with costs on the broad ground that the appellant bargained for that which he never got and which respondent, the vendor, had never in his power to give.

The mistake was mutual. The supposed title to the stock rested on a signature which might as well, by reason of its legal inefficacy, have been pure forgery (though I assume it was not), and this defect of title

was not discovered by appellant till after the money had been paid by him.

I do not think the loss of the certificate with this supposed valid indorsement had the effect of depriving the appellant of his right to recover his money.

The case is not encumbered with any Stock Exchange rules as to dealing in stock, nor yet with the difficulties presented in *Wilkinson* v. *Lloyd*(1), in 1845, as to getting a transfer admitted for register.

The shares for $400 of stock to which there may have been a title formed such a mere fraction of the bargain that it seems to me the bargain as a whole failed.

Indeed the appellants have properly made no contest over that.

MACLENNAN J.—I would allow the appeal, and agree with the reasons given by Mr. Justice Idington.

DUFF J.—This action arises out of a sale of shares in the Diamond Vale Coal Company, a company incorporated under the "British Columbia Companies Act," which in all respects material to the questions now to be determined, is a reproduction of the "Companies Act, 1862."

The company's articles of association provide that the company shall not recognize, in respect of any share, any trust, any equitable interest, or any right other than the absolute title of the registered holder; that any member may, subject to the restrictions provided by the articles, transfer his share by a transfer

(1) 7 Q.B. 27.

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in writing signed by the transferor; and that the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the register as the holder. There are further articles which are to the effect that, when a share is to be transferred, the transfer accompanied by the certificate of the share to be transferred shall be left at the office of the company with such evidence, if any, as the directors may require to prove the title of the intending transferor; that in the case of the death of a member who is the sole holder of a share the executors or adminstrators of the deceased holder shall be the only persons recognized as having a title to his shares. The articles so far as appears from the extracts placed before us do not impose any restrictions upon the right of a holder of shares to transfer them; but we are informed on the argument that there is in the articles as filed the common provision conferring upon the directors the right to object (upon reasonable grounds) to any proposed transferee; and doubtless the restriction created by this provision, is that referred to in the article (the substance of which is given above), declaring the right of members to transfer their shares.

Under an executory sale of shares in such a company the vendor undertakes to execute a valid transfer of shares which he has the right to transfer or to procure the execution of a valid transfer by somebody else who has the right to transfer them. He does not undertake, I think, to procure the entry of the vendee's name in the register. On that point I respectfully concur with the observations of Lord

Blackburn (then Blackburn J.) in *Maxted* v. *Paine* (1), at pp. 150 and 151, and with the decision of the Court of Session in *Stevenson* v. *Wilson* (2).

On the contrary it is, I think, as stated by Lord Blackburn in the passage referred to, the duty of the vendee to procure the registration of himself or some other person as holder of the shares sold and thus to relieve the vendor from any burdens which may arise from the fact that the shares are registered in his name.

Where the sale is not executory but made by the delivery (in exchange for cash) of a share certificate with a transfer purporting to be executed in blank by the holder named in the certificate (who is not the vendor) the obligation of the vendor cannot be stated in precisely the same terms. In such a case the vendor must, I think, be taken to affirm that the *jus disponendi* of the shares represented by the certificate is vested in him. He does not represent that he is the legal owner of the shares; for the legal ownership of shares in a company governed by articles such as we have to consider in this case is vested in the person registered as the owner. But the delivery of a share certificate accompanied by a transfer executed in blank by the registered holder may pass to the person receiving such documents "a title legal and equitable which will enable the holder to vest himself with the shares" (*Colonial Bank* v. *Cady* (3), at p. 277), subject only to any right the company may have to object to register such person as a shareholder; and when a vendor of shares offers such documents for cash he must, I think, be taken by offering them to affirm

(1) L.R. 6 Ex. 132.
(2) (1907) Sess. Cas. 445, at p. 455.
(3) 15 App. Cas. 267.

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that such a title (subject to the restriction mentioned) is vested in him by virtue of the certificate and the transfer he thus offers.

In the case before us it seems to be quite clear that no such right was vested in the respondents. The evidence shews that the name of the registered holder (James Boecher) had been written by his wife at the bottom of a blank form of transfer indorsed on the share certificate. This was done by Boecher's direction, but the facts in evidence do not warrant any inference that any transaction took place between the husband and the wife which would have the effect of passing to her in his lifetime any interest in the shares. At the utmost his act can only be said to have conferred upon his wife a revocable authority to deal with them which was in fact revoked by his death a short time afterwards. The document so executed thereupon became wholly ineffective for any purpose whatever. Neither the respondents nor the appellant could acquire anything under it; the subsequent delivery of the certificate with the purported transfer indorsed being, in point of law, equivalent to the manual delivery of the certificate alone.

It follows that upon the discovery of the facts the appellant had a right to rescind the bargain with the respondents and recover back the purchase money as upon a failure of the consideration for which it was paid. He paid for a certificate of shares accompanied by a valid transfer. He received manual delivery of a certificate only. Between the thing paid for and the thing received there was such a diversity of substance as to constitute a failure of consideration.

It has been suggested that the respondents had acquired an equitable interest to which the appellant

succeeded and that, therefore, the failure of consideration was partial only. I do not think the evidence makes it appear clearly that Mrs. Boecher was at the time of the sale of the certificate to the respondents the sole beneficial owner of the shares—although it may be a nice question whether, since she was under her husband's will the sole residuary legatee, having regard to the fact that the will had been proved (in China) a little over a year previous to that occurrence, it should not be presumed that the debts had been paid in the ordinary course of administration. It would follow (if we were entitled to act on this presumption) that the executor was a bare trustee of these shares for Mrs. Boecher at the time of the sale to the respondents. This will not having, however, been proved in British Columbia the presumption would be of questionable validity; and assuming that at the time of the delivery of the certificate to the respondents Mrs. Boecher had the right to dispose of the shares as the beneficial owner, still I think the difficulty is not met. If I am right in the view I have just expressed touching the character of the representation made by the vendor on the delivery of the documents, then it is quite clear that the appellant did not get what the respondents represented they were giving him. A transfer entitling the purchaser to the registration either of himself or of some nominee of his as owner of the shares purchased is one thing; a right of action, based upon an estoppel against the beneficial owner to compel a trustee to execute such a transfer is in substance a wholly different thing. It was observed in *Chanter* v. *Leese* (1), that it is not a sufficient answer to a claim to recover money paid upon

(1) 5 M. & W. 698.

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consideration which is alleged to have failed to shew that the plaintiff has received something of value:

> We see, therefore, (said the court) that the consideration is entire, and the payment agreed to be made by the defendants is entire, and we see also a failure of the consideration, which being entire, *by failing partially, fails entirely;* and it follows that no action can be maintained for the money.

Mr. Ewart's principal contention—the only contention perhaps offering any hope of success—was that assuming the appellant to have had a right to rescind the contract for the reasons mentioned he must in the circumstances of this case be held to have lost it and consequently he must rely upon the appropriate remedy (if any) under the contract. The principle of law is plain. A purchaser who seeks to recover back the purchase money paid under a contract of sale upon an allegation that the consideration has failed must be in a position to rescind the sale. Losing that right he is, of course, confined to his remedy under the contract.

I think, however, the contention fails on the facts. It is based on two distinct grounds: first, that after discovering the facts the appellant's conduct amounted to an election not to exercise his right to rescind; and second, that when he attempted to exercise that right such changes had taken place that the parties could not be replaced *in statu quo.*

As to the first of these grounds it is said that the appellant having learned of the defect in the transfer not only waited an unreasonable time before making the facts known to the respondents, but that he assumed dominion over the shares by applying to have himself registered as the purchaser. In the circumstances I do not think the delay was unreasonable; nor do I think the action of the appellant in applying

for registration affords a solid ground for imputing to him an election to affirm the contract. The head office of the company was in Vancouver; the appellant received the certificate with the transfer in Ottawa about 7th December, 1905; meeting one Smith, the president of the company, in Ottawa, about the same time, he shewed him the transfer stating that he wished it registered. Smith told him the signature appended to the transfer was not in the handwriting of Boecher, but that it was in the handwriting of his widow, who he said (as he erroneously believed) was Boecher's executrix. Smith also told the appellant that if he would send the document to the company's office at Vancouver after his return there, he had no doubt the registration could be completed without any difficulty. Both the appellant and Smith believed, no doubt, that the defect in the transfer was wholly due to inadvertence and could be remedied without the least difficulty. On the 6th of January, the appellant (having, as he says, learned that Smith had reached Vancouver) forwarded the documents to the company's office for their registration.

Up to this stage there seems to be no ground for attributing to the appellant any unreasonable delay. Neither does one find any basis for imputing to him an election to waive his right to rescind the contract. The appellant could not, I think, be held bound to accept the judgment of Smith on the question of handwriting; rather it would seem to have been his duty to put any such question to the test by forwarding the documents with an application for registration to the office of the company. His action in so doing was therefore not incompatible with a determination to stand upon his rights as against the respondents.

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A more serious question arises upon the second contention. The facts on which it is based are these. Smith having received the documents at Vancouver sent for John Boecher (who was a son of James Boecher and had attached his signature to the transfer as a witness); gave the documents to him; and he disappeared with them. Failing to recover the documents the company issued a duplicate certificate which the appellant offered to return to the respondents who refused it, offering, however, to return the purchase price on delivery to them of the original share certificate.

It is argued that this loss of the share certificate effected such a change in the conditions as to deprive the appellant of his right to rescind.

We can only conjecture why Smith handed the documents to Boecher evidence of the interview between them having been at the trial successfully objected to on behalf of the respondents. But assuming it to have been an act which if it had been done by the appellant would have resulted in a loss of his right of rescission, still I do not think that is the effect of Smith's act, because I do not think, in a fair view of the circumstances, that any responsibility for it can be attributed to the appellant. I cannot accept Mr. Ewart's suggestion that Smith was acting as the appellant's agent. I think the opposite view expressed during the hearing by the learned trial judge is that which best accords with the facts in evidence.

In the absence of any such agency what is the effect on the appellant's right of this loss of the share certificate? If the document had been stolen or destroyed either accidently or through the default of the company while at the company's office must the

appellant for that reason alone lose his rights? I think it is very clear that he would not; and the question before us is indistinguishable from that which such a case would raise. The contract was a contract for the sale of shares. As I have already said in my view one of its terms required the vendee to apply to have himself registered as the owner of the shares, involving the step of putting the documents which were lost in the hands of the company in order that the registration might be effected. The very thing that is to say that the appellant did which led to the loss of the documents was a thing required by the contract. The contract being affected with a vice entitling the vendee to rescind it, on what principle can it be said that, so long as the documents were dealt with as the contract required, the loss of them, from no default of the purchaser, should in any way affect the purchaser's rights? It is to be noted that here the shares themselves were the subjects of the sale; that the lost documents were evidentiary documents only; and the case is consequently not exactly the same as that in which a chattel is lost or injured in the hands of a purchaser who, by reason of a breach of condition, has a right to return it. Even in such a case, however, there is very high authority that the right to rescind the sale is not defeated by the loss of the chattel alone; so long, on the contrary, as the right to return remains in force the risk of loss when it arises without the purchaser's default lies with the vendor. That is the view expressed by Lord Bramwell (then Bramwell B.) in *Head* v. *Tattersall*(1), at pp. 12 and 13, and acted upon in *Chapman* v. *Withers*(2).

(1) L.R. 7 Ex. 7.

(2) 20 Q.B.D. 824.

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I think, therefore, that the plaintiff is entitled to recover and the appeal should be allowed.

Appeal allowed with costs.

Solicitors for the appellant: *Livingston, Garrett & King.*

Solicitors for the respondents: *Russell & Russell.*

THE LAURENTIDE PAPER COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

ALEXANDER BAPTIST (DEFENDANT) ..... } RESPONDENT.

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*Feb. 21, 24.
*Oct. 27.

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

Sale of standing timber—Registration of real rights—Ownership—Distinction of things—Movables and immovables—Priority of title.

A deed of sale of the right, during twenty years, to cut and remove standing timber, with permission to make and construct such roads and buildings as might be necessary for that purpose, does not affect the title to the lands on which the trees are growing but merely conveys the personal right to the timber as and when cut under the license. The registration of such a deed, in conformity with the provisions of the Civil Code of Lower Canada respecting the registration of real rights, is unnecessary and, if effected, cannot operate to secure to the vendee any right, privilege or priority of title in or to the timber as against a subsequent purchaser of the lands. *Watson* v. *Perkins* (18 L.C. Jur. 261) distinguished.

The judgment appealed from (Q.R. 16 K.B. 471) was affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing that of Cannon J., in the Superior Court, District of Three Rivers(2), and dismissing the plaintiffs' action with costs.

The action of the plaintiffs was accompanied by a seizure in revendication of 12,500 pine logs, cut by

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

(1) Q.R. 16 K.B. 471. (2) Q.R. 16 K.B. 471-473.

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The Belgo-Canadian Pulp & Paper Co., the defendants, whose *fait et cause* was taken up by the present respondent, their warrantor, as defendant in warranty. The plaintiffs' claim to the logs seized was based upon a deed of sale to them, in 1888, from a former proprietor of the lands in the Township of Radnor from which the logs had been taken, of the right, during twenty years from the 25th of January, 1887, of cutting all "soft wood" which was to be found thereon, with permission to make all necessary roads and erect all necessary buildings upon the said lands for the purpose of their operations in cutting and removing such timber. The deed to the plaintiffs was registered at length in the office of the registrar of deeds for the County of Champlain, within which the lands mentioned were situated, and, subsequently, by a series of conveyances the said lands were vested in the defendants. The learned trial judge declared the attachment in revendication valid, held that the plaintiffs were the owners of the logs seized and condemned the defendants to return them to the plaintiffs or pay them the value thereof. This judgment was reversed by the judgment now appealed from.

The questions at issue on the appeal to the Supreme Court of Canada, so far as material to this report, are stated in the judgments now reported.

T. Chase-Casgrain K.C. for the appellants.

G. G. Stuart K.C. for the respondent.

THE CHIEF JUSTICE.—I agree entirely with the Chief Justice of the Court of Appeal that there is little to add to the admirable judgment of the late Mr.

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Justice Bossé, who spoke for the majority of that court. I accept his reasons and adopt his conclusions. The case is reported at full length in the Quebec Official Reports(1). In view of the very exhaustive and able presentation of appellants' case I venture, however, to say that the judgment in *Watson* v. *Perkins* (2), so much relied upon by Judges Trenholme and Cross, who dissented below, and pressed upon us at the argument here, is of very little assistance in this case. There the question at issue was the rights of the holder of a timber license with respect to timber cut in trespass on limits bought from the Crown, and, as Mr. Justice Bossé points out, those rights are settled by a special provision of the statute regulating the sale and management of Crown lands under which the limits were bought. Here the point to be determined is the rights acquired under a deed passed between two private individuals conveying the right to cut timber and the construction of which is governed by the general rules of law found in the Civil Code.

Briefly the facts are:

On the 25th January, 1887, the appellants, through their agent, Forman, bought from one Reynar, in the words of the deed,

> the right of cutting all soft wood (*la coupe de tout bois mou*) which is to be found (here follows a description of the lots on which the soft wood is to be cut) with the right to make all necessary roads and buildings for such purpose (*to-wit, said cutting*) on all the aforesaid lots; for the said Forman to have and cause the said cutting during the period of twenty years from the date of these presents.

Subsequently Reynar sold the same lots to one Vallières under whose title the respondent holds. The question at issue is: What is the character of the title

(1) Q.R. 16 K.B. 471. (2) 18 L.C. Jur. 261.

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given by Reynar to Forman? Did the purchaser, Forman, now represented by the appellant, acquire or take, under the terms of his deed I have just quoted, a title in the land, *"un droit dans la chose," "jus in re,"* or merely a license to cut not all the standing timber, but the trees of soft wood to be found on the lots mentioned, which when cut and removed became his property? In other words, can it be gathered from the words of the contract that the vendor intended to sell growing timber which might remain on the land, drawing nutriment therefrom for the benefit of the purchaser during twenty years, or did he acquire a right or license to cut a certain portion of the timber then standing, which right was to be exercised at any time during twenty years?

The principle of construction applicable here is, in my opinion, well expressed in Pandectes Françaises, *vo.* "Biens," No. 135:

> Le caractère mobilier ou immobilier des biens faisant l'objet d'un contrat se détermine par le point de vue auquel les ont considéré les parties contractantes et par la destination qu'elles leur ont attribuée.

As to the nature of the title I am, applying this principle, clearly of opinion that the vendor intended merely to grant a license to cut the standing trees which would become the property of the vendee only after severance; that he never intended to convey and the purchaser never intended to acquire a title in the land.

Pothier in his "Traité des Choses," No. 52, says:

> L'action qui naît de la vente des fruits pendants par les racines, ou d'un bois sur pied pour le couper, est une action mobilière; car quoique ces choses fassent partie de la terre, et soient immeubles pendant qu'elles y sont cohérentes, néanmoins les ayant achetées pour les acquérir seulement après que, par leur séparation du sol, elles seraient devenue meubles, l'action que j'ai *"tendit ad quid mobile,"* et par conséquent, est une action mobilière.

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And in this opinion all the modern French commentators on the Code Napoléon, from which art. 378 of the Quebec Civil Code was taken, concur. I might add that the jurisprudence in France is to the same effect. It will be found collected in Fuzier-Hermann, *vo.* "Forêts," No. 400; and in the same work, *vo.* "Ventes," No. 41. See also Dalloz, Rec. Pér., 78, 2, 261.

There is a case in appeal reported in Dalloz, Rec. Pér., 97, 2, 101, relied upon here which would appear to give some support to the appellants, but this judgment has been much criticized (see reporters' note) as a departure from the accepted rule of law and has not been since followed by the *Cour de Cassation,* as will be found on reference to Dalloz, Rec. Pér., 99, 1, 246, reported also in S. V., 1900, 1, 398. This case formally decides that the movable or immovable character of the thing sold is to be determined chiefly by the intention of the parties and the purposes to which the object of the sale is to be put.

Baudry-Lacantinerie, "Des Biens," No. 49, says:

> Les parties contractantes considèrent les objets incorporés au sol dans l'état où ils se trouveront quand la mobilisation prévue sera devenue effective. Le contrat, dans la pensée des parties, a pour objet non pas un immeuble, mais un meuble; on traite en vue et sous la condition d'un évènement qui doit amener les choses à l'état mobilier. Tel est le principe reconnu par la jurisprudence et consacré dans la formule; le caractère mobilier ou immobilier se détermine avant tout par le point de vue auquel les ont considérés les parties contractantes et par le but qu'elles leur ont assigné.

Here clearly the property in the trees did not vest in the buyer before severance. It was not intended that the purchaser should acquire the trees to remain in the soil deriving therefrom the benefit of further vegetation. What he wanted for the purposes of his business and what he acquired was not the standing

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tree, but the right or license to cut the tree and convert it into logs or lumber. The right to make new roads and to use existing ones, limited as it is by the deed to the cutting of the timber, helps us to gather the intention of the parties. The purchaser did not acquire the standing tree but the logs and timber into which the tree was to be converted and for this purpose exclusively he could make and use roads to give him access to the property. If the timber was left standing at the expiration of 20 years, the right to cut ceased, and if troubled in his possession in the interval the purchaser would have no right whatever to bring the "action en réintégration." See Fuzier-Hermann, *vo.* "Ventes," 127, and *vo.* "Forêts," 1357; 5 Laurent, No. 429.

2 Marcadé, No. 346, at page 343, says:

> Enfin, dans le cas même d'inhérence parfaite et perpétuelle au sol, les produits peuvent encore se trouver meubles dans un certain sens. Ainsi, quand les grains, fruits ou bois sont vendus séparément du sol, c'est là une vente de meubles, et l'acheteur n'a qu'un droit mobilier. Ces objets, en effet, ne sont vendus que comme produits, comme choses distinctes du sol, et en tant que devant être séparées de lui; dans la réalité, ils sont immeubles, mais ils sont cependant vendus comme meubles; l'acheteur achète des choses encore immeubles, mais sous la condition et avec le droit de les mobiliser. (Cassat. 19 vendém. an 14, 25 févr. 1812; 5 oct. 1813; 24 mai 1815; etc.)

Mr. Casgrain, in his factum here, raises an interesting question as to the rights of the purchaser of the cut against the subsequent purchaser of the land from his vendor and refers to an opinion expressed by Lyon-Caen in a note to be found at the foot of a judgment reported in Dalloz, 78, 2, 261, where it was held:

> Par suite, dans le cas de vente faite à deux acquéreurs successifs, au premier, de la coupe du bois, et au second, de la forêt entière (sol et superficie) l'acquéreur de la coupe ne peut se prévaloir de son droit contre l'acquéreur de la forêt, alors même que son contrat aurait une date certaine antérieure à celle de la second vente.

To this judgment, there are two foot-notes, in one of which it is argued by Lyon-Caen that the second purchaser takes the property subject to the rights acquired by the first. The criticism of the judgment is thus expressed:

Ainsi l'équité proteste contre la solution formulée dans les motifs de l'arrêt rapporté; et nous estimons que le droit est ici d'accord avec l'équité. Sans doute l'article 1141 c. civ. ne règle dans ses termes que le conflit qui s'élève entre deux acquéreurs successifs d'un même meuble; mais il doit être étendu au cas où, par exception, la chose successivement vendue est meuble par rapport au premier acquéreur et immeuble par rapport au second. En effet, d'après l'enseignement des jurisconsultes les plus autorisés, l'art. 1141 n'est qu'une conséquence de la maxime: "En fait de meubles, possession vaut titre," maxime érigée en disposition de loi par l'art. 2179 c. civ., et qui signifie que, relativement aux meubles, le fait de la possession constitue du possesseur un titre irréfragable de propriété (Aubry et Rau, *op. cit.* t. 2, § 174, p. 55, et § 183, texte et note 2). Or, la propriété, une fois légalement constituée, est, de son essence, un droit réel, absolu, opposable aux tiers. L'acquéreur, une fois mis en possession réelle et effective de la coupe, et qui en est devenu par cela même propriétaire, ne saurait donc en être évincé sous prétexte que, dans une vente passée postérieurement avec un tiers, cette coupe a été considérée comme un immeuble dont la propriété n'est point acquise par la seule possession.

On the other hand, in another note to the same judgment, the conclusion reached by the Cour de Cassation, to the effect that the purchaser of the right to cut (*droit de coupe*), would have no claim against the subsequent purchaser of the property, is approved of in the following words:

Dans l'intervalle de la vente à l'exploitation, l'acquéreur ne peut donc être investi que d'un droit personnel en vertu duquel il peut contraindre le vendeur à lui laisser exploiter la coupe. Si telle est la nature du droit que la vente de la coupe confère à l'acquéreur il faut en conclure, avec l'arrêt rapporté que ce droit n'est pas opposable à celui qui a postérieurement acquis du même vendeur la forêt elle-même, sol et superficie. C'est, en effet, un principe élémentaire de notre droit que, sauf les rares exceptions résultants de dispositions formelles de la loi (c. civ. 1743, et 2091), celui qui n'est investi que d'un droit personnel, c'est-à-dire le créancier, ne peut l'exercer que contre la personne obligée à la prestation, c'est-à-dire contre le

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débiteur et que spécialement les ayants cause à titre particulier du vendeur d'un immeuble ne sont pas tenus des obligations personnelles qu'il a pu contracter relativement à cet immeuble. V. conf. Demolombe, *op. cit.* t. 1er, nos. 183, et suiv.; Laurent, *op. cit.*, t. 5, No. 432.

The Chief Justice.

At the very most, therefore, this reference given us by Mr. Casgrain shews that the text writers are not agreed in their interpretation of the law and, under such circumstances, we would not be justified in setting aside the apparently well settled jurisprudence of the French courts on this point.

It will not be necessary, in my view of this case, to consider the other interesting questions raised. I entirely concur in what Mr. Justice Bossé says as to the effect of the sale by Vallières.

DAVIES J. concurred in the judgment dismissing the appeal with costs for the reasons stated by the Chief Justice.

IDINGTON J.—I incline so much to hold as correct the opinion expressed by Mr. Justice Bossé in the court below that the right in question here, which is expressed in the document giving it as follows,

> the right during twenty years from the twenty-fifth of January, eighteen hundred and eighty seven, of cutting of all wood (*la coupe de tout bois mou*) which is to be found,

was a mere personal obligation, that I might well be content merely to say that by reason of so failing to find clear error I would dismiss the appeal.

I, however, have given a great deal of attention to the interesting questions arising before us and the very full argument had relative to the nature of the right in question, if not a mere personal obligation.

It was contended before us that the right to cut was in the nature of a superficies and therefore not within the requirements of the "Registry Act" and amendments thereof, rendering it imperative that there should be registration.

I assume, for argument's sake, this latter part of the contention may be correct, but do not express any opinion on the point whether or not a right of superficies is within the "Registry Act" or amendments thereof.

I do not, however, agree that this right (so limited as to time) to cut was at all in the nature of a superficies.

I read the right as expressed in the last few words as made relative to timber *then to be found.*

The origin, in the civil law, of the right of superficies, does not indicate that such a right as cutting existing wood was within the scope of its original operation. It indeed seemed rather confined to the case of buildings. Sohm puts it thus:

> Superficies stands to houses in the same relation as emphyteusis to agricultural land. Superficies in Roman law is a perpetual lease of building land, subject to the payment of an annual rent (solarium). On the land thus leased the superficiary erects a house. He builds it with his own materials. By the rules of accession, therefore, the ownership of the house vests in the owner of the soil; *superficies solo cedit.* A superficiary, however, has a real right, for himself and his heirs, to live in the house and to exercise the rights of an owner therein for the specified term of years (say, ninety-nine years) or forever, as the case may be. Hence the legal position of the superficiary is the same as that of the emphyteusis.

There does not seem much resemblance in this bargain in question here to anything in the nature of an emphyteusis and yet that is what several authors have, as this one I cite, compared the right of superficies to.

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Idington J.

Granted that in some authors on French law there is a recognition of the extension of superficies to trees or the right to cut trees, it must conform in such cases to the fundamental elements upon which a right of superficies rests or by which it may be recognized.

I have been unable to find, however, a single authority in the cases in Quebec upon which such like right to cut trees as here in question has been treated otherwise than as a personal obligation or a servitude.

The following are some of the Quebec authorities that have referred to the matter of such a right as a servitude: *Croteau* v. *Quintal*(1); *Archambeault* v. *Archambeault*(2).

In *Watson* v. *Perkins*(3) a license to cut was referred to as a servitude and by one learned judge as a superficies. But the peculiarities of the government renewable license, such as in question there, is clearly distinguishable even if from one point of view it could be looked at as a superficies.

Then the case of *Cadrain* v. *Theberge*(4) has no resemblance to this case even if beyond question rightly held to be a case of right of superficies.

The jurisprudence of Quebec would seem to indicate that such a right has there, when of a permanent nature, been uniformly looked on as a servitude.

If a servitude of any kind some one of the several amendments to the "Registry Act" must, I think, cover it. Such is their scope and purpose.

I think the appeal should be dismissed with costs.

(1) 1 L.C. Jur. 14.
(2) 15 L.C. Jur. 297.
(3) 18 L.C. Jur. 261.
(4) 16 Q.L.R. 76.

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MACLENNAN and DUFF JJ. agreed in the judgment dismissing the appeal with costs for the reasons stated by the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellants: *Casgrain, Mitchell & Surveyer.*

Solicitors for the respondent: *Martel & Duplessis.*

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*Feb. 25-27.
*Oct. 27.

THE MONTREAL LIGHT, HEAT AND POWER COMPANY AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

THE ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC (PLAINTIFF) ..... } RESPONDENT.

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

River improvements—Precaution against danger to existing constructions—Alteration of natural conditions—Responsibility for damages—Vis major.

Where works constructed in a river so altered its natural conditions as to create a reservoir in which ice formed in larger quantities than it did prior to such works, and which, during the spring freshets after a severe winter, was driven with such force against the superstructure of a bridge as to partially demolish it, those who constructed the works are responsible for the damages so caused, notwithstanding that they had taken precautions for the protection of the bridge against like troubles, foreseen at the time of the construction of the works, and that the formation of ice in increased weight and thickness in the reservoir had resulted from natural climatic conditions during an unusually rigourous winter.

Judgment appealed from (Q.R. 16 K.B. 410) affirmed.

APPEAL and CROSS-APPEAL from the judgment of the Court of King's Bench, appeal side(1), which varied the judgment of the Superior Court, District of Montreal(2), and ordered the assessment of damages to be referred to experts for report.

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

(1) Q.R. 16 K.B. 410. (2) Q.R. 29 S.C. 356.

The action was to recover, from the appellants, damages occasioned to the Yule bridge, across the Richelieu River, at Chambly, Que., caused, as alleged, through the negligent and faulty construction of dams and other works in the bed of the stream by the appellants in order to secure more power for the purposes of their power house, situated in the vicinity of the bridge. At the trial, Loranger J. decided that the Province of Quebec was owner of the bridge, at the time of its destruction, during the spring freshets of 1904 and 1905, through ice from a reservoir created by the appellants in making the river improvements (and forming there in much greater quantities than there would have been in the natural condition of the stream), being carried with increased force against the structure of the bridge. The defendants, appellants, contended, among other things, that they had taken all necessary precautions which could have been foreseen against the happening of the accidents, by strengthening and raising the superstructure of the bridge, and that the causes which led to the disaster were owing to the natural climatic conditions which prevailed during an unusually rigourous winter season preceding the accidents complained of. The learned judge held that the action, as taken, would lie against the defendants, that their dams and works were the determining and only cause of the injuries to the bridge, and condemned them in the sum of $40,000 for the damages thus caused. The Court of King's Bench varied this judgment by ordering that the quantum of damages should be ascertained by a reference to experts and directed the mode in which those experts were to proceed in determining the amount of damages suffered.

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The appellants sought to have the judgment which decreed their liability set aside, and a cross-appeal was filed by the Attorney-General to have the decision of the trial judge restored.

The material circumstances of the case and the issues raised on the appeals are stated in the judgments now reported.

R. C. Smith K.C. and *G. H. Montgomery* for the appellants.

Wilfred Mercier K.C. for the respondent.

THE CHIEF JUSTICE concurred in the opinion stated by Davies J.

DAVIES J.—The substantial question argued before us and now to be determined on this appeal is the responsibility of the appellant companies for the destruction of the Yule bridge so called which spans the Richelieu river between the villages of Richelieu and Chambly-Canton and near where that river flows into the St. Lawrence.

There were many incidental points raised as to the ownership of the bridge by the Province of Quebec, and the right of the latter to recover damages for its destruction, but they were all practically disposed of in the respondents' favour during the argument excepting the question of damages, to which I will refer later.

The appeal was argued very fully at bar and very ably and I have had the advantage since then of reading the evidence called to our attention in the factums and at the oral argument. The result is that my im-

pression formed during the argument has been confirmed and that I am in favour of dismissing the appeal and confirming the judgment of the court of appeal substantially for the reasons given by the late Mr. Justice Bossé.

It seems to me, however, that one important fact, and one which I confess has greatly influenced me in reaching my conclusion, has been overlooked in that judgment and for this reason I desire to add a few explanatory notes of the facts relating to the conditions of the river and its bed before the construction of the dam complained of and those which existed after such construction and the operations connected with its construction had been completed. The bridge, the destruction of which is the subject of this action, had six spans of 157 feet each and one short span. It was built in the year 1845. The dam and the works incident to it the existence of which was alleged to have been the cause of the destruction of the bridge were begun to be built in 1896 and completed in 1897.

The Central Vermont Railway bridge was built higher up the river above the Yule bridge upon stone piers in 1874.

In 1898, a year after the construction of the dam, both bridges were raised in height by or at the instance and expense of the appellant company. The Yule bridge, 6 feet on the Richelieu side of the river and 4 feet on the Chambly side.

Mr. Macklin was the engineer who supervised and directed the construction of the dam and who remained in the employ of the Chambly Manufacturing Co., by whom the dam was originally built as such engineer until that company was merged in the appellant company, the Montreal Light and Power Co.

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Davies J.

He says—explaining the raising of these bridges after the construction of the dam—that there was an ice jam in 1898 which *endangered the safety of the bridge* and that

> the ice piled up and that was when I recommended that the bridge should be raised, because of that.

After explaining why on the score of expense he did not raise the bridge still higher he says:

> Nobody knew what the conditions of the river were at that time after the dam was built. We had to learn all that and my suggestion to raise it six feet was based upon what knowledge I obtained at that time.

Speaking broadly the river alike where the dam was built and at the site of the Yule bridge was about 1,000 feet wide, and the distance between the overflow dam and the Yule bridge was about 1,800 feet. Between the Yule bridge and the Central Vermont bridge, distance of about 900 feet the river became some 300 feet narrower and continued gradually to narrow until about 2,000 feet further up from the railway bridge it reached its narrowest point for some miles about 500 feet wide.

About 800 feet above this railway bridge there existed in the natural condition of the river a broad reef or ridge of rock rising high above the normal height of the river, though probably covered or almost so during the spring freshets and when the water of the river was at its greatest height. This reef or ridge of rock which began about twenty feet from the Chambly bank of the river, and was about 200 feet in width, ran about two-thirds of the way across the river.

As a part of the operations incidental to the construction of the dam and the formation of the huge still-water lake above it, the company deemed it desir-

able on Mr. Macklin's advice, in 1898 after the dam was constructed, to blast away the top of the reef or ledge to the depth of three or four feet so as to allow of the more easy flow of water there. It still, however, remained quite an appreciable height above the level of the bed of the stream, because when several years after the construction of the dam a part of the latter was carried away and the waters of the river in consequence resumed their natural level this ridge or reef though reduced in height three or four feet still stood out clearly visible above the natural height of the waters of the river.

From this ridge or reef down towards the mouth of the river, below where the dam was constructed, the bed of the river inclined very much, a fall variously estimated in that short distance of 15 or 18 feet, thus forming what is known as "rapids" or swift flowing water. The water here at ordinary times, as Willett, Macklin and other witnesses prove, would be about a foot or 18 inches in depth at ordinary times rising during the spring freshets to a depth of from three to four feet. About one and a half miles above the reef the foot of the rapids of St. Thérèse were reached and these rapids extended up the river for still another mile and a half.

The reef in question therefore lay between the St. Thérèse rapids and the lower rapids across which the dam and the two bridges had been built.

These lower rapids were of course all covered by the still-water lake formed by the construction of the dam which still-water lake or pond extended about one and a quarter miles or one and a half miles above the dam.

The ice which caused the trouble came down the

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river from the head of St. Thérèse rapids which extend over about 1½ miles and the foot of which is distant about 3 or 3¾ miles from the dam. In years, therefore, when the rapids do not freeze over, and by common consent it is only very rarely and at long intervals that they do freeze, the only ice you have to take care of is that which forms from the foot of the rapids down.

Experience has shewn that this ice was not dangerous or destructive in the natural condition of the river. Twice before the construction of the dam did these rapids freeze over within the memory of living witnesses, namely, in 1868 and 1872, without, however, injuring the Yule bridge. Again, twice since the construction of the dam was the cold severe enough to freeze these rapids and that was in 1904, when the bridge was partly carried away, and in 1905, when it was further damaged.

Mr. Smith, for the appellant, contended that the construction of the dam and the operations connected with it had nothing to do with the destruction of the bridge, which resulted from "ice shoves" entirely unconnected with the company's obstructions in and to the river and would have produced the same results inevitably had these works not been constructed.

He proved from eye witnesses that the ice in the rapids broke up and jammed at Papineau Point on the 27th March; that on the 28th the blockade at Papineau Point gave way and moved down stream until it was stopped by a small island lying in mid-stream; that on the 29th this blockade again gave way and carried the ice in a great heap down to Arbec's Point, where the river contracted to a width of about 500 feet, and that on the 31st this blockade which he con-

tended was still above the back water of the dam gave way and, to quote from the appellants' own factum,

> some of the ice came down as far as the railway bridge where it lodged against the timbers, but *the greatest part of it jammed upon the reef opposite the lighting station*, which, it will be remembered, is about 800 feet above the railway bridge. It will be noticed that no jam whatever took place at the place where the still-water pond runs out which would be almost half way between the lighting station (opposite thereof) and Arbec's.

Further on the factum says:

> On the morning of April 1st the blockade at the reef opposite the lighting station gave way about 7.15 a.m. and came down against the railway bridge which it carried away. It then adopted a wedge formation and directed itself towards the Richelieu side where it carried away the second pier of the Yule bridge from the Richelieu shore.

Mr. Smith, alike in his factum and in his oral argument, threw over the suggestions and opinions of his expert, Mr. Wilson, that it was the changed condition of the river arising from the construction of the railway bridge which caused the damage to the Yule bridge. In my judgment he was well advised in doing so, as it was clearly proved to have been the ice itself and not the debris of the railway bridge which carried away the second pier of the Yule bridge and that this ice notwithstanding the comparatively narrow spans of the railway bridge rushed with irresistible force against and carried away the pier of the Yule bridge. Mr. Smith preferred to rest his case upon his main contention that the ice was formed to an abnormal thickness in the rapids which froze almost solid and on its breaking up in the spring was carried by an irresistible natural force arising from the several blockades damming back the water of the river, until it had force enough to carry everything before it. Now it will be seen that notwithstanding

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the fact that the still water of the dam went up from 1,200 to 1,500 feet at least beyond the ledge of rock at the lighting station and was many feet deep on that ledge, the top of which had been blasted away to the depth of three or four feet, still that the ledge reduced in size and covered with the still water had power to maintain the blockade there from about mid-day on 31st March till about seven o'clock on the 1st April.

It seemed to me very plain when these facts came out at the argument that if the natural conditions of the river had been retained the ledge of rock extending two-thirds across the river, and about 200 feet wide, would have offered an effective barrier to the further descent of the ice bridge and that the channel of the river which ran around the Richelieu end of the ledge and was there of a width of about 150 feet, would have presented a natural and sufficient outlet for the flood of water carrying down the ice and for at least a third or fourth part of the ice itself without such ice or water damaging either of the bridges.

I pressed the point several times during the argument upon Mr. Smith, but his only answer was that the removal of the upper part of this reef or rock was not charged in the statement of claim as a specific fault on the part of the company.

But it appeared to me that all the operations connected with the construction of the dam and the formation of the still-water pond and the changes thereby made in the natural formation and conditions of the river were what was charged as the fault of the companies, appellants, and that these all and prominently amongst them the cutting down of this reef or rock were the issues which were thoroughly and

exhaustively threshed out at the trial. Perhaps I cannot state Mr. Smith's position better with respect to this ledge or rock than he himself put it in his factum. He says:

> So far from the works of the company having made it more difficult for the ice to get down, they made it easier inasmuch as they offered a large volume of water for its passage. Again, it will be remembered that the last blockade took place on the reef opposite the lighting station. This reef formerly stood right out of the water, but it had been considerably lowered by the company with the object of preventing jams. Had it therefore been in its original condition, the chances of a jam must have been infinitely greater.

The passage for which the works of the company made it easier for a "larger volume of water" to pass also made it easier for a larger mass of ice to rush down with the larger volume of water and so cause the damage complained of. When this reef "stood right out of the water" and before "it had been considerably lowered by the company with the object of preventing jams," the average normal depth of water from this reef down under the two bridges to Willett's mills below the dam was about 18 inches to two feet, and during the spring freshets as much as three or four feet. This ice which came down in jams from time to time would naturally be effectually stopped in great part by this ledge or reef standing right up out of the water and extending for two-thirds of the distance across the river. The water would naturally swirl and eddy around the side of this rock and rush around its end down the channel it had made for itself, carrying with it portions of the ice, but not such enormous quantities as would render the condition of the bridge precarious.

I am confirmed in this opinion which the facts would naturally suggest by the positive and clear testimony of Mr. Willett, the Rev. Father Lesage

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and other witnesses as to the actual natural conditions of the river before and at the time of the construction of the dam, and of that of Civil Engineer Macklin, who superintended and directed all the operations connected with the building of the dam, the necessary excavations and the damming back of the water.

Mr. Willett from his long and active life spent on the banks of the river at Chambly-Canton, his occupation as owning two or three mills there, and the position he held for some years as president of the Chambly Manufacturing Co., by which the dam was built, seems to me to have been a man above most others qualified to give most valuable evidence towards the solution of the questions before the court. He seems from his evidence to be quite impartial and to desire to state only those things which he knew to be true. He spoke with reference to the severe winter of 1868, when all the rapids were frozen solid, conditions similar to those of 1904, and shewed that when the spring thaws came and the ice began to come down the river rapids while great quantities of ice came down and made ultimately a severe jam for a few hours away below his mill and below where the present overflow dam is (that is below the rapid extending from the reef above the Yule bridge to Willett's mills below that bridge), there never was any damage done to the bridge nor does it seem at any time to have been in jeopardy. Amongst other statements of fact which he mentions, and after stating that professional opinions regarding the action of ice were not always borne out by his experience of facts he refers expressly to this reef or ridge as follows:

Q.—Now with regard to this bank of rock just above the Central Vermont Railway bridge, previous to the building of the dam, what

has been the habit of the ice as to blocking and piling up on this rock? A.—I cannot say that the ice ever piled up on it. The ice has taken out a channel along this rock and there was no piling up of the ice there. It naturally took level—this rock formed a kind of eddy, and the ice used to take out in that section out as far as the channel on the opposite side, but there was a channel with the exception of when the river was taken all the way up, there was always a channel at the end of those rocks.

Q.—It is a bed of hard rock—*banc rouge?* A.—Yes.

Q.—Now this bed of *banc rouge* extends, how far across the river? A.—About two-thirds of the way across, I think.

Q.—So that it constitutes a natural obstruction in the river to the extent of two-thirds? A.—Yes, it did; they have taken it away, you know.

I do not think the facts could be put any plainer. This rock formed a kind of eddy in the river and the ice used to "take out" in that section as far as the channel on the opposite side. There was no piling up of ice there. If, however, such a huge ice jam as Mr. Smith depicted had come down the river in its natural condition it would in all human probability have been largely disintegrated before reaching this rock or reef. At any rate the reef would under those natural conditions have opposed an effectual barrier to the rush of any huge pile or mass of ice below it. The natural channel around the edge of the reef would carry off from time to time part of the ice wall or mass that was stopped by the ledge and allow of the passage through of the accumulated water behind the ice jam. Such portion of the ice jam as was not so intermittently carried down the channel around the reef would be stranded on the reef and effectually prevented from doing injury to the bridge.

I have dealt at more length with this phase of the case than perhaps I was justified in doing, but the more I read of the evidence and the more I pondered upon the problems presented to us for solution, the

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more convinced I became of the grave importance of this ledge of rock in their solution. In the natural condition of the river the reef did form an effectual barrier against any huge bergs of ice being carried down past it into the reaches of the river below.

As to the damages I would not have been disposed to send the case back for further evidence on the sole question of the amount of damages sustained had the Court of Appeal agreed on the point with the trial judge. Neither on the other hand am I disposed to alter their disposition of the case in referring it back to obtain more satisfactory and complete evidence of the actual damage sustained.

I regret the further delay, but am in favour of confirming the judgment appealed from and dismissing the cross-appeal.

IDINGTON J.—I think this appeal should be dismissed with costs and the cross-appeal be allowed with costs and the judgment of the learned trial judge restored in its entirety.

A book might be written giving reasons for such conclusions. I do not think I can do so usefully.

The judgments of the learned trial judge and of Mr. Justice Bossé, so far as the main issues determining the responsibility for the damages are concerned, furnish the general reasoning I adopt in regard thereto.

I am tempted to add just one or two observations.

I venture to think that if any man of intelligence and an observant turn of mind spent a winter and spring on the bank of any of our rivers at a point where there was a stretch of rapids and above and below that stretch others of still water, he would find

abundant room to doubt many and modify others of the statements of opinion that appear in the evidence of these experts appellants ask us to accept as against the expert evidence given on respondent's side of the case.

He would, I imagine, find the rapids the last to be frozen over in winter and the first to be open in spring, and when witnesses express in emphatic language sweeping opinions that seem to discard the consideration of results of such daily experience, they do not add to the strength of their testimony.

Again the theory is set up by the defence that a dam facilitated, by increasing the body of water it created, the removal of the ice that had formed a jam. If this is correct, it was a serious mistake for the respondent's manager and men to have removed just before the flood the flash-boards and thus in effect to lessen that body of water and the space under the ice covering of the pond for the ice issuing out of the jam to disappear in.

It is further to be observed that it is stated the back water would extend 1,000 to 1,200 feet further up the river when the flash boards raised the dam their full height of three feet than when they were off.

A very large area of the rapids would thus be submerged and the consequent formation of ice be much thicker than over the rapids in their natural state; if indeed in such latter case, there had been any formed over the whole of that area.

This area might be roughly estimated at 1,000 feet in length by the width of the river, from five hundred to eight hundred feet.

If this mass of ice did not itself help as a substan-

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tial addition to the usual field of ice in the dam as it existed before appellants' improvements to obstruct and hinder the clearing of the river, then all I can say is it did not operate as ice usually does. The removal of the flash-boards after this increased body of ice was formed and new needs had arisen for increased space in which it might disappear would of itself be crass negligence if there be anything at all in the appellant's theory.

But that is not all, for the flash-boards were removed before the flood, and if doing so did not lower the ice so that over that field of rapids it would touch the rocks that formed the rapids in that area, it would be owing only to the ice being tied at the river banks so as to hold up the entire field of ice, as Mr. Gauvin, a witness of respondent's, suggests might to a certain extent be the case.

He says it would to a certain extent sink in the centre part of the river. At all events, I am not persuaded that this whole process of raising the river by flash-boards, so that it would submerge the rapids and produce a vast mass of thick ice, and give it a chance by removal of the flash-boards to sink and stick on the rocks, was of that beneficient order of things some witnesses and defendants would lead us to believe.

I doubt if the place for ice escaping from the jam to disappear in, was quite as open as it might have been to receive such disintegrated jams as had formed above.

Indeed, I doubt if the theory put forward is even a respectable theory, much less a working or a workable one.

I would have preferred some accurate observations as to the depths of the river, the thickness of the ice, the actual area of the rapids (of which I have made

only a guess), the usual volume of the water flowing there, and a comparison in these several regards with what existed on the occasion in question, and the means of like comparisons further up stream, before I could accept what seems inconsistent with reason. I would also have liked amongst other things, a better idea than I can form of the conformation of the land on either side back from the river margin or bank. I admit some of the material to aid in arriving at conclusions on some of these points is before us, but not all.

Again there was another field of rapids and frozen ice (of possibly greater extent than that which the use of the flash-boards created), and which raised questions as to it. It was that lying between the point to which the old dam backed waters to and that which the new dam without the flash-boards backed the waters to. The same questions as arise from the use of flash-boards, so far as the mere raising of water submerging the rapids is concerned, arise as to this field of ice. The consequences of sudden change brought about by the removal of the flash-boards, lowering the ice do not arise as to this field. But answers to similar questions relative to it in regard to the results of accurate observations may well be sought for as above suggested. Very much is given in one exhibit for this year 1903-04, but no means so far as I can see is furnished for scientific comparison.

Moreover, the changed conditions arising from ice cutting done that year are for purposes of comparison a disturbing factor though no doubt expected to have been beneficial.

I merely mention these few matters as some of what might have been settled and put before the court

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by an intelligent and capable expert; and to illustrate wherein on one point or some points my understanding has not been enlightened. It rested on appellants to have cleared up such matters once a *primâ facie* case had been made by plaintiff.

I refuse to accept unless absolutely necessary the mere *ipse dixit* of any expert when presented for my acceptance merely as an act of faith, and without the aid of such reasons as his reasoning power, or means of, and result of the use of means of, observations may have developed.

The more capable an expert is, the more likely he is to make in a few words his meaning clearly appear to the common man to be founded on reason.

I make these remarks because though there has been presented a mass of facts they are not so complete as to render them of great service and were not so used and presented by the men of whose eminence, wisdom, skill and learning we heard so much as to make of them a comprehensible defence that necessarily rebuts the case made out by the evidence for the plaintiff.

Many other things put forward by some of those whose professional eminence, it is urged, is such as to enable us to discard entirely the opinions of men, who, for aught I know, may be quite as eminent, may or may not stand such tests as I have applied to these points I have referred to.

All I can say is that after much time and consideration given to the whole case I cannot find either in the expert evidence or the other valuable evidence of the appellants, that it meets the case which I think is made by the respondents.

As to the damages, I cannot see that the appel-

lant should first take its chance of an assessment by the learned trial judge, fail to meet the reasonable case for assessments made there, and then seek, or be allowed to find, another opportunity of threshing the matter of damages out before a referee or referees.

That branch of the case should, if such a course were intended, have been left aside before or at the trial. Perhaps, speaking for myself, I would have preferred that a board of eminent experts should have investigated and tried the whole matter. Too late for that now, and besides there must be an end to any law suit.

I cannot find that appellants suggested such a course or such as that they now seek for.

As to the title to the property, every one seems to have assumed up to the time of this action that the respondent had such possession that the title was, *primâ facie,* such as to entitle the founding the action upon it.

MACLENNAN and DUFF JJ. concurred in the opinion stated by Davies J.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellants: *Brown, Montgomery & McMichael.*

Solicitor for the respondent: *Wilfred Mercier.*

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*Oct. 13.
*Nov. 10.

JOHN ARTHUR O'NEILL HAYES (PLAINTIFF) ..... } APPELLANT;

AND

EDWARD W. DAY (DEFENDANT) ....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Construction of contract—Findings of trial judge—Appreciation of evidence—Reversal on appeal.

In a dispute as to the nature and effect of a contract, the trial judge, on his view as to the weight of evidence, found the facts in favour of the plaintiff and gave judgment accordingly. His decision was reversed by a majority of the court *in banco*, and the action was dismissed with costs.

Held, per IDINGTON, MACLENNAN and DUFF JJ., reversing the decision of the full court, that the findings of the trial judge, who had seen and heard the witnesses, should not have been reversed.

The CHIEF JUSTICE and DAVIES J. considered that the trial judge had not made his findings as the result of conclusions arrived at by him having regard to the conduct and appearance of the witnesses in giving their evidence, and, on their view of the conflicting testimony, were of the opinion that the full court was right in reversing the judgment at the trial and that the appeal from their judgment ought to be dismissed.

APPEAL from the judgment of the Supreme Court of Alberta, *in banco,* reversing the judgment of Sifton C.J., at the trial, and dismissing the plaintiff's action with costs.

The plaintiff (appellant) alleged that the defendant, desiring his advice and assistance as an experienced land valuator and inspector, entered into an agreement with him by which he was to accompany

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

the defendant in the examination and selection of certain large tracts of land, in the country adjacent to Wetaskiwin, Alberta, and that his remuneration for doing so should be the payment, in the nature of a commission, of an amount equal to one-third of the "turn over" upon the sale of the lands so selected jointly by them. The action was brought to recover 33 1-3 cents per acre in respect of 123,000 acres of land alleged to have been so examined, selected and sold, and, at the trial before Sifton C.J., the learned Chief Justice, speaking of the testimony adduced, said: "It is rather an extraordinary case that men should so disagree in regard to a conversation as these men appear to. All of them, so far as their appearance goes and so far as anything that appears in evidence is concerned, are responsible, respectable and upright citizens. I, therefore, feel bound to accept the story of two as against one, there being nothing in their conduct or appearance to detract from the truthfulness of the story they told. Most extraordinary bargains are made and have been made, the last three or four years, in regard to real estate." In view of the evidence, the Chief Justice held that the quantity of land which could be affected was, practically, 29,000 acres, being a quarter of what had been selected, and based his verdict in favour of the plaintiff, for $9,666.66, at the rate of 33 1-3 cents per acre upon that amount of land. On appeal to the full court, this judgment was reversed and the plaintiff's action was dismissed with costs, Harvey J. dissenting, and it was ordered that the plaintiff should have leave to amend his claim by claiming upon a *quantum meruit* and, thereupon, should be entitled to a new trial upon payment of costs.

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Ewart K.C. for the appellant.

Henwood for the respondent.

THE CHIEF JUSTICE (dissenting).—I am of opinion that the action, in this case, should have been dismissed for the reasons stated by Mr. Justice Davies.

DAVIES J. (dissenting).—I am of opinion that this action should have been dismissed with costs, and to that extent would have modified the judgment of the Supreme Court of Alberta.

The action was one brought on an alleged agreement that if the appellant, plaintiff, would select certain lands containing 200,000 acres more or less *available for purchase by respondent*, the latter would pay to the plaintiff 33 1-3 cents per acre in respect of each acre of land so selected, and that as plaintiff so selected 123,000 acres he became entitled to receive $41,000, which he claimed.

The evidence relied on to support such agreement was a statement alleged to have been made by Day to Hayes when Day first visited Wetaskiwin, at the hotel there, and in the presence of one Bull, who had accompanied Day on his visit. My opinion gathered from a careful examination of the evidence as to all this conversation was that it was well understood by the parties as being quite general and not intended to bind any one to any specific agreement. Hayes would not have broken his agreement if he had afterwards declined to have anything more to do with Day or his company, and Day would not have broken his had he chosen another guide. I am the more satisfied upon this point because Bull, who is relied upon as cor-

roborating Hayes, expressly states that he did not regard or understand the parties as then coming to any definite bargain and that he supposed there would be something further done and in writing. I cannot for myself accept Hayes' remembrance of this conversation which had taken place some years before as correct, though I have not the slightest doubt some "tall talk" was indulged in at the time during the two hours' conversation alike by the would-be land purchaser and the land guide as to possible profits and otherwise. It must also be remembered that at the time of the conversation Day had not definitely selected any part of the lands which it was known were open for purchasers; at that time his idea was generally to purchase "sections" of the land. Afterwards and before Hayes went out with him he had the offer of sale from the Canadian Pacific Railway Land Co. of a specified number of townships and when he returned to Wetaskiwin and before they started out to see the lands the object was not *selection* of sections or of lands generally for sale or *selection* of one or more of the townships offered him for sale, but *inspection* of these particular townships, with a view of determining whether on the whole the offer he had to purchase them should be accepted or not.

There was no pretence that he could accept some of the townships and reject others.

To return to the conversation on the first occasion when it is said the agreement sued on was reached, Hayes says that Day asked him "if he could select a tract of land for him and that he, Hayes, asked him how I would make out—what commission I would get out of the deal. He said that I would make more money than I ever made in my life or had ever seen

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before; that he would easily make a dollar on the turnover which would be divided equally among the three of us."

Bull gave evidence which Chief Justice Sifton, who tried the case, accepted as corroborative of Hayes' statement of the agreement, which was emphatically denied by defendant. There was nothing the Chief Justice said in the conduct or appearance of the witnesses which influenced his judgment, but simply the fact of there being two against one. He admits that the profit claimed was an extraordinary one but says that "most extraordinary bargains have been made the last three or four years in regard to real estate."

While, however, accepting Hayes' version of the agreement as correct under the assumption that there was corroboration, the Chief Justice reduces the claim from $41,000 to $9,666.66 because, as he says, "I feel, although the agreement was made in that way it was made affecting whatever lands were selected *at that time* and purchased by Mr. Day." Now as a fact no lands were selected at that time or purchased by Day. The purchase made by him was made months afterwards. The Chief Justice, moreover, reduces the number of acres on which Hayes was to receive his commission from 116,000, the quantity purchased by Day for the company he represented from the Canadian Pacific Railway Land Co., to one-quarter thereof, 29,000, that being the proportion of shares or interest Day had in the company by which the land was ultimately purchased.

I am quite unable to agree to this method of construing the suggested agreement, and I cannot think that the measure of plaintiff's right was to be deter-

mined by the proportion of shares in the company, large or small, that Day might have. If the agreement was accepted by the court as proved, Hayes was surely entitled to his $41,000 either against the company Day represented, if Hayes knew he was only an agent representing a company, or against Day personally if he did not know he was such agent and treated with him personally.

I am satisfied beyond doubt that Hayes knew Day was only an agent acting for others and so dealt with him and that his remedy if any was against the company and not against Day personally.

I cannot conceive it possible to spell out of the supposed agreement a personal liability on Day's part to pay a commission only on such proportion of the land selected as represented Day's interest in the shares or stock of the company purchaser, and in this way reduce the $41,000 claimed to $9,666.66. Such an agreement as that never, I am confident, entered into the minds of the parties.

Then again I agree with the court below which reversed the judgment of Chief Justice Sifton that according to the plaintiff's own version of the agreement his remuneration was dependent upon a "turn over" of the lands at an advanced price, and that it was this turn over profit "which was on his own shewing to be divided." It was not the average profit which might be subsequently made by separate resales of the lands in farms or plots possibly extending over years which plaintiff had in his mind, but the "turn over" or secret profit which Day could make as between him and the company he represented. No such secret profit was as a fact attempted to be made by Day; he handed over the lands he had purchased

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to the company at the price he bought them. If this view as to the meaning of the "turn over" is correct it is needless to say that the courts would not lend their aid to the enforcement of any such fraudulent bargain.

There are many other fact and incidents, but I forbear enlarging further than to remark that the Canadian Pacific Railway Land Co., with which Day was in treaty for the purchase of these lands, had agreed to sell him a certain number of specified township lands west of Wetaskiwin at a certain price, and that it was to view these specified townships and determine whether or not he would purchase them that Day and his associate Harstone, accompanied or guided by plaintiff, went to see the lands. No question of selecting could arise; the lands as specified had to be accepted or rejected as a whole.

No evidence was given by Hayes of his having brought these lands to defendant's notice or knowledge, or of any *selection* having been made by him with respect to them or any of them, or of his having advised for or against the purchase of any township or done anything more than as a land guide shew the intending purchaser the location of the specified townships for the purchase of which the latter had been negotiating and which he subsequently purchased.

Hayes' evidence on the point, quite irrespective of the emphatic denials on the part of Day, is to my mind conclusive. After making the general statement in his examination in chief that during the day when not in camp he was out "sizing up the country, drawing lines, etc.," he says in his cross-examination that on the visit to the lands he used to get out and find the township mounds and section posts and that

Day and Harstone "drove in around the lines," and "drove over the land" and that *"what he* (Hayes) *did in each case was to shew them where they were on on the township exactly and tell them where they were."*

He never commits himself to a single statement of advice on his part as to selection or rejection of any lands or as to having brought any lands to their notice or done any one single thing evidencing what would be known as selecting blocks of land or advising as to the general neighbourhood where they would be found. He was simply a guide to take them to see the particular townships Mr. Griffin, the Canadian Pacific Railway land agent at Winnipeg, had offered them for sale.

Summarizing my conclusions after a close examination of the evidence I am convinced that when the conversation between Hayes and Day took place at the hotel in Bull's presence, in which the alleged agreement was made, Hayes was informed that Day was there for the purpose of purchasing land as the agent and representative of the Empire Loan Co., and that his conversation with him was as such agent; that no such agreement as Hayes sets up was really made; that so far from corroborating Hayes, Bull, the third party present, says "he did not regard what was said as the finality of the whole transaction, but thought there would be something further as to a bargain and the reduction of the bargain to writing between them;" that if such agreement is accepted as having been made it must be held to have been so made either with the Land Co. Hayes knew Day then represented, or with Day personally and not as the agent; if the former, the Land Co., and not Day personally would be liable upon it, and if the latter, the "turn over"

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mentioned in it and of which Hayes and Bull were each to have had an equal share with Day related to a secret and corrupt overcharge which Day was supposed to make as against his principals in purchasing and turning over the lands to them, which corrupt bargain is disproved and which, of course, the courts would not lend their aid to enforce even if proved; that there is not any justification for cutting down the claim if accepted as genuine and recoverable, from $41,000 to $9,666.66; that the gist and basis of the whole action was the giving by the plaintiff to the defendant for the benefit of himself or the company he represented of the skill, experience and knowledge of the plaintiff in the selection by the defendant of a large quantity of land in what was then the North-West Territories, and as the Chief Justice says was made "affecting whatever lands were selected at that time and purchased by Day;" that as a fact no lands whatever were selected at that time and purchased by Day; that, months afterwards, Day having an offer to buy certain specified townships procured Hayes' services as a land guide to shew him where they were, and that no such skill, experience or knowledge ever were asked of or utilized by the defendant or given or offered by the plaintiff to the defendant, but that on the contrary such services as the plaintiff rendered the defendant were those simply of a land guide to identify and lead defendant to these township lands, for doing which he was amply paid at the time.

IDINGTON J.—We have presented to us several judicial ways of looking at this curious case, but upon

the whole that of the learned trial judge seems to me the most satisfactory.

In adopting this view I may add that I think the respondent never needed nor supposed a special Canadian Pacific Railway Co. introduction needed, to get a man merely to find and shew him the corner posts of the prairie townships, but that he did feel he needed the Canadian Pacific Railway Co. introduction to the appellant to acquire from him, thereby freed from restraint, all the information an old experienced agent of the Canadian Pacific Railway Co. for years engaged in selling lands, could give and that he thought, when he got his introduction and as a result engaged appellant, he was buying the peculiar skill and knowledge appellant's long experience must have given him and which qualified him to be of the greatest value as a *guide in relation to the selection of lands to be speculated in.*

When appraised on such a basis I am not prepared to say that, even in case the claim had been rested on a *quantum meruit,* as the majority of the court below admit it could have been, the basis of the price for such service, as suggested by the respondent and assented to by the appellant, and accepted by the learned trial judge, should be disturbed.

It is quite possible the surmise of Mr. Justice Stuart may be correct, but with respect I submit it is mere surmise and not proven.

As to the point of uncertainty I think the learned trial judge had the material before him to apply the principle of the maxim *certum est quod certum reddi potest.*

I would allow the appeal with costs.

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MACLENNAN and DUFF JJ. concurred with Idington J.

Appeal allowed with costs.

Solicitors for the appellant: *Short, Cross & Biggar.*

Solicitor for the respondent: *George B. Henwood.*

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THE QUEBEC RAILWAY, LIGHT AND POWER COMPANY (PETITIONERS) ..... APPELLANTS;

*Oct. 29.
*Nov. 10.

AND

THE RECORDER'S COURT OF THE CITY OF QUEBEC AND THE CITY OF QUEBEC (RESPONDENTS) ..... RESPONDENTS.

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

Operation of tramway—Powers of municipal corporation—Legislative authority—Use of streets—By-law—Conditions imposed—Penalty for breach of conditions—Repeal of by-law—Contractual obligation—Offence against by-law—Jurisdiction of Recorder's Court—Prohibition.

The city enacted a by-law granting the company permission to use its streets for the construction and operation of a tramway and, in conformity with the provisions and conditions of the by-law, the city and the company executed a deed of agreement respecting the same. A provision of the by-law was that "the cars shall follow each other at intervals of not more than five minutes, except from eight o'clock at night to midnight, during which space of time they shall follow each other at intervals of not more than ten minutes. The council may, by resolution, alter the time fixed for the circulation of the cars in the different sections." For neglect or contravention of any condition or obligation imposed by the by-law, a penalty of $40 was imposed to be paid by the company for each day on which such default occurred, recoverable before the Recorder's Court, "like other fines and penalties." An amendment to the by-law, by a subsequent by-law, provided that "the *present disposition* shall be applicable only in such portion of the city where such increased circulation is required by the demands of the public."

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

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Held, that default to conform to the conditions and obligations so imposed on the company was an offence against the provisions of the by-law, and that, under the statute, 29 & 30 Vict. ch. 57, sec. 50 (Can.), the exclusive jurisdiction to hear and decide in the matter of such offence was in the Recorder's Court of the city of Quebec.

Judgment appealed from (Q.R. 17 K.B. 256), affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of McCorkill J.(2), in the Superior Court, quashing a writ of prohibition, issued on the petition of the appellants, with costs.

On complaint, by the City of Quebec, that the company had illegally neglected to operate their tramcars at certain stated intervals necessary for the convenience of the general public, upon certain streets in the city, in violation of the city by-laws then in force, the company was summoned before the Recorder's Court for the City of Quebec and, upon conviction of the offence as charged against the by-laws, it was condemned to pay the penalty of $40 provided under the by-laws in question. The company, in pleading to the complaint, denied the jurisdiction of the Recorder's Court to hear and determine the matter in issue on the ground that the obligation, if any, of the company to operate and circulate its cars at certain fixed intervals was contractual and the breach of any such obligation was not a matter which came within the jurisdiction of that tribunal, but was within the exclusive jurisdiction of the Superior Court. Upon conviction, the company sued out a writ of prohibition, alleging that the Recorder's Court had no jurisdiction to entertain any suit or proceeding in respect

(1) Q.R. 17 K.B. 256. (2) Q.R. 32 S.C. 489.

of the penalty claimed; that the penalty sought to be recovered was for the alleged breach of a contract resulting from the by-laws and a deed of agreement entered into between the city and the company, based on the by-laws; that, for any such breach, the company was not liable to a penalty but for damages only in a suit properly instituted in a court of competent jurisdiction; that the frequency of the service required had not been legally determined prior to the complaint; that the by-laws in question did not impose any penalty in respect of the matters complained of; that the city had no authority to enact by-laws imposing penalties for the breach set out in the complaint or to give the Recorder's Court authority to entertain such a complaint, and that the by-laws in question were inconsistent, void, vague and ineffectual for want of certainty.

At the trial, the writ of prohibition was quashed with costs, and this decision was affirmed by the judgment appealed from, Bossé and Cimon JJ. dissenting.

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

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

C. E. Dorion K.C. and *Corriveau K.C.* for the respondents.

THE CHIEF JUSTICE.—I concur in the view of this case taken by Sir Louis Davies. The appeal is dismissed with costs.

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GIROUARD J.— I am of opinion that this appeal should be dismissed for the reasons stated by Mr. Justice Davies.

DAVIES J.—The two questions arising in this case are, first, as to the extent of the jurisdiction given to the Recorder's Court by the legislature, and next, as to the nature of the breach by the appellants of the obligation imposed upon them by the by-law of the city permitting, on specified conditions, the use by the appellant company of the streets of the city for the construction and operation of a street railway.

It had been made by a statute a necessary pre-requisite to the granting of such permission that the city council should first determine by resolution *all the conditions* on which it should be given, and that, when the city and the company agreed upon these conditions they should be embodied in a by-law of the council to come into force only after the passing of a notarial contract between the parties based on and in conformity with the by-law.

Such a by-law was passed by the city council of Quebec granting the necessary permission to use the streets of that city to the appellant company subject to the conditions and obligations therein stated, and a notarial contract was duly passed between the city and the company in conformity with those provisions and conditions.

One of the provisions of this by-law, art. 37, stipulates as follows:

> The cars shall follow each other at intervals of not more than five minutes, except from eight o'clock at night to midnight, during which space of time they shall follow each other at intervals of not more than ten minutes. The council may, by resolution, alter the time fixed for the circulation of the cars in the different sections.

Amendment, 23rd November, 1900, by-law No. 370:

The present disposition shall be applicable only in such portion of the city where such increased circulation is required by the demands of the public.

It was strongly pressed upon us that this amendment practically repealed the whole original article and required a new by-law to be passed specifying the parts of the streets where "such increased circulation is required."

I have, after some difficulty, owing to the vague language used, accepted the construction placed upon the amendment by the courts below, namely, that it applied only to the last sentence of art. 37, and was not intended to change and did not change the first part which was called, in the amendment, the "present disposition," but meant that the council, if and when it altered such disposition, should only apply that existing or "present disposition" to such portion of the city as the increased circulation should shew required its application or retention. No alteration under the amendment was ever made.

As to the recorder's jurisdiction, the language of the statute, 29 & 30 Vict. ch. 57, sec. 50 (Can.), gives him "exclusive jurisdiction" to hear and decide in the matter of any offence committed against the provisions of the city charter or its amendment

or the by-laws now in force or which shall hereafter be in force in the said city.

The question arises *in limine:* Was the neglect to comply with the by-law requiring the cars to be run within stated times an *offence* against its provisions? I think it was. It was a neglect to comply with a positive requirement of the by-law which became an obligation of the company when the by-law came in

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force on the passing of the notarial contract between the city and the company. Art. 60 of the by-law says:

If the company neglects to conform to or contravenes any of the conditions or obligations imposed upon it by the present by-law, it shall thereby incur and be liable to a penalty not to exceed $40 for each and every day that it fails to conform to or that it contravenes any of the said conditions or obligations, and the said penalty shall be recoverable before the Recorder's Court of this city like other fines and penalties.

I am unable to see why a failure to comply with a specific obligation imposed by this by-law upon the company to run its cars at prescribed times is not an offence against the by-law and is not recoverable in the court specially designated by the legislature as the one having exclusive jurisdiction over offences against the city by-laws. Mr. Stuart's argument was that this was merely a breach of a contractual obligation arising out of the contract which the legislature enacted should be entered into by the company accepting the by-law and agreeing to build and operate the street railway pursuant to it. But it seems to me that the test must be found in the answer to the question, whether the breach complained of is of an obligation which it was within the power of the city council to impose upon the company, either by virtue of the general powers of government conferred upon the city or of the specified powers given to it to make a by-law which should be the basis of any contract entered into for the operation of a street railway on its streets. If the by-law comes within that test, and has a prescribed penalty for breach, as in the case before us, then the jurisdiction of the Recorder's Court is broad enough to embrace it.

The courts below seem to base their judgments

upon the general powers given by the legislature to the city to make by-laws

> for the good order, peace, security, comfort, improvement, cleanliness, internal economy and local government of the said city.

No language could well be broader than this, but, in addition, and, I assume *ex abundanti cautelâ,* the legislature gave special powers also to make by-laws on enumerated subjects. The judgment of the court of first instance and that appealed from both proceeded upon the ground that the regulation for violation of which the action was brought was within the police powers of the city, and so was not *ultra vires.*

Without determining whether or not this is a proper ground upon which to base judgment, I prefer to rest mine upon the ground that, altogether outside of the powers conferred on the city by its charter, the legislature has, by 57 Vict. ch. 58, expressly conferred upon it special powers to grant conditional permission to street railway companies to make use of the streets for the purpose of laying their rails and, in section 20, enacted as follows:

> The city council shall first determine, by resolution, all the conditions on which it intends to grant such permission; and when the city, and the said company shall agree upon all the said conditions, a by-law shall be made and passed by the said city council, comprising all the said conditions of the said permission, *the said by-law to come into force only after the passing of a notarial contract between the parties* based on the said by-law, and in conformity therewith.

Pursuant to these powers the by-law in question, containing the article 37, above quoted, was passed and accepted and agreed to by the appellant company and a notarial contract passed between the city and the company as provided by section 20. Here we have

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all the pre-requisites necessary to give the Recorder's Court jurisdiction to hear any complaint as to the violation by the company of article 37 of the by-law.

Whether, in addition to this penalty, a civil suit might be brought for special damages incurred by the city as a result of a violation of the contractual obligation of the company as embodied in the notarial contract was not before us in any way, and I say nothing about it.

It is enough for me to say that, in my judgment, the Recorder's Court had jurisdiction to try the offence complained of and impose the penalty prescribed.

The appeal should be dismissed with costs.

IDINGTON J.—The only question raised, which is that of the jurisdiction of the recorder of Quebec, seems answered by the clear and comprehensive language of the statute conferring upon him jurisdiction to hear and determine the matter of any offence against the by-laws of the city; and of the statute enabling the city to pass such by-laws as deemed meet on almost any subject the city government required and, then, by the statute specially enabling it to provide for the running properly of an electric car service.

It would not seem necessary, once the general penal power that appears in the statute is given to add to each of such by-laws as the city might pass the sanction of a penalty, or to provide, in each new enactment rendering it necessary or empowering the city to pass by-laws relative to some new subject matter brought within the range of the matters the city council may have to deal with, an express power

to add such sanction to such by-laws relating to the new subject matter.

It is not an unheard of thing to attempt, by means of sanctions such as these, to secure the performance of duties to be discharged by corporations created to furnish a service, it may be of light or of water or even of running cars.

All these franchises are contractual or quasi-contractual in character, and I fail to see why we should draw a line which the legislature has not.

The only serious question here is whether or not the amendment of the by-law really repealed the section proceeded upon.

It certainly does not seem to have been the intention to do so, and I do not think we can impute to the curious language used such an effect. That being the case, I am happy to find it unnecessary to determine further what this amendment does mean.

I think the appeal must be dismissed with costs.

MACLENNAN J.—I agree in the opinion stated by Mr. Justice Davies.

Appeal dismissed with costs.

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

Solicitor for the respondents: *Philéas Corriveau.*

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*Nov. 19, 20.
*Dec. 1.

THE STEAMSHIP "TORDENSKJOLD" (DEFENDANT) ..... } APPELLANT;

AND

THE HORN JOINT STOCK COMPANY OF SHIPOWNERS (PLAINTIFFS) ..... } RESPONDENTS.

THE JOINT STOCK COMPANY, LIMITED, "TORDENSKJOLD" (PLAINTIFFS) ..... } APPELLANTS;

AND

THE STEAMSHIP "EUPHEMIA" (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT.

Appeal—New grounds—Admiralty law—Collision.

A court of appeal should not consider a ground not previously relied on unless satisfied it has all the evidence bearing upon it that could have been produced at the trial and that the party against whom it is urged could not have satisfactorily explained it under examination.

In this case damages were claimed from the owners of the "Euphemia" for collision with plaintiffs' ship and the latter in their preliminary act charged that the "Euphemia" was in fault for not reversing her engines. The Exchequer Court judgment held plaintiffs' ship alone in fault and on appeal the majority of the Supreme Court refused to consider the ground not previously urged that the "Euphemia" when she saw the other ship attempting to cross her bow held too long on her course instead of reversing. Fitzpatrick C.J. and Davies J. were of opinion that under the circumstances this point was open to the plaintiffs.

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

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APPEAL from the judgment of the local judge for the Quebec Admiralty District of the Exchequer Court of Canada (1), holding the plaintiffs' ship alone to blame for a collision.

The points for decision are stated in the head-note.

Pentland K.C. and *Meredith K.C.* for the appellants.

L. P. Pelletier K.C. and *A. H. Cook K.C.* for the respondents.

THE CHIEF JUSTICE agreed with Davies J.

DAVIES J.—I concur generally in the judgment prepared in this appeal by Duff J., but desire to add a few words, especially upon the second ground upon which the appeal is based, namely, that the "Euphemia" was in fault in not having reversed her engines sooner than she did. I am not satisfied that under the facts that ground was not open to the appellants on this appeal.

Very many of the difficulties in understanding the relative courses and distances of the two steamers for the few moments immediately preceding the collision and their relative bearings at the moment of the collision arose out of the statements of several of the witnesses that the "Euphemia's" bow collided with the starboard quarter of the "Tordenskjold" when the latter's bow was pointing almost directly up the river channel westwardly and the former's bow was pointing south across the river so that as was argued by counsel for the "Tordenskjold" the blow was almost, if not quite, at right angles. This assumed fact, which the statement of several of the witnesses justified, is not, I think, proved by the evidence as a whole. I

(1) 11 Ex. C.R. 234.

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Davies J.

have no doubt the witnesses were speaking of a time immediately following the impact or blow, and not of the relative courses of the ships at the moment of the impact and before its effect was produced.

The "Tordenskjold" was an iron steamer of 2,295 registered net tonnage, heavily laden with coal, drawing 20 or 21 feet fore and aft and running at full speed with a flowing tide of three knots. The "Euphemia" of 2,034 tons laden with grain was running at full speed down the river against the tide. The two vessels were approaching each other at the rate of two thousand feet per minute or 18 knots an hour. The impact of two such bodies must have been very great as indeed the photograph put in evidence of the breach made in the "Tordenskjold's" starboard quarter abundantly evidenced.

Was the blow struck a right angled one or nearly so? I think the photographs of the "Tordenskjold's" side where she was struck and of the injured bow of the "Euphemia" taken after the collision, and the evidence of the captain of the "Tordenskjold," who states that he was standing at the time on the starboard side of the bridge of his own ship, shew that the blow must have been at a considerable angle, but not at a right angle. The captain says (p. 100): "The 'Euphemia' struck us in the anchor from thirty degrees to forty-five degrees. His stem and starboard bow struck us." I am satisfied beyond reasonable doubt therefore that the "Euphemia's" stem and starboard bow struck the starboard bow of the other steamer at an angle considerably less than a right angle, and that as the "Tordenskjold" was the heavier ship and was going at a rate nearly double as fast as the "Euphemia," the immediate result of the blow would be not only to stop the "Euphemia," whose stem would probably be caught for a time at least in the enormous hole she

made in the other ship's quarter, but to carry her bow in the direction the "Tordenskjold" was going with the tide, so that as the ship's recoiled from each other after the blow the bow of the "Euphemia" would be pointing in the direction the witnesses stated.

The manœuvre of the "Tordenskjold," which first caused danger to the ships was no doubt the porting of her helm as the ships were approaching each other. If she had not ported and shewn her red light they would doubtless have passed starboard to starboard, green light to green light. Her signal being answered and responded to by the "Euphemia" as soon as she saw the other's red light, it is more than probable the collision would have been altogether avoided even then had not the "Tordenskjold" for some inexplicable reason starboarded her helm and so crossed the "Euphemia's" bows as the latter was shearing off to starboard under a hard-a-port helm in obedience to the call of the "Tordenskjold." This last manœuvre of the "Tordenskjold" in starboarding was attempted when the steamer had reached a position slightly on the port bow of the "Euphemia" and was fatal. It seems to me that it had the effect of making it impossible for the "Euphemia" to avoid a collision even had she reversed immediately the three lights of the other steamer came into line instead of blowing the single blast as she then did. It is true she reversed full speed astern the moment the other's green light opened. The single blast and the order to reverse followed fast one upon the other, but I do not think that if the order full speed astern had preceded instead of followed the single blast of the whistle the collision could then have been avoided.

Mr. Meredith adopted and pressed upon us the

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finding of Captain Tooker, the assessor of the late Mr. Justice Burbidge, that the "Euphemia" was in fault in porting her helm at the moment the "Tordenskjold" shewed her red light and in not accompanying that action with a single blast of her whistle, and that she should instead, before she saw the red light and as soon as she saw the "Tordenskjold's" three lights at position T 4, in chart No. 1, have gone full speed astern giving the usual signal, three blasts. Burbidge J. thought the reference to plan No. 1 a mistake, and that the assessor meant plan No. 2. If he did, then with every respect I must concur with Mr. Justice Burbidge and dissent from the conclusion of the assessor on that point. A careful reading of the evidence convinces me that if the two ships had kept on their changed courses after porting their helms and shewing each other their red lights there was room for them to have passed and they would have done so safely had not the "Tordenskjold" made the fatal manœuvre of starboarding and so thrust herself ahead of the "Euphemia." If, on the other hand, the assessor meant the positions of the two vessels as shewn at position T 4, of plan No. 1, as expressed in his answer, I repeat what I have already said that it was then too late for the "Euphemia," by reversing, to avert the collision.

It is true that the "Tordenskjold" did in her preliminary act charge the "Euphemia" "with not stopping and reversing when risk of collision was imminent." But such fault so charged was not followed up at the trial, and, indeed, was hardly consistent with the case then put forward by the appellants. In fact the real contention put forward by the "Tordenskjold" at the trial was that

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the two vessels were proceeding on their respective courses, green to green, at such relative distances as would have enabled them to pass each other in perfect safety and that the "Euphemia" suddenly and without any warning changed her course to starboard and ran into the "Tordenskjold" almost, if not quite, at right angles, the latter ship having continued steadily and evenly on her westward course. There was no special examination of the witnesses produced by the "Euphemia" or other evidence given with a view of proving fault or delay on the part of the "Euphemia" in *not having reversed* sooner than she did. It is true there was evidence as to when she did reverse. But that was not the point put forward to be tried and determined nor, as my brother Duff has shewn, was the evidence given specially directed either on main or cross examination to such a point or issue as one which it was contended affected the liability of the "Euphemia." Although mentioned in the preliminary act it does not appear to have been practically made an issue until suggested by Captain Tooker, the assessor, on appeal. But as the facts relating to the time of reversing her engines by the "Euphemia" did appear, incidentally at any rate, in the evidence and was charged as a fault in the preliminary act and pleadings of the "Tordenskjold," I have thought it desirable to deal with it on the merits instead of relying upon the legal point that the objection could not now be taken on appeal.

I fully agree with all my brother Duff has said with respect to the alleged failure of the "Euphemia" to blow a single blast of her whistle when she ported, and with his conclusion that this point is not open on this appeal, and if it was, that the evidence would

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not under our statute justify a holding that the fault, even if proved, contributed to the collision.

I think it important that the attention of the proper authorities should be drawn to the admittedly deplorable ignorance of the pilots of these ships alike with respect to the compass and its different points as to the regulations for preventing dangers from collisions of ships, commonly called the "Rules of the Road." There was hardly any pretence of knowledge with regard to either. They were, it is true, elderly men, and one of them stated that when he obtained his branch or license many years ago he was not examined at all with respect to the compass. It was not the practice he said in those days. But it is evident that with the existing traffic of the River St. Lawrence by large and valuable steamers it is imperative that those licensed as pilots should possess in addition to their other qualifications a knowledge of the regulations by which they are bound and of the compass without which it seems impossible for them properly to discharge their duties or give intelligible evidence in cases of collision between ships such as we have now before us. The learned trial judge (Routhier J.), who saw the witnesses and heard their evidence, expresses himself on this want of knowledge of the pilots thus: "Finally I must say that the two pilots who have been heard in this case lack knowledge and they lack it in a large measure. They do not know the compass nor the rules of navigation nor much of the map of the river." We desire to emphasize his opinion.

I would also like again to repeat my regrets that our statute does not permit of our having on appeal to this court experts to advise us on nautical points in like manner as the courts of Vice-Admiralty and Ex-

chequer and the Privy Council have. In the present case we feel that such expert advice might have been of great benefit. This court stands in the anomalous position of being obliged to decide difficult nautical points on which the appeal may turn without the advice of nautical experts while the courts from which appeals are taken to us and the Judicial Committee of the Privy Council to which appeals from this court lie have the benefit of such advice as and when they desire.

IDINGTON and MACLENNAN JJ. concurred in the opinion stated by Duff J.

DUFF J.—These appeals relate to a collision which occurred in the St. Lawrence River at a place below the St. Antoine and above the Ste. Croix range lights between the SS. "Euphemia," going down, and the SS. "Tordenskjold," going up the river. Both sides concede that a short time (less than three minutes) before the mishap occurred, the ships were proceeding starboard to starboard upon courses which, had they been kept, would have taken them past one another in perfect safety.

It was found by the learned trial judge (Routhier J.) with the concurrence of his assessor (Captain Koehig)—and these findings have been affirmed by the learned judge of the Exchequer Court (Burbidge J.) with the concurrence of his assessor (Captain Tooker, R.N.)—that when at a distance of not more than a half and not less than a quarter of a mile from the "Euphemia" the "Tordenskjold," being then on the course I have mentioned, suddenly turned to starboard, first exhibiting to the "Euphemia" her three

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lights and then shutting out her green light; that seeing the "Tordenskjold" thus changing her course the "Euphemia" answered the movement by porting her helm; but when the "Tordenskjold's" red light was a little on the "Euphemia's" port bow the "Tordenskjold" again changed her course, this time shewing first her three lights and then shutting out her red light; that the "Euphemia" then reversed her engines at full speed, but, it being then too late to avert a collision, the "Tordenskjold," passing the "Euphemia's" bows, received on her starboard side the blow of the latter's stem.

The learned trial judge on the advice of his assessor, has held on this state of facts that the "Tordenskjold" was in fault in this; that the ships being so close together, and upon parallel courses by which they could pass with safety, the "Tordenskjold" should not have directed her course across the "Euphemia's" bows; but that, having indicated an intention of thus directing her course by exhibiting her red light alone to the "Euphemia," she should have kept that course. The opinion of the trial judge and his assessor that the "Tordenskjold" was in fault in both these respects had the concurrence of the learned judge of the Exchequer Court and of the assessor who advised him. The trial judge further held (and upon this point also his view was shared by his assessor and by the learned judge of the Exchequer Court) that the "Euphemia" was not in fault. It is in respect of this holding only that the judgment of the Exchequer Court is impugned on these appeals.

The appeals are rested on two grounds, first, that when the "Tordenskjold" shut out her green light after exhibiting her red the "Euphemia" should have

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seen the risk involved in proceeding further ahead and should have reversed; and secondly, that assuming she was justified in porting her helm, she was in fault in not giving the prescribed signal to indicate that she was about to direct her course to starboard.

I think neither of these grounds is available in this court.

As to the first, I cannot find, in the evidence given at the trial, or in that taken before the Commission of Inquiry which preceded the trial, anything which indicates that it occurred to the trial judge or to his assessor or the Commissioners or to the counsel for the appellants that, at the time the "Euphemia"—according to the account given by those on board of her—ported her helm (when the "Tordenskjold" was about one-half a mile distant) there was not sufficient room to enable the ships to pass port to port. The respondents in their preliminary act and in their pleadings stated the salient facts substantially as their witnesses stated them at the trial; and notwithstanding the appellants had thus the most ample notice of the respondents' account of their manœuvres which preceded the collision, there is not one word of cross-examination conveying a suggestion that (if each ship should have held her course to starboard) this manœuvre would have involved any apparent or foreseeable risk of collision. The contention seems to have been suggested for the first time in the Exchequer Court where the nautical assessor expressed the view that the only safe course for the "Euphemia," when she saw that the "Tordenskjold" had shut out her green light, was to reverse her engines.

The principle upon which a Court of Appeal ought to act when a view of the facts of a case is presented

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before it which has not been suggested before, is stated by Lord Herschell in *The "Tasmania"* (1), at p. 225, thus:

> My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinized. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
>
> It appears to me that under these circumstances a court of appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.

In *The "Tasmania"* (1) the particular point referred to—which the House of Lords refused to entertain—had not been made in the pleadings. Here it is true there is in the pleadings a general charge that the "Euphemia" was in fault for not reversing her engines. In point of fact it was clearly proved that before the collision she did reverse her engines; and the allegation in the pleadings would suggest to nobody reading the pleading as a whole a hint of the contention upon which the "Tordenskjold" now actually relies.

Is it then manifest that if this controversy had arisen at the trial no facts bearing on it, other than those which the record discloses, could have been brought to light? I cannot think that can be the case. There are many things I should like to be informed about before passing upon such a question. More exact information about the width of the channel,

(1) 15 App. Cas. 223.

about the speed of the vessels, about the time and distance in which they could turn, would seem to be almost essential to enable one to form confident opinion concerning it. The opinion of the nautical assessor who assisted the judge of the Exchequer Court is entitled of course upon any question of nautical manœuvering to the highest consideration. But we have not the advantage of knowing the views upon all important questions of fact which formed the basis of his opinion; and without those views I am not entitled to assume that a fuller investigation specifically addressed to those questions might not present a very different case respecting them.

For the same reason I do not think we are entitled to entertain the contention which forms the second of the above-mentioned grounds of appeal. The decision of the Court of Appeal in *The "Anselm"*(1), cited by Mr. Meredith, satisfies me that, assuming a failure on the part of the "Euphemia" to sound her whistle, such a failure would have constituted a breach of article 28; but before the "Euphemia" can be convicted of fault in this regard two questions must be determined; first, whether in fact there was on her part a breach of the rule, and secondly, whether, assuming a breach established, it contributed to occasion the collision. Whether, in respect of this latter question, the onus would lie on the "Euphemia" or on the "Tordenskjold" need not concern us. Assuming that, a breach being proved, the burden is cast upon the "Euphemia" is it clear that we have before us all the evidence which would have been produced had these questions formed a subject of contest at the trial?

(1) [1907] P. 151.

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As to the first of them there is not in the voluminous examinations and cross-examinations which fill the record, a single word directed expressly to the point whether the "Euphemia's" whistle was or was not sounded when her helm was ported. There are, it is true, expressions throughout the case, many of them, which obliquely suggest and (if used when such a point was before the minds of those employing them) might, I think, be taken to imply with sufficient certainty that the signal was not given; and there are plenty of indications leading to the conclusion that neither pilot had a clear notion of the directions of article 28. But, on the other hand, if such a breach could have been proved, unless indeed there was some explanation which does not appear, it seems incredible that it should not have been charged in the preliminary act or in the pleadings; and that at the trial the point should have been by both sides so successfully avoided.

Whatever view may be taken, however, on this point I am satisfied that the second question involved in this ground of appeal could not be decided adversely to the respondents upon the evidence as it now stands without the gravest risk of doing injustice. In the light thrown upon the methods of these pilots by the evidence in this case, I should have no doubt that the exhibition of the "Euphemia's" red light to the "Tordenskjold" in answer to the exhibition of the "Tordenskjold's" to the "Euphemia," would be regarded by the pilot on the "Tordenskjold," even in the absence of a signal, as a definite indication of the "Euphemia's" intention to pass to starboard; the question when that occurred, that is to say at what point the red light of the "Euphemia" must have been seen

by the "Tordenskjold" is a question which, if it was to be the determining point of the litigation, should have been investigated at the trial. It is quite true there is some evidence, indeed a good deal of evidence, bearing upon it. But it is clear that neither the court nor counsel specifically addressed themselves to the point; and it is not, I think, open to doubt that, had they done so, the circumstances affecting it would have been much more fully disclosed.

In this court we suffer from the disadvantage of lacking skilled advice; that is a circumstance which emphasizes, I think, the importance of having all questions of fact—and more especially questions of seamenship—in such a case as this, distinctly raised before the court which tries it with the assistance which is not afforded us.

The appeals should be dismissed with costs.

Appeals dismissed with costs.

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

Solicitors for the respondents: *W. & A. H. Cook.*

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*May 14, 15.
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*Feb. 12.

THE SHIP "NANNA," HER CARGO AND FREIGHT (DEFENDANT) ..... APPELLANT;

AND

THE ENGLISH AND AMERICAN SHIPPING COMPANY, OWNER OF THE "MYSTIC" AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY DISTRICT.

Admiralty law—Salvage—Injury to salving ship—Necessities of service—Seamanship—Appeal on nautical question.

In an admiralty case the Supreme Court of Canada must weigh the evidence for itself unassisted by expert advice and will, if the evidence warrants it, reverse the judgment appealed against on a question of seamanship or navigation.

The ship "M." brought an action for the value of salvage services rendered to the "N." part of the damages claimed being for injury to the "M." in performing such services.

Held, Girouard and Maclennan, JJ., dissenting, that the evidence established that said injury was not caused by necessities of the service but by unskilful seamanship and improper navigation; the judgment appealed against should, consequently, be varied by a substantial reduction of the damages allowed by the local judge.

The dissenting judges were of opinion that sufficient ground was not shewn for disturbing the findings of the trial judge.

APPEAL from the judgment of the local judge for the Nova Scotia Admiralty District of the Exchequer Court of Canada in favour of the plaintiffs.

The action was for the value of salvage services performed by the "Mystic" in rescuing the "Nanna" from probable shipwreck off the southern coast of

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

Nova Scotia, the latter, a steel ship of 1,125 tons gross tonnage being on her way from Halifax to New York with a cargo of deals, and the "Mystic," 2,342 tons bound for Halifax. The facts of the salvage are stated by the local judge as follows:

There is nothing to especially distinguish this case from the ordinary cases of salvage towage services rendered to vessels in distress, until the "Mystic" and the "Nanna" arrived in the vicinity of the Sambro Ledges.

On Monday, February 4th, at about 7.30 in the morning the "Mystic" took the "Nanna" in tow off Seal Island near Cape Sable. Previous to that date the "Nanna" had been drifting about with her propeller shaft broken. That happened on the night of January 31st.

During the day before the "Mystic" came up a heavy westerly gale prevailed, which caused the "Nanna" to drift a long distance. She could not be steered, even with all her sails set, as way enough could not be made to enable her to answer her helm. Cargo was jettisoned in the hope that by lightening the vessel steerage way could be made but she would not obey her helm even then, nor could she be made to do so by any of the devices tried.

On Monday, 4th February, when picked up, she was about twenty miles off Seal Island. When the vessel was disabled signals of distress were put up.

On Sunday night there was a high sea, and as the captain of the "Nanna" says, her position on that night was not pleasant.

The vessel when picked up by the "Mystic" was, no doubt, not in a safe position, though she was in the vicinity of the usual route of vessels. After the

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"Mystic" made fast to the "Nanna" the towing proceeded without serious accident until Tuesday morning at about 7.45, when the line parted in a heavy wind, when the vessels were nearing Chebucto Head. At that time the captain of the "Mystic" appears to have been on his proper course to Halifax; but as he could not pick up a pilot, and as the weather was becoming bad, he decided to put to sea.

It was while he was bringing his ship slowly round, so as to avoid breaking the hawser, that the line parted, and the "Nanna" immediately commenced to drift towards the shoals at Morris Point. The captain of the "Mystic" at once proceeded to manœuvre his vessel in an attempt to again make fast to the "Nanna"; and this he succeeded in doing in a most creditable manner, considering the condition of the weather.

* * * * * * *

While he was thus endeavouring to get a line aboard the "Nanna" both vessels were drifting rapidly towards the dangerous reefs known as the Sambro Ledges. From the time when the line parted, until it was again put aboard the "Nanna" about half an hour elapsed, and three quarters of an hour passed more before the line was made fast aboard the "Nanna."

While they were thus drifting no soundings were taken. After again getting under way with the tow, and while steering a S. by E. course, the "Mystic" saw breakers ahead on the starboard bow, which were probably the Sisters; thereupon his helm was starboarded and he kept away from them, changing his course to north.

He then went slow, and was taking soundings. Not long after this the soundings shewing 15 fathoms,

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then again 15 again, and after that 17 fathoms, speed was increased, and breakers were seen a point or two on the port bow. These breakers were what is known as the Stapleton Rock breakers.

The captain of the "Mystic" signalled to the "Nanna" to anchor, and this was done by both vessels; the "Nanna" being in a position where she weathered the gale that blew all day Tuesday and on Tuesday night, without incurring any mishap whatever. The "Mystic" bumped several times on Stapleton Rock and incurred considerable damage. She made water in some of her compartments, but does not seem to have been rendered unseaworthy. After coming to anchor the weather continued to be very bad; a gale blew and the sea became extremely rough. Nevertheless, the vessels rode out the gale without further mishap until taken in charge by the tow boats from Halifax on Wednesday morning.

Judgment was given against the owners of the "Nanna" and damages were assessed at $27,000, which included a sum for the injury sustained by the "Mystic" at Stapleton Rock, the local judge holding that such injury was caused by necessities of the service. The defendants appealed mainly against the allowance of damages under this head.

Mellish K.C. for the appellants.

W. B. A. Ritchie K.C. for the respondents.

GIROUARD J. (dissenting).—I think the judgment of the trial judge should not be disturbed. The appeal involves only a question of fact and his finding is not so clearly wrong as to justify an appellate court

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in reversing, much less to simply reduce the amount awarded. All the points seem to have been fairly weighed by the trial judge. This court agrees with him that without the services of the "Mystic" the "Nanna" would probably have been a total loss. This admission is sufficient for me to accept the amount of the judgment which is fully and properly detailed, to my satisfaction at least. Twenty-five thousand dollars for salvage seems to be a large amount, but, when we consider that more than $15,000 go for repairs rendered necessary by the salvage services performed, I do not think it excessive. I am, finally, of opinion that $10,000, outside of these repairs, is not an unreasonable remuneration for saving a vessel of the value of $65,000, without propeller, at the mercy of a raging gale, close to a dangerous coast, amidst a blinding snow storm and after great exertions and risks to the salvors whom the pilot and salvage tugs would not even venture to assist at first.

Upon the whole, I think the appeal should be dismissed with costs and, in reaching this conclusion, I keep within the well-settled jurisprudence of this country. I do not propose to review all the cases for they are too numerous. I will merely quote three or four, two of our own court, *The "Picton"*(1), in 1879, at page 653, and *The "Santanderino"* v. *Vanvert*(2), in 1893, and two of the highest courts in England.

In *The "Baku Standard"*(3), at page 551, Sir Ford North, speaking for the Privy Council, said:

> Their Lordships are of opinion that, considering the evidence, and that the compensation for damage is dealt with separately, full

(1) 4 Can. S.C.R. 648. (2) 23 Can. S.C.R. 145.

(3) [1901] A.C. 549.

justice would have been done by an award of less than £1,000 for salvage. But this is a question of amount only, and it is not the custom of this committee to vary the decision of a court below on a question of amount merely because they are of opinion that, if the case had come before them in the first instance, they might have awarded a smaller sum. It has been laid down in the *"DeBay"* (1), and other cases that they will only do so if the amount awarded appears to them to be grossly in excess of what is right; which is not the case here.

In another case, *The "Glengyle"* (2), at page 521, where a salvage of £19,000 was awarded, Lord Herschell, speaking for the House of Lords, said:

> At the best, in cases of this description, all that can be done is what may be called rough justice. It is impossible nicely and accurately to measure in relation to the risks run and the services rendered the sum which ought to be awarded by the court. My lords in the present case the amount is large, and it may be that it is larger than each of the members of this house, who have heard the appeal, would have given if it had been left to his individual judgment. I do not say that it is so; all I say is that, in my opinion, it is not so exorbitant or so manifestly excessive that we ought to interfere with the conclusion which has been arrived at.

I am, therefore, of opinion that the appeal should be dismissed with costs.

DAVIES J.—I concur with the judgment of Mr. Justice Duff.

IDINGTON J.—I also concur in the opinion of Mr. Justice Duff.

MACLENNAN J. (dissenting).—I am of opinion that this appeal should be dismissed.

The appeal is from a judgment of the local judge in Admiralty, at Halifax, in a case of salvage, and the only serious question is whether the sum

(1) 8 App. Cas. 559. (2) [1898] A.C. 519.

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awarded to the "Mystic" for the salvage of the "Nanna" is excessive.

The witnesses in the case were all examined in the presence of the learned judge, and I think his conclusions from the evidence were well founded, and it was for him to judge between conflicting statements.

Both vessels are of steel and propelled by steam, the "Mystic," without cargo, valued at $219,000, and the "Nanna," with cargo, at $65,437.

The "Nanna," loaded with lumber, and on her way from Halifax to New York, became disabled, on the night of the 31st of January, 1907, by the breaking of her propeller.

This happened off the southwest coast of Nova Scotia, and she then drifted about helplessly, at the mercy of the wind, and tides, and currents, for three days and four nights, until picked up and taken in tow for Halifax, about 10.40 a.m., on the 4th of February, by the "Mystic," which was on a voyage from Boston to Louisburg, in Cape Breton.

All went well for about two hundred miles, except for some delay caused by the parting and re-hitching of the tow-line, until about 5 a.m., on the 5th of February, when it began to snow so heavily that they could see nothing, the thermometer, at the same time, indicating a zero temperature.

Under these circumstances they soon began to take soundings, and, at 7.45, they heard the whistle at Chebucto Head, the entrance to Halifax Harbour, the same being supposed to be about a mile and a half distant.

And here is where trouble and confusion began. In addition to the heavy snow and the zero temperature, a heavy gale sprung up from the E.N.E. and the tide was flowing in the same direction.

About this time the tow line parted again, while making a change of course, and, for more than an hour, except for the manœuvres necessary to get the hawser on board the tow and made fast, the ships could do nothing but drift.

The circumstances were such that to re-hitch the tow-line the ships had to get alongside; if a boat had been launched, it could not have lived. No pilots were out, although they were on pilot ground, and the evidence is that the pilots refrained from going out on account of the violence of the weather.

It was nine o'clock before the tow-line was made fast on the "Nanna," and a further quarter of an hour, or twenty minutes, passed before movement could be made.

At this time the captain could not tell in what direction they had drifted, or where they were, and for another hour afterwards he endeavoured to make his way out to sea, but, seeing breakers whichever way he turned, he failed to get out, and, at last, determined to anchor.

This both ships did, but, before the "Mystic" was able to do so, she struck a shoal, and received injuries, repairs of which amounted to $13,850.

The "Nanna" suffered no injury, and both ships rode out the gale at anchor all that day and the following night. The "Nanna" was towed into harbour next morning by tugs, and the "Mystic" went in with her own steam; and the learned judge is of opinion that, while the "Mystic" was quite capable of taking the "Nanna" in, it was more prudent to accept the offer of the tugs.

The result was that, by the exertions of the "Mystic," the "Nanna," valued at $65,437, was

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rescued from a position of great danger on a rocky coast in which she had been for three days and nights, and was brought into port without appreciable damage, while the "Mystic," while so employed, suffered very serious injury and incurred very serious risk of total destruction.

Now, I do not understand that, in order to earn substantial reward, the master of a salving ship must be found to have done everything in the best possible manner. All men have not equal skill and capacity in difficult circumstances. No want of attention or effort is charged against the master of the "Mystic." He was at his post of duty during the whole period of danger, using his best skill and judgment in the difficult situation and circumstances in which he was placed, and I do not think that, because he did not succeed in finding a way out to sea from among the shoals and breakers into which he had drifted, after the cable had parted, his owners are to be deprived of the just reward which the "Nanna" ought to pay for complete rescue from very great peril.

The learned judge has awarded a sum of $27,000 altogether, or about forty per cent. of the saved ship's value. Of this sum, $25,000 is awarded to the "Mystic," and its officers, and, after deducting the expense of repairs, and other damages, the sum of $8,022 is all that goes to the owners of the "Mystic" as compensation for the services rendered by their ship and crew, and for the loss of forty-five days' use of their ship and wages of crew while undergoing repairs.

I think that is a very fair sum to charge against the "Nanna" for her complete rescue from a position of very great danger, and the learned trial judge, having thought that sum a proper one to allow, I do not think we ought to reduce it.

In *The "Chetah"* (1), it was declared that the first and most important question in such cases is the danger of the vessel salved, and that the most important element in a claim for high salvage is the imminent danger of destruction of the salved vessel. That there was such imminent danger in this case from first to last cannot be denied.

It is evident that it is only in very plain cases of excess that an appellate court interferes with the salvage allowed by the trial judge, for, in the *"Chetah" Case* (1), in 1868, it is stated that was the first case in which the sum awarded was reduced.

In *The "City of Chester"* (2), Lindley L.J. enumerates the matters proper to be considered in salvage cases, and, at page 203, says:

> Another circumstance to be considered is the importance of so remunerating salvors as to make it worth their while to succour ships in distress. This consideration renders it necessay to be liberal, not only to captains and crews who perform the salvage services, but also to owners of vessels engaged in those services where such vessels have been injured or exposed to danger. The salving vessel is often herself exposed to imminent peril; the risk of loss or damage to her is often very great; and the damage actually done to her, and the loss actually sustained by her owner from delay in her voyage and otherwise, may be, and often is, very considerable. Hence, one element in determining the amount to be awarded for salvage services is the value of the salving ship and cargo which have been exposed to risk; and the nature and extent of the risk are other elements for consideration. Where the salving vessel is, as in the present case, a large and valuable steamer, exposed to great risk, the claims of her owner deserve very favourable attention.

In the present case the value of the "Mystic" was more than three times that of the "Nanna," and, having regard to the risk to which she was exposed, and the damage sustained, I think the award not excessive, and that a substantial value, over sixty per cent., is not an unfair surplus left to the salved vessel.

(1) L.R. 2 P.C. 205. (2) 9 P.D. 182.

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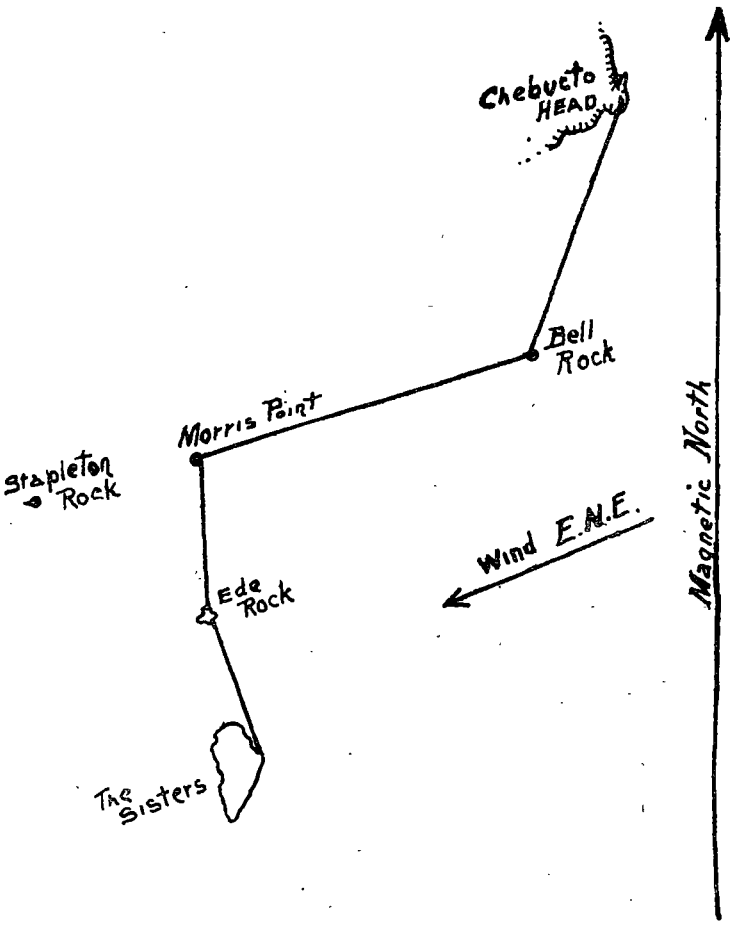
DUFF J.—This is an appeal from a salvage award; and the question principally argued—which is the question of substance to be decided—is whether the learned trial judge erred, in finding that certain injuries suffered by the "Mystic" (the salving ship), were caused by the necessities of the service, and so clearly erred as to justify a reversal of that finding; the damages attributable directly to these injuries as well as damages for the delay and loss of earnings consequent upon them having been reckoned as elements in the computation of the amount awarded ($25,000).

The appellant, "Nanna" (the salved ship), is a Norwegian steel ship of 1,125 tons gross tonnage; the SS. "Mystic," which is owned by the respondent company, is a steel vessel of 2,342 tons.

The "Nanna" had her propeller shaft broken on the 31st January, 1907, in a voyage from Halifax to New York—laden with deals. She was taken in tow, on Monday, the 4th February, at 10.40 o'clock a.m., by the "Mystic," then bound for Louisburg. When picked up the "Nanna" was about 20 miles S.W. of Seal Island, which lies fifteen or twenty miles off the extreme southwest coast of Nova Scotia. Nothing material to the question at issue happened until the following morning—Tuesday, 5th February —when the whistle at Chebucto Head, which marks the outer entrance to Halifax Harbour, was heard by the "Mystic." According to the bearings and soundings then taken, Chebucto Head would appear to have been about a mile and a half away.

The account of what followed will be more readily comprehended by referring to the accompanying sketch, which shews approximately the relative situ-

ations of the different localities that it will be necessary to mention as we proceed.



About the time Chebucto whistle was heard, the "Mystic" sighted Bell Rock buoy close at hand, and, as the wind from the E.N.E. was rising and snow was falling, she decided to put to sea in order to avoid risk of stranding. About this time the tow line broke and the "Nanna" was allowed to drift until a line was again passed to her. Shortly after this, breakers, which proved to be on Morris Point, were seen, and a

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course was then set S.E. by E. for the open sea. Breakers were again seen on the starboard bow, on Ede Rock or the Sisters, at 9.15. The "Mystic" then turned around with her tow under a starboard helm and, at 10.18 struck the shoal at Stapleton Rock, receiving the injuries referred to. Both ships then came to anchor at that place and safely rode out the gale which afterwards came on, the "Nanna" receiving hardly any damage. On the following morning, the weather having moderated, tugs came to their assistance and towed the "Nanna" to Halifax — the "Mystic" entering the harbour under her own steam.

There is, on the evidence, some conflict respecting the course steered by the "Mystic" after clearing the breakers seen at 9.15. The master of the "Nanna" says the course was north-west. Owen, the first officer of the "Mystic," and Schlieman, the third officer, say that the course was north and that this was maintained until Stapleton Rock was reached. The captain of the "Mystic" when first called, on both cross-examination and re-examination, agreed with this; being re-called, in rebuttal, he said that the course first taken was north, but that, after the tow had cleared the breakers this course was changed to a course north-east by north. The learned trial judge seems to have accepted the statement given by the first and third officers of the "Mystic" and by the captain when first called, and I think the weight of evidence is in favour of this view.

The contention on behalf of the appellant is that, in steering this course and maintaining it as he did for nearly an hour, the captain of the "Mystic" was guilty of a want of ordinary care or skill and that to his failure in this regard the injuries suffered by that ship are attributable. It is not suggested that the

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captain of the "Mystic" committed a fault in turning to the north when he first saw the breakers referred to; this course was prudent to take in order to make sure that the "Nanna" could clear the dangerous place. But the captain admits that the "Nanna" was clear in ten minutes from the time the breakers were seen; and the question is—whether or not the "Mystic's" course from that time can be justified.

The onus is, at the outset, on the appellant, and was so in the court below; *"Baku Standard"* (1); but I think that when the admitted facts are considered, they are, in themselves, of such cogency as to require an explanation of the conduct of the captain of the "Mystic." His own statement is that, having sighted a spar buoy at Morris Point, he believed it to be the Bell Rock buoy; and that, when he saw breakers the second time, he was at a loss to know where he was; and that the only thing he could do was to "take soundings and keep in good water." I do not think this can be accepted as a satisfactory explanation. He knew he was on the southeast coast of Nova Scotia, near the outer entrance to Halifax Harbour, that an hour and a half before he had been within a short distance, a mile and a half, he says, of Chebucto Head; the wind was east northeast; for nearly an hour he had been drifting; he could hardly suppose he had been drifting in an easterly direction, and, on any conceivable assumption as to his position, it must have been plain that north of him and west of him was the shore and that a northerly course maintained for even a short time must take him into exactly the kind of danger he was trying to avoid.

The skilled seamen who were called as experts all

(1) [1901] A.C. 549.

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say that in the circumstances his only prudent course after clearing the breakers was to proceed to sea, that is to say, on an easterly course. I cannot find in the evidence given on behalf of the respondents anything that appears to amount to a good reason why this course, seemingly so obvious, should have been looked upon as involving any special risk; or any plausible excuse for not taking it. I do not think it is sufficient or, indeed, any explanation to say the "Mystic" was "always keeping in good water"; to the eastward there was not only good water, but sea-room as well.

The standard which ought to be applied to the conduct of navigators engaged in a salvage operation is stated in the following passage quoted from the judgment of Dr. Lushington, in *The "Magdalen"* (1) at page 142:

> If it be such an error that men of skill and ability would say, from what had been done in attempting to render the salvage service, that, if they had had to undertake the operation, they would have considered it so doubtful as to the method of proceeding that either of two methods of proceeding might have been adopted, and that they would have tried one way, and that, if that had been unsuccessful, they would have adopted another, the court would not look upon that error in a severe light. But if there were measures pursued which were so grossly unskilful as to make it evident that ordinary skill and ability were wanting, that would be taken into consideration by the court.

I think the captain of the "Mystic" fell below this standard; and that the appellants have succeeded in making out that the injuries in question were due, not to the necessities of the service, but to the default of the "Mystic."

I am not overlooking the counsel that upon a doubtful question of navigation the court should, in trying a claim for salvage, incline to the lenient view;

(1) 31 L.J. Adm. 22.

nor am I leaving out of mind the danger that, in passing judgment after the event, one may not make full allowance for all the difficulties and embarrassments of a navigator in an emergency at sea. Giving her the full benefit of these considerations, I cannot escape the view that the course of the "Mystic" is not to be explained upon any hypothesis consistent with reasonably competent seamanship.

The learned trial judge has, as I have said, found the injuries suffered by the "Mystic" were due to the necessities of the service; and this finding was strongly pressed upon us as decisive. The particular question I have discussed is not touched upon by the learned trial judge; and it is, after all, a simple question of fact which, as with any other question of fact not involving the credit attributable to particular witnesses, we must examine for ourselves; and, if satisfied that the court below is wrong, we are bound to give effect to our own view. It being a question of seamanship, one is disposed once again to repeat what has been said so often—it is unfortunate that, while exercising the functions of a court of appeal in respect of such questions, we have not (unlike other courts the world over exercising the like functions), the benefit of skilled advice.

The respondents are, however, entitled to a substantial reward for their exertions. I do not accept Mr. Mellish's contention that the "Nanna" was left by the "Mystic" in a position more dangerous than that from which she was taken. The learned trial judge found that the "Mystic," notwithstanding her injuries, was still able and ready to tow the "Nanna" into Halifax on the morning of the sixth. The acceptance of the assistance of the tugs with the consent of all parties is not sufficient, I think, in these circum-

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stances, to disentitle the "Mystic" to be rewarded as for a successful and completed service, though the sums allotted to the tugs must be taken into consideration in determining the amount which should be paid to her.

The learned judge has found that the operation of getting a line aboard the "Nanna" after the parting of the hawser, through no fault of the "Mystic," was a difficult operation, was performed very creditably, and saved the "Nanna" from the probability of a total loss. I do not see any reason for disagreeing with this. On the whole, I think the award should be reduced to $12,500. The master's share should abate proportionately; but there should be no abatement of the sums allotted to the other officers and members of the crew.

Appeal allowed in part with costs.

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

Solicitor for the respondents: *H. C. Borden.*

THE DOMINION TEXTILE COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

L. CHARLES A. ANGERS (PLAINTIFF) ..... } RESPONDENT.

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*Nov. 4.
*Dec. 15.

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

Company—Sale of shares—Resolutive condition—Hypothecary security—Construction of contract—Rescission.

By the judgment appealed from (Q.R. 18 K.B. 63), affirming the judgment of the Superior Court (Q.R. 30 S.C. 56), it was held that the acceptance of a proposal to purchase shares in a joint stock company for a price payable half in bonds and half in the stock of a new company to be formed to take over the business of the first mentioned company, on condition that the shares so sold should be deposited in trust as security for the payment of the bonds and that, so soon as all the shares of that company were so deposited and its real estate transferred to the new company, a mortgage on the real estate should be executed to secure payment of the bonds, was a sale subject to a resolutive condition to become complete and effective only in the event of the new company acquiring the property of the first company and executing the mortgage, and that, on breach of the condition respecting the security to be given for payment of the bonds, the sale became ineffective and should be rescinded.

On an appeal to the Supreme Court of Canada, the judgment appealed from was affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of Archibald J. in the Superior Court, District of Montreal(2), maintaining the respondent's action with costs.

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

(1) Q.R. 18 K.B. 63. (2) Q.R. 30 S.C. 56.

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In December, 1904, the respondent was offered bonds and preferred stock of a projected joint stock company in exchange for fifty shares of stock held by him in the Dominion Cotton Mills Company. It was stipulated in the offer that the fifty shares would be held in trust by the Royal Trust Company as security for the payment of the bonds. The person who made the offer and his associates undertook that, so soon as all the shares of that company were so deposited in trust and its real estate transferred to the new company, a mortgage would be executed and registered by the new company against such real estate to secure the payment of the bonds to be so given in exchange, so that they should be secured, not only by the assets of the new company, but also by such real estate. In case of acceptance of the offer the respondent was asked to deposit the stock as proposed "in order to receive in exchange therefor the securities above mentioned so soon as the transaction can be given effect."

The respondent accepted the offer, agreed to make the exchange at any time within three months, and transferred his fifty shares to the Royal Trust Company. The appellants are the company which it was proposed to incorporate, as mentioned in the offer.

At the time of the institution of the action the shares of the Dominion Cotton Mills Company had not all been deposited and its real estate had not been transferred to the appellants.

On the 27th January, 1905, the Royal Trust Company wrote and sent to the respondent and other shareholders of the Dominion Cotton Mills Co. a letter in which it was stated that the buyers had turned over to the Royal Trust Company the shares of the Dominion Cotton Mills Company stock which had

been deposited, so that such shares would thereafter be held for the appellants, and that the appellants would continue the offer of exchange made on the 29th December, 1904. The respondent acquiesced in this substitution of the appellants for the persons by whom the offer was made, but it was understood that the fifty shares remained subject to the trust stated in the offer.

In January, 1905, the appellants enacted a by-law to provide for the issue of debentures, a proportion of which debentures were to be applied in exchange for the shares of the Dominion Cotton Co., which had been agreed to be exchanged. Bonds were accordingly issued and tendered to the shareholders of the old company, but those tendered to the respondent were refused by him, and the respondent brought the action for an order that the mortgage bonds and preferred stock should be delivered to him, within fifteen days; that, in default of such delivery, the sale of the fifty shares of stock should be set aside and the defendants condemned to re-transfer the shares to him, and that, in the event of the defendants neither delivering the bonds and preferred stock, nor retransferring the fifty shares, they should be condemned to pay him $5,000, the par value of said fifty shares, with interest from the 11th day of January, 1905.

At the trial the plaintiff's action was maintained, with costs, and that judgment was affirmed by the judgment from which the present appeal was asserted.

Aimé Geoffrion K.C. and *George H. Montgomery* for the appellants.

Béique K.C. for the respondent.

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THE CHIEF JUSTICE and GIROUARD J. were of opinion that the appeal should be dismissed with costs.

IDINGTON J.—Let us try to understand what those concerned were about and I do not think we will find much difficulty in finding the law suitable for their case.

I cannot read the proposal and the acceptance in question as a whole, as they ought to be read, if we wish to understand the questions raised, without coming to the conclusion that what the respondent intended to obtain was fifty cents on the dollar for his stock in the Dominion Cotton Mills Company by means of exchanging it for bonds of the appellants to the amount of $1,250, charged upon the property of the Dominion Cotton Mills Company, and preferred stock of the appellant company for the like amount.

Nor can I doubt, unless I impute a dishonest instead of an honest purpose to the appellants, that their intention coincided with that of the respondent and that he should have realized his expectations within a reasonable time, now long since expired.

The appellants got a delivery of the respondent's shares on the faith of such common intention and understanding, and I see no reason why, as a result thereof and of the appellants' failure to implement the bargain, they should not abide by such a judgment as that appealed from, which seems to fit the case.

The phrase "so soon as," of which much has been made, does not mean "never," or imply some years short of forever, as the appellants' contention might lead to if maintained.

It does not matter that by a long involved train of reasoning it may become, to the legal mind, clear that

if the law is honestly observed and remains unchanged the security the respondent has may, in effect, be as good as what he sought.

It is not what he bargained for. It is not as simple and easily understood as that. It is, hence, by no means as marketable.

The respondent may be ill-advised in claiming a return of his stock instead of trusting to the financial skill and benignity of the promoters of the appellants. Yet I cannot see how he has, by anything he did, adopted the latter course.

The appeal should be dismissed with costs.

MACLENNAN and DUFF JJ. concurred in the opinion of Idington J.

Appeal dismissed with costs.

Solicitors for the appellants: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Béique, Turgeon & Béique.*

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*Feb. 12.

J. A. FAULKNER (PLAINTIFF) .....APPELLANT;

AND

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Negligence—Drainage—Capacity of drain—Vis major.

F. brought action against the City of Ottawa claiming damages for the flooding of his premises by water backed up from the sewer with which his drain pipe was connected.

Held, Idington and Duff JJ. dissenting, that according to the evidence the sewer is capable of carrying off a fall of 1½ inches of water per hour, which is considered as meeting the requirements of good engineering and is the standard adopted by all the cities of Canada and the Northern States; the city, therefore, was not liable.

Held, also, that a fall of rain at the rate of 3 inches per hour for nine minutes was one which could not reasonably be expected and for which the city was not obliged to provide.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment at the trial in favour of the plaintiff and dismissing his action.

The appellant is a dry goods merchant, doing business at the corner of Clarence and Dalhousie Streets, in Ottawa. His premises are drained by a sewer running along Clarence Street from a point near Sussex Street, in an easterly direction, to King Street, or King Edward Avenue, a distance of four city blocks, when it connects with one of the main sewers of the city.

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

The Clarence Street sewer, as originally constructed, was for the two blocks nearer to King Street only. This sewer was constructed in or about the year 1885, and was in two sections, the one being of pipe 18 inches in diameter, and the other of pipe 15 inches in diameter. This sewer was of sufficient size to comply with the standard recognized by engineers at that date, when street sewers were not called upon to bear the heavier burdens placed upon them by the paving of street, the concreting of sidewalks, and other improvements now in vogue.

In or about the year 1891 a further sewer was constructed along Clarence Street, from a point near Sussex Street, and thence easterly for about two blocks, to a connection with the sewer already described. This was a 12-inch pipe, and it naturally brought down a large body of water to the lower sewer.

In the following years, up to and including 1903, a small part of Clarence Street, next Sussex Street, was paved with asphalt, and the old wooden sidewalks were replaced by concrete or granolithic sidewalks. A number of additional gullies were also constructed to conduct the surface water to the sewers in question. The result was that the surface waters were collected together and carried to the sewers in greater quantity and with greater rapidity, so that the sewer opposite the property of the appellant was required to accommodate a somewhat greater quantity of water and sewage material than had been contemplated by the original engineering plan. During the same period the corporation passed a by-law compelling, for the first time, all house drains to be connected with the street sewers, as well as all down spouts con-

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veying water from the roofs of the houses. Of these latter it was proved there were six in all, on Clarence Street, connected with the drain.

The trial judge found, that while that portion of the sewer opposite the premises of the appellant was, probably, sufficient for the territory intended to be served originally, the subsequent extension of it to Sussex Street, and the addition of many subsidiary drains leading into it, had completely overtaxed its capacity, so that when there was a heavy rainfall the contents of the sewer were backed up into adjoining cellars. He also found that, according to the weight of expert opinion, the capacity of the sewer was not more than two-thirds of what it should have been to accommodate the increased burden imposed by the acts of the respondents.

On the night of the 30th of June, or the morning of the 1st of July, 1903, the basement of the appellant's premises was flooded by backing up of sewage, and quantities of goods which he kept there were destroyed. There was also some slight flooding of the plaintiff's cellar on the 1st of August, and the 2nd of September, 1904, but the chief contest centered in the flooding of the 30th of June, 1903, when the greater part of the damage claimed was caused. The trial judge found that these floodings were the result of negligence of the respondent in so increasing the facilities for running-water and sewage into the sewer in question as to cause the backing up, which resulted in the damage to the appellant, and that while the rainfalls on the occasions in question were heavy, they were not so heavy or extraordinary as not to have been reasonably anticipated, and with ordinary prudence provided for by the respondent.

The Court of Appeal reversed these findings and dismissed the appellant's action.

G. F. Henderson K.C. for the appellant.

Shepley K.C. and *McVeity* for the respondent.

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

DAVIES J.—Owing to the great importance of the questions raised in this case as to the duty resting upon civic authorities in the provision made by them for the drainage of cities, and to the difference of opinion which has existed amongst the learned judges before whom the case has been argued in their appreciation of the evidence as to the facts proved, I have read all of the evidence most carefully and given the case much thought and consideration.

The result is to convince me that the judgment of the Court of Appeal is correct and that the appeal should be dismissed.

The action was brought by Faulkner, a storekeeper, whose shop fronted on the south side of Clarence Street in the City of Ottawa.

Clarence Street runs east and west and connects Sussex Street with King Edward Avenue.

One of the main sewers of the city runs along the avenue and the Clarence Street sewer discharged into this main sewer.

Clarence Street sewer does not connect with Sussex Street sewer, and is what was called a lesser or subsidiary sewer for the drainage of Clarence Street alone. There are 104 buildings on the street, but only

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nine down spouts from the houses, and of these six are directly or indirectly connected with the sewer. The roofs of most of the buildings face half towards the street, and half away from the street. In the opinion of the city engineer this was a very important factor resulting in only about fifty per cent. of the water falling on the houses reaching the sewer because the southerly roofs throw the water southerly, towards Murray Street, the general formation of the ground sloping towards that street, and the water naturally ran that way. There is a water shed there.

The Clarence Street drain was built in three parts and of three different sized pipes. The pipe next to King Edward Avenue and which discharged into the main drain there, was 18 inches in diameter. Next to that the pipe was 15 inches, and beyond that for a length of 700 feet was 12 inches. The total length of the drain was 2,200 feet. Faulkner's shop was opposite the 12-inch drain, about three or four hundred feet from Sussex Street.

The 18-inch and 15-inch drain was constructed in 1883 or 1885 and the 12-inch continuation in the year 1891. Some ten years afterwards (in the year 1901) 375 feet of Clarence Street next to Sussex Street by about 47 feet in width were paved with asphalt and granolithic sidewalks substituted for the old wooden ones.

There were complaints by Faulkner of three floodings, on the evening of 30th June, 1903, August 1st, 1904, and September 2nd, 1902. The two latter floodings caused comparatively little, if any, damage, and the substantial contest centered in that of 30th June, 1903, for which damages to the amount of $1,622 were claimed.

The contention on the part of the city was two-

fold; first that the Clarence Street drain was a local improvement constructed under the statute at the expense of the property owners whose lands bounded on Clarence Street, and that the city after complaint had been made to them of the flooding of certain cellars during an extraordinarily heavy rain storm had submitted to the ratepayers a proposition to take up the existing drain and relay it either with larger pipe or steeper grade (which the grade of the main sewer permitted) and that the ratepayers had voted the proposition down and refused to allow it to be carried out. It was submitted that under these circumstances the city was powerless to make the contemplated change at the expense of the general taxpayer, and that the residents or owners of land fronting on the street could not hold the city liable for negligence if by their own act they prohibited the change suggested.

The second ground of defence was that it was good engineering in the northern zone according to the considered opinions of engineers generally to construct drainage providing for a downfall of 1½ inches of rain per hour, and that this was the standard adopted by Ottawa and all the cities of Canada and the northern States, excluding Pennsylvania from that category; that while this Clarence Street drain was originally designed only to carry one inch it was mathematically capable of carrying off without any head 1¼ inches, and with a head of 18 inches of carrying off 1½ inches without damage to any one, and *as a fact demonstrated by numerous actual experiments* carried on by Mr. Ker, the city engineer, and his assistant, Mr. Parsons, did so safely and without damage to any one.

The learned trial judge, as I read his reasons and interpret them, was of the opinion that a rainfall at

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the rate of three inches per hour lasting continuously for 9 minutes, such as that which occurred on the evening when the damages were caused, was such a storm as "ought reasonably to have been anticipated and with ordinary prudence provided for by defendants." If he was right in that conclusion of course there was no defence to this action because Mr. Ker himself admitted that the sewage system of Ottawa, like other Canadian towns, was only designed to provide against a rainfall of 1½ inches, and that neither the general system nor the Clarence Street drain would carry off rain falling for nine minutes at the rate of three inches per hour, a downpour which he admitted would inevitably cause flooding all over the city.

The evidence of Mr. Found, the meteorological observer and keeper of the rainfalls at Ottawa, places it beyond doubt from the records shewn by his automatic machine, which, he stated, from its very construction and nature must be accurate, that while the rainfall was very heavy from 5 to 7.30 on the evening of the 30th June, 1903, from two minutes after five till eleven minutes after five, that is for nine minutes, the rain fell at the rate of three inches per hour.

I agree with the appeal court that no such duty rested upon the city as, if I interpret the judgment aright, was found by the trial judge, and that it was not negligence on its part to fail to provide against such an extraordinary and abnormal downpour as that which caused the damage.

I think that when there is such a general concensus of opinion amongst engineers as is shewn by the evidence that in the northern zone of America 1½ inches is the proper rate of fall to be provided against,

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a municipality discharges its duty when it makes efficient provision for such a rainfall.

In the view I take of the proper conclusions of fact to be drawn from the evidence I do not desire to be understood as expressing any opinion upon the very interesting and important question whether in case a city seeking to substitute an effective system of drainage, for a particular street or locality for a system which had become or was claimed to have become obsolete or ineffective from accident or other cause is prevented by the adverse vote of the ratepayers entitled to vote on the proposal submitted to them from carrying out its object under the local improvement clauses of the Municipal Act, it still remains liable to any of these ratepayers in case they sustain damages to their property from the inefficiency of the system they refuse to have so remedied.

It was contended that in such case the city is liable because the corporation have general powers outside of the local improvement clauses to which they in the cases suggested are bound to resort, and that it is no answer to say that a resort to these general powers would create a burden upon the civic ratepayers generally. The point was not argued fully by Mr. Shepley who, however, challenged the existence of these general powers in the circumstances mentioned, but who relied upon the facts as proved by Mr. Ker and his assistant with regard to the efficiency of the existing drain as sustaining the judgment of the appeal court.

If the questions of fact still remaining open and to be determined were to be determined on theory alone, that is, given such a street with a pipe of such a size or sizes and of such length and grade to drain the usual

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area supposed to be required to be drained apart from special physical conditions affecting the area, I should probably find great difficulty in deciding between the conflicting opinions of engineers equally qualified and having had equal opportunities of forming their opinions.

But that is not the case here. It is true that the eminent engineers called upon for the plaintiff express the opinion that the size of the pipe on Clarence Street, 12 inches, 15 inches, and 18 inches, all alike shew the drain to be inefficient for a downpour at the rate of $1\frac{1}{2}$ inches.

But they are very frank in admitting their conclusion to be a theoretical and general one which local conditions might materially modify, and they one and all admit that while they looked generally at the street they did not examine or study the local conditions with such care as would be necessary if they were themselves going to report upon or design a drain or system of drainage for that street. Mr. Lewis says that he "did not survey the ground, but looked at it simply," and he based his conclusion on the assumption that the 12-inch sewer would drain seven acres. Mr. Keefer said that he thought if the city

provided for an inch and a half rainfall an hour they would be doing well.

He said that

he had made a careful calculation, examined the tracings of the plans to ascertain the grade and then "took the drainage area."

He says

of course there might be difference between engineers as to the exact limits of the drainage area that would be tributary to this sewer *but I took it as it is very often taken that is the centre of the block on each side of Clarence Street* that would be about 266 feet,

that would be the strip that would form the drainage area for this sewer, that would be the width of it; and the length of it I did not take down to King Street, say about 2,000 feet from Sussex down to within 250 feet of King Street which would be drained probably by this sewer.

This he said he made 12 acres

then for the discharge I took the different sections of the sewer by the usual formula.

Now I have given in his own words the data on which Mr. Keefer based his conclusions and the methods (the usual formula) by which he worked them out; not with the object of in any way discrediting him, but of shewing that his opinion was a theoretical one only and should not be preferred to the judgment of equally competent engineers formed upon actual survey of the existing area and based upon actual facts. As Mr. Keefer himself says in his examination "all depends on the physical condition of the area."

The competence of Mr. Ker, an engineer of very great experience, especially in drainage and municipal engineering, was frankly admitted at the argument by Mr. Henderson. Both he and Mr. Parsons, C.E., his assistant, made actual tests of the capacity of the Clarence Street drain under the existing conditions alike with regard to the asphalt pavement at the west end of Clarence Street, and also to the downspouts from the houses and the closet connections. He explains in the first place that *Faulkner's cellar floor was two and a half feet above or higher than the street sewer*. This was a vitally important matter and so far as the evidence goes (if known to the engineers called by the plaintiff which does not appear) does not enter into their calculations at all. Both Ker and Parsons base their conclusions largely upon that fact.

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Again and again in his main examination, his cross-examination and in reply to questions put to him by the trial judge Mr. Ker explains (and Parsons is equally positive on the point) that *when under a slight head* the drain was fully equal to carry off 1½ inches without damage to any one. He says (in answer to a question as to the capacity of the entire sewer from Sussex Street):

As I said before that it will carry an inch and a quarter almost inch and a half,

this, as he explains is "when running free and without any head." Then he goes on,

Take an inch and a half it will run under the lower section eighteen inches a foot and a half head; fifteen inches eleven inches head; the twelve inch pipe at Faulkner's would be running free. His Lordship.—"No head?" A.—No, that is to make myself plain on this sewer there are man holes in the centre of the street and the water will back up in these man holes the same as if you have a water tap in a water works system a foot and a half until it gets sufficient pressure to clear itself it will run under a foot and a half head on the eighteen eleven inches on the fifteen and nothing on the twelve.

And he again repeats in answer to a question from the Bench whether it will carry away a rainfall of an inch and a half an hour that it will do so and

according to the calculations and gauges and experience in a rainfall *it has done that.*

Then after explaining about Faulkner's cellar being above the sewer 2½ feet he states *there is absolutely no danger of flooding under an inch and a half storm.* He also explains to the judge "the length of the storm makes no difference, it may last an hour, two hours or three hours." Mr. Ker then explains that "the general formation of the ground slopes towards Murray Street," in other words, does not run up hill.

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Now these two important and controlling facts, namely, the fact that the Clarence Street drain was two feet six inches below the floor of Faulkner's cellar; and the fact that all rain water carried from the southerly slopes of the roofs of the houses fronting on the south side of Clarence Street ran not into the main drain, but away south to Murray Street were not known to or at any rate did not enter into the calculation of the engineers Lewis, Keefer and McDougall. Ker's conclusions were not theoretical, but his and Parsons' were mathematical conclusions based as they say upon the size of the drain, and the actual existing local conditions agreed *with the actual tests they made in the man holes of the drain during the storms.* In other words, the practical tests absolutely proved the correctness of their mathematical calculations.

Mr. Ker frankly admits that when it rained at the rate of three inches, as it did on the date of the flooding which caused the damage, or if it rained at any greater rate than 1½ inches the drains were not sufficient and flooding would occur. But unless we are to refuse to accept the sworn statements of himself and his assistant engineer as to the actual tests and observations made by them when the storms were on, there was not and there could not be any flooding of Faulkner's cellar unless one of two things occurred, an artificial obstruction getting into the drain as it once did before according to the evidence of the former city engineer, Edward Perrault, or an extraordinary downfall of rain exceeding that which in this northern zone the concensus of civil engineering opinion says it is reasonable and proper to provide against, 1½ inches per hour. The tests if made as sworn to

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would seem to be conclusive as to the capacity of the drain.

The conclusion I have reached is that there is really no absolute conflict between the engineers; "everything depends upon the actual physical conditions," says Mr. Keefer. Neither he nor Mr. Lewis surveyed or examined closely the physical conditions of the area south or north of Clarence Street—"they just looked at it." They did not know, therefore, that the land sloped from Clarence Street to Murray Street and that all the water flowing from the southerly roofs of the houses facing on the south side of Clarence Street, ran, not into the drain, but away towards Murray Street. Neither do they appear to have known that the drain was two and a half feet lower than the floor of Faulkner's cellar, thus allowing nearly that head of water before any flooding could take place. And yet these are the two facts which controlled very largely Mr. Ker's opinion as to the capacity of the drain, an opinion which repeated practical tests only served to confirm.

Holding, therefore, as I do, that the existing drain conforms so far as its practical capacity is concerned to the standard exacted by the highest engineering skill with respect to this northern part of the continent and that it is capable under existing condition of receiving and carrying off without damage any rainfall up to and including one of an inch and a half per hour and does actually carry off such rainfall I am of opinion that the appeal should be dismissed.

Since writing the foregoing opinion, concurred in by my brethren Girouard and Maclennan JJ., I have had the opportunity of reading the dissenting opinion

of my brother Duff. To obviate possible misconceptions I desire to add a word to what I have already written with reference to the decision of the majority of this court on the crucial question of the capacity of the sewer to carry off the water and sewage discharged into it during a rainfall of 1½ inches per hour. That decision is to the effect that the sewer in question did satisfy this requirement. My learned colleague is of the opinion that the majority of the Court of Appeal had found with the trial judge to the contrary. I do not so understand their findings. The trial judge did, of course, but not the Court of Appeal. On the contrary, their findings and those of the majority of this court fully agree on the point stated, and it was because of such agreement and because we also agreed with them as to abnormal downpour of rain on the occasion when the plaintiff's goods were damaged that we dismissed the appeal.

IDINGTON J. (dissenting).—The appellant's cellar on three different occasions within about fourteen months was flooded with sewage that came into it from a sewer with which he was bound by the city by-laws as well as the needs of his premises to form a connection.

Mr. Justice Teetzel, the learned trial judge, found as fact that this was caused by the city after its construction of the sewer having so constructed the neighbouring streets by means of new cement sidewalks and asphalt pavement as to pour into this sewer a greater volume of water and filth than the sewer's limited capacity would serve to carry away. He therefore adjudged the city liable and assessed the plaintiff's damages at $1,700.

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From this judgment the city appealed to the Court of Appeal for Ontario, and by a majority that court reversed this judgment and dismissed the action. Hence this appeal, which I think should be allowed.

The action rests on the palpable negligence of the city.

The sewer in question was constructed under and by virtue of two separate applications of the local improvement sections of the "Municipal Act."

In the view adopted by the learned trial judge and in which I agree it is quite unnecessary to determine whether or not either piece of work constituting this sewer was of the capacity required for the purposes intended.

It may have served the immediate purposes of its construction in the condition of things years ago, but before the city took the liberty of afterwards increasing, as it did, the volume of water poured into it within a given space of time, it was in duty bound in law (as I conceive it) and in accordance with elementary principles of justice and common sense to see that the turning in of such increased volume of water would not have the effect of thereby pouring filth into the cellars known to be rightly connected with and served by this sewer. It is not pretended this was done. It is not denied that this increased burthen alone unprovided for is sufficient to have produced the results in question.

The following passages from the evidence of the city engineer explain this clearly, and as he put it this is the key to the whole:

> Mr. Henderson.—Can we not put it in any way like this; that the sewer as originally built was not designed to accommodate these changed conditions? A.—Yes, you are right there.
>
> * * * * * * *

Q.—Take question 142, where you say it was only in the last four or five years that this thing had occurred. 143. "Then how do you account for it? What made the change?" A. "The place is built up more, and people like Mr. Faulkner have downspouts connected, and the water that used to run away and soak in the yard now finds its way to the sewers, and that has changed the conditions."

* * * * * * *

Q.—The construction of the asphalt pavement on Clarence Street —what additional burden would that impose on the sewer? Any appreciable addition or burden? A.—It would result in draining a larger percentage of water more quickly into that section.

Q.—Would it be appreciable? A.—Yes, it would.

Q.—To what extent?

His Lordship.—Before, with the ordinary macadam, what proportion of water would get in? A.—About a third.

Q.—And on the pavement about what? A.—About 75 per cent., and the appreciable difference would be as to the ratio between the paved portion and the unpaved portion: that is the ratio that that paved area would bear to 11 acres.

* * * * * * *

Mr. Henderson.—The whole difficulty is caused by the paving and these manholes? A.—That is the key note.

Q.—So that these recent changes are the cause of the whole trouble? A.—Yes.

Why in the face of so simple a case we are troubled in appeal with a mass of law and fact that departs from the simple lines of the learned trial judge's findings and needs no consideration to determine the real issue I cannot understand.

Of course I understand those concerned may at the trial have partly, as foundation for their claim, before the evidence of the engineer cleared the issue, and partly with an eye to the ulterior use of such an exhibition of the law and the fact have justification for this wandering afield. At present it only serves to becloud the real issue.

Then as to the unexpected storm feature of the defence the recurrence on at least the three occasions in question within so brief a period of the like results sweeps away the excuses sought in unexpected storms.

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And this is also shewn by a mass of evidence proving that in other years and almost yearly for some few years the flooding occurred though not attended with such serious results as on one of the three occasions directly in question herein.

Each furnished causes of action, and all that ever should have resulted from giving heed to the wonderful three-inch storm of nine minutes, of which so much has been made, was a diminution of the damages which is not now sought, nor at this stage could be listened to.

Sewers, drains and water courses are not merely for service in fair weather, but in rainy weather also, to that degree which long experience and observation will enable those concerned to know was likely to happen.

It is the duty of those having in charge the execution of such works to make the necessary observations, acquire the necessary knowledge that experience has brought those dwelling in or near to the locality which is to be served. Failure in that regard is negligence. It is not necessary to determine here the limit of range of time over which such an inquiry should be had.

An attempt by experiments later on after disasters resulting from improvidence or neglect in this regard have occurred to lay some sort of foundation for theory more or less plausible as an excuse is a poor substitute for the forethought that the occasion called for.

The argument that the construction of the streets in question had been done as the sewer itself under the local improvement clauses above referred to, and hence the city had no responsibility or means of recti-

fying a gross wrong, is absolutely without any foundation.

These street constructions being later in date than the sewer plaintiff uses ought not to have been entered on at all in such a way as to interfere with any prior existing right. The city council is not a mere machine but is in duty bound to exercise every care that a private owner would or should. Indeed, it has the right without giving any reason to refrain from executing any such work.

And on the other hand if through great need of the work the cost of a relief sewer or storm sewer were justifiable it could have been so made as to form part of the cost of the street formation.

Many times and for various reasons the storm waters have to be taken care of without resorting to the sewer proper.

Again, when through miscalculation, error or otherwise a local work has not fulfilled expectations and served the purpose, the city is in duty bound to rectify, at the expense of the city, its own mistakes.

The law is not so lame as to render this impossible.

I would like to see the man bold enough to apply to the court to restrain the city council from expending money to rectify such wrongs done and resulting from error in utterly unjustifiable destruction of property, health and comfort.

Some corporations have been willing to spend the money in litigation that costs as much as or more than some simple device to remedy the evil.

I think the trial judge's judgment should be restored with costs of the appeal to the appellant.

MACLENNAN J.—I agree with Mr. Justice Davies.

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DUFF J. (dissenting).—The appellant, who was the plaintiff in an action, is the tenant of premises on Clarence Street, Ottawa, which he uses as a dry goods shop. On three different occasions in the years 1903 and 1904, within a period of less than two years, his cellar was flooded by a discharge from a sewer constructed and maintained by the respondent, the City of Ottawa, and he thereby suffered damages to the extent — as found by the learned trial judge — of $1,700. At the trial, judgment was given against the municipality for this sum. The Court of Appeal by a majority of three to two reversed the judgment of the trial judge and hence this appeal.

The appeal raises two distinct questions. One question is whether or not, assuming the respondents to be answerable to the appellant for the absence of care in the construction of the works of which the injury suffered by him was admittedly the consequence, this injury was in fact the result of any such want of care. The other question is the question of law, whether or not under the "Ontario Municipal Act" the respondent municipality was, in point of law, under any duty to the appellant in the construction of the works, making it so answerable.

In considering the first question it is to be observed that upon some important points the facts are hardly matter of dispute. The sewer in question, which was constructed partly in the years 1885 and 1886 and completed in 1891, was designed to dispose of storm water in addition to sewage matter proper. It is not disputed that for many years before the commencement of the action the appellant's cellar had, with more or less regularity, at least once a year, been invaded by an offensive liquid discharged from

this sewer. It is clearly proved that his neighbours suffered in the same way, though not quite to the same extent. It is not open to question either that the facts were known through the complaints of the sufferers and the reports of the municipal inspectors at the office of the city engineer. It is also admitted that in these circumstances changes were made by the municipality in the condition of the area tributary to the sewer in the construction of new pavements which, coupled with a large increase in a number of catch basins connecting the surface of the street with the sewer, had the affect of greatly augmenting the volume of storm water discharged into it in any given storm.

These facts would seem in themselves to require some explanation from the respondent municipality when resisting a claim based on the occurrences mentioned at the outset. Sewers, designed with a sufficient capacity to carry the burden cast upon them, and at the same time properly constructed, do not periodically discharge their contents into the premises which as sewers they are intended to serve. *Primâ facie*—treating the question at issue as a question of negligence purely—the facts I have just stated would appear to put the municipality on its defence.

But before a municipality can raise the question of non-liability to a person on whose land their drains discharge water that would not otherwise be there discharged, they must at least shew that they have done their work without negligence; and that due care was used to discharge what they say was their statuteable duty in the drainage and management of this highway. *DeRinzy* v. *City of Ottawa* (1), at p. 716.

The defence is two-fold: First, it is said that the sewer was constructed in accordance with the re-

(1) 15 Ont. App. R. 712.

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quirements of good engineering, having regard to the conditions existing at the time of the occurrence upon which the appellant's claim is based; that is to say, given the pavements and openings which, as I have mentioned, so largely added to the original burden of the sewer, it is contended that the sewer, at the time the various causes of complaint arose, was nevertheless adequate, according to the standard set by approved engineering practice, to cope with the additional demands arising from the altered conditions. The second defence is that every one of the three floodings, for the consequences of which the appellant seeks to make the municipality responsible, was due to a rainfall of such excessive intensity that the municipality could not reasonably be expected to anticipate it, and consequently cannot be held answerable as being negligent in not providing for it.

The first of these defences rests upon a certain rule touching the capacity of sewers intended to dispose of storm water as well as of sewage which admittedly is accepted by engineers as a working rule governing the construction of works of that character within a zone known as the northern zone, in which Ottawa is situated. This rule requires that such sewers when designed for places where street paving is extensively used shall be of sufficient capacity to dispose safely of the surface water collected and discharged into them during a rainfall having an intensity of $1\frac{1}{2}$ inches per hour continued indefinitely.

The principal contention on behalf of the respondent municipality was that the sewer in question satisfied this requirement. The learned trial judge found that it did not. A majority of the members of the Court of Appeal seem to me to have found that it did

not. There was at the trial conflicting evidence on the point. It should, perhaps, in these circumstances, be sufficient to say that it is not in accordance with the practice of this court to set aside a finding of fact in which both the trial judge who saw the witnesses and the majority of the first Court of Appeal have concurred; and I should leave the matter there were it not that the majority of this court do not agree with my interpretation of the reasons given by the Chief Justice of Ontario; and in these circumstances I have thought it better to state the result of my own independent examination of the evidence, which examination has led me to the same conclusion, upon this point, as that reached by the other courts.

* * * * * *

(The learned judge after an examination of the evidence in detail concluded that, on this point, it fully confirms the opinion of the learned trial judge.)

* * * * * *

As regards the second defence, that is a defence in which the onus is on the respondents. To establish it the respondents must prove that on each of the three occasions in question the storm was one which in Ottawa, to borrow language used by Lord Chelmsford in delivering judgment of the Privy Council in *Great Western Railway Co.* v. *Braid*(1) would not "be expected to occur." Has this been shewn? The professional witnesses called by the appellant said that in many places within the zone to which the standard above mentioned is applied the most severe of the three storms—there being an exact record of the rainfall on that occasion—would be regarded as

(1) 1 Moo. P.C. (N.S.) 101.

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an ordinary storm; and that the rule was designed to provide for and does provide for such a storm. On what ground is that evidence to be rejected? Mr. Ker hardly disputes the first statement that such storms frequently occur on the southern part of the zone. He can only escape the natural inference from that by taking refuge in the trying position already mentioned that the rule is not designed to protect people along the route of the sewer from periodical overflows —once a year or so.

Moreover, it seems difficult, in view of the admitted facts, to regard the contention seriously. These three storms occurred within the space of fourteen months, yet every one of them is said to be a storm which could not reasonably be expected in Ottawa. Still another of this class of storms is added to the list, in 1905, more violent even than the three earlier ones, making four of these unforeseeable deluges within two years. Earlier than 1903, unfortunately for the appellant, the records are silent. Can it really be argued that in face of all these facts the respondent municipality has acquitted itself of the onus upon it to shew that each of these storms was of such a character as reasonably careful persons establishing a means for the disposal of storm water would not provide for? The true answer, I think, is to be found in Mr. Ker's repeated excuse, "it is a matter of expense."

There remain the arguments that what the municipality did was done under its statutory powers and that the appellant's remedy (if any) is under the compensation clauses of the "Municipal Act" and a further argument based upon the local improvement clauses of that Act.

The first of these contentions must stand or fall upon the construction of the statute. The general rule of law is clear. If the thing complained of, although an act which would otherwise be actionable, be authorized by statute then no action will lie in respect of it; that is to say, if it be the very thing the legislature has authorized. Because, of course, no court can treat as *injuria* that which the legislature has sanctioned. Examples of the rigid application of the principle will be found in *Williams* v. *Corporation of Raleigh*(1), and in *East Freemantle Corporation* v. *Annois*(2). The principle is equally applicable to persons and bodies acting under legislative authority for their own profit and to public bodies exercising powers conferred upon them for the public benefit. In both cases where the authority is in general terms merely it may be inferred from the general scope and provisions of the statute that the powers conferred are not to be exercised to the prejudice of private rights. This was the view taken of the statute under consideration by the House of Lords in the *Metropolitan Asylum District* v. *Hill*(3), and of that construed by the Privy Council in *Canadian Pacific Railway Co.* v. *Parke*(4). It is, nevertheless, entirely a question of the true meaning of the statute. In *Westminster Corporation* v. *London & North Western Railway Co.*(5), Lord Halsbury said:

> Assuming the thing done to be within the discretion of the local authority no court has power to interfere with the mode in which it has exercised it. When the legislature has confided the power to a particular body with a discretion how it is to be used it is beyond the power of any court to contest that discretion. Of course this

(1) [1893] A.C. 540.
(2) [1902] A.C. 213.
(3) 6 App. Cas. 193.
(4) [1899] A.C. 535.
(5) [1905] A.C. 426.

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assumes that the thing done is the thing which the legislature has authorized.

This, however, must be read subject to two important observations, that is to say, that in the absence of some provision (either express or clearly implied) to the contrary it must be taken that in carrying out works authorized by a statute or in exercising powers conferred by a statute you are not to act negligently and you are to act reasonably, that is to say, you are to prosecute the work or you are to exercise the power, as the case may be, in such a manner as not to do unnecessary injury to others. Lord Macnaghten, at p. 430, said:

> It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second if not in the first.

It is not necessary for the purposes of this case to decide the question whether the rule applied in *Canadian Pacific Railway Co.* v. *Parke*(1), and in *Metropolitan Asylum District* v. *Hill*(2) is applicable to the conduct of a municipality constructing, under the authority conferred by the "Ontario Municipal Act," a work such as that which has given rise to the present litigation. Upon that point conflicting opinions would appear to have been expressed at different times in Ontario courts. Compare, for example, the judgment of Street J. in *Weber* v. *Town of Berlin*(3) with the judgments of the Court of Appeal in *Garfield* v. *City of Toronto*(4), and the judgment of Hagarty C.J. in

(1) [1899] A.C. 535.
(2) 6 App. Cas. 193.
(3) 8 Ont. L.R. 302, at p. 305.
(4) 22 Ont. App. R. 128.

Derinzy v. *City of Ottawa*(1). The point has not been argued, and I express no opinion upon it, but only observe in passing that, reading the statute as it now stands, the legislature would appear to have anticipated that works constructed by a municipality under the powers conferred by the statute might affect injuriously the property of private individuals; and in some cases to have made provision for compensation in respect of such injuries.

On the other hand, it has been held in a long line of authorities, beginning with *Brown* v. *Municipal Council of Sarnia*(2), the statute does not protect the municipality from responsibility in an action for damages caused by the negligent construction of works of a kind authorized by the statute; I think these authorities have been well decided; but, even if I doubted that, it would be a grave question whether it is not now too late to depart from the rule established by them.

In this case the corporation by reason of making and maintaining an excessive number of conduits leading to the sewer passing appellant's property periodically conducts into his neighbourhood quantities of water and liquid filth for which they have provided no proper means of escape except into the premises abutting upon the street. This cannot be said to be the result of any mere error of judgment; but on the contrary was a consequence of what the municipality did, if not actually foreseen at least foreseeable by the most ordinary forethought.

That does not seem to me to be a reasonable exercise of the powers vested in the municipality in re-

(1) 15 Ont. App. R. 712. (2) 11 U.C.Q.B. 87.

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spect of the control of streets or of the control of sewers.

The last point arises upon the contention that the municipality is not liable because it has no funds which can properly be applied to remedy the mischief. This point with great respect seems to me to beg the question. If the mischief is the result of an actionable wrong it is hardly conceivable that means are not within the power of the council to remedy it. I do not, however, enlarge upon the question, but agree with the view expressed by my brother Idington upon it.

The appeal should be allowed and the judgment of the trial judge restored.

Appeal dismissed with costs.

Solicitors for the appellant: *McCracken, Henderson, McDougall & Greene.*

Solicitor for the respondent: *Taylor McVeity.*

ANNIE BARRETT THOMPSON (DEFENDANT) ..... APPELLANT;

AND

ARTHUR SIMARD (PLAINTIFF) ..... RESPONDENT.

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*Oct. 29, 30.
*Nov. 10.

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

Servitude—Construction of deed—Purchase of dominant and servient tenements—Unity of ownership—Extinction of servitude—Revival by sale of dominant tenement—Effect of sheriff's sale—Purgation of apparent servitude—Reference to former deed creating charge—Lost deed—Evidence.

By the judgment appealed from (Q.R. 18 K.B. 24), reversing the judgment of the Superior Court (Q.R. 32 S.C. 289), it was held that (1) Where the purchaser of two parcels of land upon one of which there existed a servitude for the benefit of the other, that was extinguished by the unity of ownership thus restored, executes a deed of sale of the former, subject to the servitude as constituted by the original title deed to which it made reference, such deed of sale in turn becomes a title which revives the servitude; (2) The situation of a servitude giving a right of passage, which has not been defined in the title by which it was created, is sufficiently determined by the description given of its position, accompanied by a plan, in a deed of compromise between the owners of the two parcels of land submitting their differences in regard to the servitude to the decision of an arbitrator; (3) Both before and since the promulgation of the Civil Code, apparent servitudes are not purged by adjudication on a sale by the sheriff under a writ of execution.

On appeal to the Supreme Court of Canada the judgment appealed from was affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), which reversed the judgment of the Superior Court, District of Quebec(2), and maintained the plaintiff's action with costs.

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

(1) Q.R. 18 K.B. 24. (2) Q.R. 32 S.C. 289.

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The circumstances of the case are stated in the judgment of Mr. Justice Girouard, now reported.

J. N. Belleau K.C. and *G. G. Stuart K.C.* for the appellant.

C. E. Dorion K.C. for the respondent.

THE CHIEF JUSTICE.—I am of opinion that the judgment of the Court of King's Bench ought to be affirmed and this appeal dismissed with costs for the reasons given by Mr. Justice Cimon in that court.

GIROUARD J.—Cet appel soulève d'intéressantes questions de servitude de passage différemment jugées par les tribunaux inférieurs; d'abord par la cour supérieure du District de Québec en faveur de l'appelante et ensuite par la cour d'appel en faveur de l'intimé. Nous avons les notes des juges des deux cours, très élaborées et contenant un résumé complet des faits de la cause et des questions de droit qui furent soulevées devant eux. Tous les juges admettent que le 10 juin, 1817, il a été passé un acte entre Joseph Lépine et John Boyd établissant une servitude entre deux lots de ville contigus sur la rue d'Auteuil, en la cité de Québec, savoir une servitude de passage sur le lot maintenant connu sous le no. 2686 comme fonds servant au profit du lot 2685 comme fonds dominant. L'acte qui contient cette servitude a été passé devant notaire; mais la minute en est disparue et il n'existe, paraît-il, aucune copie. Dans presque tous les actes de mutation qui suivent, et ils sont nombreux, référence est faite à cet acte de la manière la plus formelle, mais d'une manière générale, à peu près dans les

termes suivants, que je reproduis; d'abord l'acte de vente du dit Lépine et de son épouse à John Phillips du lot 2685 à la date du 8 novembre, 1830:

Avec en outre tous les droits généralement quelconques que les dits vendeurs peuvent avoir et prétendre, leur résultant de l'acte d'accord et conventions fait entre eux et le dit sieur John Boyd, passé devant Mtre. Bélanger, notaire, en date du dix juin, mil huit cent dix-sept, et auquel le dit acquéreur sera tenu de se conformer strictement.

Puis l'acte de vente de Charles Smith, junior, qui a acquis le lot 2686, à la date du 21 janvier, 1840:

And also subject to all and singular the charges, clauses and conditions mentioned and expressed in a certain deed made between the said Joseph Lépine and John Boyd, passed before Jean Bélanger and colleague, notaries, the tenth of June, one thousand eight hundred and seventeen, respecting the common passage existing between the said lot of ground hereby sold and the one remaining to the said John Phillips, to which deed the said Ann Sprowles, her heirs and assigns, shall conform in every respect.

Enfin l'acte de vente du même lot du 10 mars, 1842, par Mme. Sprowles à Wm. Booth:

subject also by the said purchaser to the observance of all conditions and obligations of a certain deed of agreement entered into between the said Joseph Lépine and John Boyd, passed before Mtre. J. Bélanger and colleague, notaries, at Quebec on the tenth day of June, one thousand eight hundred and seventeen, and which related to the common wall and passage between the property hereby sold and that of the said John Phillips adjoining thereto.

Le savant juge qui a rendu le jugement de la cour de première instance a été d'opinion que ces reconnaissances étaient trop vagues et ne rencontraient pas les exigences des articles 545, 549, 550, 551 et 1213 du code civil de Québec. En supposant que ce dernier article s'applique, la doctrine contraire semble prévaloir; Baudry-Lacantinerie, Dr. C. t. 5, n. 1095, p. 3; Gilbert sur Sirey, C.C. art. 695, n. 2; il n'exige pas que toutes les particularités d'une servitude soient par

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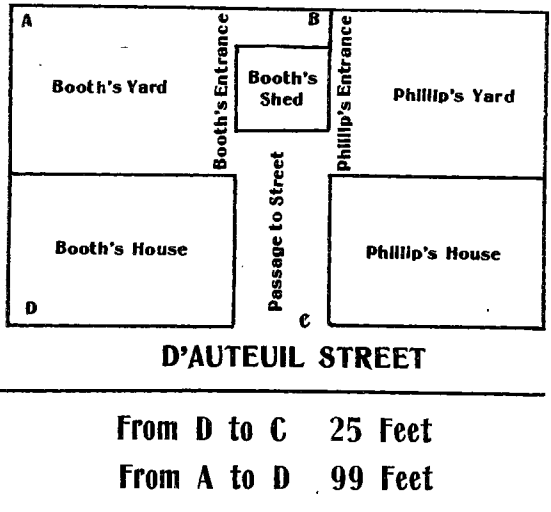
écrit; il suffit que la substance du titre primordial soit donnée, ce qui pourra être prouvé par un commencement de preuve par écrit, d'autres documents, la possession immémoriale et la preuve orale. Presque toutes les reconnaissances de la servitude portent que c'est un droit de passage sur un des lots au profit de l'autre, situés sur la rue d'Auteuil; voilà la substance: le doute n'est pas possible là-dessus: par conséquent la nature et la situation de la servitude sont spécifiées dans ces reconnaissances. Reste l'étendue qui ne l'est pas: mais ne l'est-elle pas, et particulièrement la situation, au plan et au compromis signés par Julia Healy et H. J. Noad, propriétaires respectifs des deux lots à la date du 29 novembre, 1852, le propriétaire du lot servant prétendant que l'ayant acheté au shérif il était libre de la servitude, le propriétaire du lot dominant soutenant au contraire qu'étant une servitude apparente par la porte de sortie de la cour de Phillips au passage et à la rue d'Auteuil et *vice versâ,* visible sur le plan et les lieux, elle n'était pas purgée par le décret. C'est le seul point qui fut soumis à M. Black, un éminent conseil de la reine, qui devint plus tard juge à l'amirauté à Québec. M. Black décida en faveur de la servitude et le principe qu'il a adopté a depuis été consacré par notre Code de Procédure Civile, art. 780 et 781.

Cette opinion de M. Black n'est d'aucune importance dans cette cause et il importe peu de savoir si elle a été signifiée aux parties au désir du compromis, bien que sa production par le demandeur fasse présumer qu'elle le fut. Quand bien même cette opinion n'existerait pas, le résultat serait le même. Nous trouverons toujours dans l'acte de compromis et le plan qui y est tracé le reconnaissance complète de l'existence de la servitude. On lit dans le compromis:

The proprietor, Mrs. Healey, of the lot on the south side, viz., Phillips's lot, now pretends and claims the right of passage and asserts that this right of passage, being a servitude visible, it was not incumbent upon her to oppose by an *opposition à fin de charge* in order to preserve her right; whereas Mr. Noad, the present owner, pretends that the lot of ground purchased by him has been purged of the said servitude by the sale thereof to him by the sheriff, in virtue of the process issued in that behalf, and that the said servitude is not a servitude visible, as it exists in the user of it.

The foregoing case we submit for your consideration and request your opinion on the following subjects: 1st, whether the said servitude is one known as a servitude visible; 2ndly, whether such servitude has been lost to the proprietor hereof by failing to fyle an opposition to conserve such servitude; and 3rdly, whether the lot purchased at sheriff's sale without notice of such servitude is purged of and freed from the said right of passage by such sale.

Voici le plan du passage tracé dans le même document:



Quant à l'étendue il n'est pas nécessaire qu'elle soit décrite par le nombre de pieds de largeur et de profondeur ou hauteur.

Le passage aura l'étendue dont il est capable tel que délimité au plan.

La cour d'appel a jugé que tous ces documents

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établissaient la servitude en question conformément au code, qui seul fut invoqué par les parties, et nous croyons qu'elle a eu raison. La savante analyse que M. le juge Cimon a faite de la cause me dispense de plus de commentaires sur ce premier point. J'ajouterai quelques remarques sur le droit qui nous régit en cette matière qui formeront le deuxième point de la cause, car je crois que cette cause doit être décidée d'après le droit antérieur au code, à l'exception des lois d'enregistrement.

Notre code reproduit avec quelques variations la coutume de Paris aux articles 186, 215 et 216, semblables aux articles 225, 227 et 228 de la coutume d'Orléans. Il faut bien remarquer qu'aux dates de la passation de tous les actes en question c'était la coutume de Paris qui déterminait les droits des parties et le code ne peut reçevoir d'application qu'en autant qu'il exprime l'ancien droit. Or, il existe une grande différence entre l'article 216 de la coutume et l'article 551 du code. La coutume n'exige pas ici que la destination du père de famille soit par écrit, c'est-à-dire que l'écrit soit produit, mais seulement qu'il a été par écrit; voilà tout et si l'écrit était perdu la preuve pouvait s'en faire, comme dans les cas ordinaires. Ici nous avons la preuve écrite émanant de plusieurs auteurs de l'appelante que l'écrit a existé. Ce qui nous intéresse le plus, c'est que la coutume n'exige pas, comme le code, que "la nature, l'étendue et la situation" soient spécifiées. L'article 216 dit:

> Destination du père de famille vaut titre, quand elle est ou a esté par écrit et non autrement.

Le droit romain contient plusieurs lois sur la destination du père de famille que les auteurs ont interprétées de différentes manières. Pothier, "Pandectes de

Justinien," t. 4, p. 267, n. XXII., et Toullier, t. 3, n. 612, sont d'opinion que ces lois exigent que la servitude soit "nommément réservée," tandis que Gilbert sur Sirey et Dard, code civil, art. 694, indiquent les lois romaines comme étant la source de cet article du code Napoléon qui dispense de toute mention de la servitude si elle est apparente. Voici le texte:

Si le propriétaire de deux héritages entre lesquels il existe un signe apparent de servitude, dispense de l'un des héritages sans que la contrat contienne aucune convention relative à la servitude, elle continue d'exister activement ou passivement en faveur du fonds aliéné ou sur le fonds aliéné;

et Toullier, t. 3, n. 612, ajoute:

Soit que les signes de servitude existassent avant la réunion des deux héritages dans la main du même propriétaire, soit qu'il les eût établis depuis cette réunion.

Or voici comment Pothier commente l'article 228 de la coutume d'Orléans, semblable à l'article 216 de la coutume de Paris, et l'on verra de suite que l'article 694 n'a fait que sanctionner la doctrine de Pothier:

Lorsque deux héritages, (dit-il), appartiennent au même maître, le service que l'un tire de l'autre, comme lorsqu'une maison a une vue ou un égoût sur l'autre, n'est pas servitude, "*quia res sua nemini servit*": L. 26, *ff. de servit., pr. rust.*, c'est destination du père de famille. Si par la suite ces deux maisons viennent à appartenir à différents maîtres, soit par l'aliénation que le propriétaire fera de l'une de ses maisons, ou par le partage qui se fera entre les héritiers, le service que l'une des maisons tire de l'autre, qui était destination du père de famille, lorsqu'elles appartenaient au même maître, devient un droit de servitude que le propriétaire de cette maison a sur la maison voisine de qui la sienne tire ce service, sans qu'il soit besoin que par l'aliénation qui a été faite de l'une de ses maisons, ou par le partage, cette servitude aît été expressément constituée. La raison est que la maison qui a été aliénée est censée l'avoir été en l'état qu'elle se trouvait; et pareillement que lorsqu'elles ont été partagées, elles sont censées l'avoir été telles et en l'état qu'elles se trouvaient; et par conséquent l'une comme ayant la vue, l'égout, etc., sur l'autre, et l'autre comme souffrant cette vue, cet égout, etc.; ce qui suffit pour établir la servitude. C'est

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ce que signifie notre coutume par ces termes, *destination de père de famille vaut titre.*

Pothier ajoute que quand la coutume parle *d'écrit* cela doit s'entendre de la preuve littérale que la servitude existait dès le temps que les deux maisons appartenaient au même maître, "ce qui," ajoute-t-il,

> peut s'établir par le marché par écrit qui aurait été fait pour la construction, par les quittances des ouvriers, ou par quelque acte qui contiendrait une description de ces maisons dans laquelle la fenêtre ou l'égout seraient énoncés.

La preuve qu'a faite l'intimé est bien plus forte. Il a produit l'acte de vente du 3 juillet, 1839, passé devant Mtre. Panet, notaire, par lequel John Phillips, l'acquéreur de Lépine et devenu aussi depuis propriétaire de l'autre lot, a vendu le lot 2686 à Charles Smith, Jr., sujet à la clause suivante:

> Subject also to all and singular the charges, clauses and conditions mentioned and expressed in a certain deed made between the said Joseph Lépine and John Boyd, passed before J. Bélanger and colleague, notaries public, the 10th of June, 1817, respecting the common passage existing between the said lot of ground now ceded and the one remaining, to the said John Phillips, to which the said Charles Smith, junior, his heirs and assigns shall conform in every respect.

Cette reconnaissance établit hors de tout doute que le passage existait lorsque Phillips était propriétaire des deux lots et le plan et le compromis plus haut mentionnes établissent la situation et l'étendue de ce passage. L'intimé se trouve donc dans le cas pourvu par les interprêtes les plus exigeants du droit romain. Or le droit romain, c'est le droit commun de la province de Québec en l'absence de dispositions spéciales.

Enfin, s'il nous est permis de suivre l'opinion de Pothier sur les coutumes d'Orléans et de Paris, il ne serait pas même nécessaire que la servitude aît été expressément constituée par le propriétaire des deux

héritages. Il ne faut pas croire que cette opinion est isolée. Elle formait la règle de droit adoptée par la majorité des commentateurs de la coutume, qui faisait autorité avant le code Napoléon, et par conséquent, avant notre code. Dard., art. 694, réfère à Merlin, "Servitude," par. 19, nos. 2 and 3. C'est aussi le sentiment de LeCamus d'Houlouvre, "Coutume du Boulonnais," t. ler., p. 342; Rousseau de la Combe, "Jurisprudence," *vo.* "Servitude," sec. II., *n.* 2, p. 206. Puis je trouve au répertoire de Guyot, "Servitude" (éd. 1783), vol. 58, p. 288 et suivantes, une longe étude sur le sujet, où la doctrine et la jurisprudence sont savamment examinées et discutées. En commençant, à la page 289, l'auteur observe que

> lorsque la servitude est désignée par son espèce particulière, il n'y a pas de difficulté à la confirmer.

A la page 291, il cite une opinion de Goupy en réponse à DesGodets où ce commentateur observe:

> Il en est de même du droit de passage. Si le propriétaire en question avait vendu une des deux maisons, avec charge d'un passage de porte cochère dans le corps du logis sur la rue, c'est-à-dire si c'est au milieu ou sur les côtés; je ne pense pas que ce vendeur, faute d'une plus exacte désignation, fût privé du droit de passage.

Enfin on apprend au répertoire de Guyot qu'Auzanet et deLamoignon sont du même avis si la servitude est apparente, et qu'un arrêt du 29 mars, 1760, a jugé dans le même sens. Puis l'auteur reproduit l'opinion de Pothier sur l'article 228 de la coutume d'Orléans, citée plus haut, et la fait suivre de l'approbation suivante:

> Mais si ces servitudes existaient déjà lorsque les deux maisons étaient dans ses mains (sinon comme servitudes, au moins comme destination de père de famille), il suffit pour les conserver, soit par lui-même, soit par l'acquéreur quand il a vendu l'une des deux maisons, soit par ses héritiers ou ses légataires lorsqu'ils en font

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le partage, qu'il y ait une preuve par écrit de l'existence de ces arrangements de famille, pour qu'ils forment de véritables servitudes, quand bien même il n'en serait rien dit dans le contrat, le testament ou le partage qui a mis les deux maisons dans des mains différentes.

A plus forte raison n'est-il pas nécessaire que la servitude soit spécifiée de la manière prescrite par l'article 215 de la coutume de Paris.

Il semble bien constant qu'il n'y a pas de différence substantielle entre l'ancien droit et l'article 694 du code Napoléon. Les codificateurs canadiens n'ont pas reproduit cet article; ils n'en parlent même pas et ils ont omis de nous donner la raison de leur silence. Cependant cet article n'a fait que reproduire l'ancien droit qui doit l'emporter sur le code, vu que les transactions dont il s'agit ont eu lieu avant le code; et même si elles avaient eu lieu depuis, ce serait la loi qui gouvernerait en l'absence de dispositions au code. (C.C. art. 2613). Il me semble que l'article 2078 de ce code consacre le même principe lorsqu'il y a délaissement sur une action hypothécaire. Cet article dit:

2078. Les servitudes et droits réels que le tiers détenteur avait sur l'immeuble au temps de l'acquisition qu'il en a faite, ou qu'il a éteints durant sa possession, renaissent après le délaissement.

Voir Laurent, t. 8, n. 302. C'est aussi la règle qui est consacrée par l'article 560.

En résumé nous sommes d'avis qu'il y a preuve du droit de passage réclamé par l'intimé, d'abord par les reconnaissances de l'acte primordial de la servitude de 1817, complétées par le dit plan et le dit compromis entre Noad et Healey en 1852: servitude qui est devenue éteinte par la confusion qui a résulté du fait que Phillips est devenu propriétaire des deux lots (C.C. art. 561); mais qui, étant apparente, revit dès le moment que le dit Phillips l'a vendu à un tiers; c'est la disposition de l'ancien droit qui ne fut pas invoquée

nonobstant nos observations lors de la plaidoirie orale devant nous, mais que nous ne pouvons ignorer.

Puis enfin on ne peut raisonablement nier, comme la cour d'appel l'a décidé, et pour des raisons que j'approuve, que la clause de servitude contenue dans l'acte de vente du 3 juillet, 1839, par Phillips à Charles Smith, Jr., supplémentée par les autres preuves que nous avons signalées, ne fasse preuve complète de l'existence de la servitude en question d'après le code, et j'ajouterai avec encore plus de raison d'après l'ancien droit antérieur au code.

Je n'ai rien dit d'une ou deux objections qui ont été faites de la part de l'appelant; savoir l'une le défaut d'enregistrement du compromis et du plan; enregistrement qui n'est pas nécessaire aux termes de l'article 2116*a* du code civil, puisque la servitude est apparente; et l'autre que l'usage fait du passage en question n'était que de simple tolérance et de bon voisinage; prétension que l'existence d'un titre à la servitude repousse évidemment. Il en est de même du plaidoyer de prescription par non-usage de trente ans qui n'est pas établi. Il est en preuve au contraire que la servitude de ce passage a été exercée depuis un temps immémorial. Sans titre, cette possession serait insuffisante; mais elle peut servir à l'interpréter et même le compléter. Pigeau, "Procédure Civile," t. 1er., p. 226 (éd. 1787), dit:

> C'est une maxime que *in antiquis enunciativa probant;* par exemple, dans la coutume de Paris et nombre d'autres, il n'y a pas de servitudes sans titre; supposez cependant que ma maison ait un droit de passage par la maison voisine, que je ne représente pas le titre qui me les donne, mais qu'il y aît dans les titres de propriété de ma maison, une énonciation de ce droit, cette énonciation, jointe à une possession de trente années, fait présumer contre le propriétaire de cette maison voisine, qu'il y a eu un titre.

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C'est d'ailleurs ce que la doctrine et la jurisprudence enseignent, par exemple un arrêt de cette cour dans la cause de *La Commune de Berthier* v. *Denis* (1), où un grand nombre d'autorités sont citées.

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

DAVIES, IDINGTON and MACLENNAN JJ. agreed that the appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Dorion & Marchand.*

(1) 27 Can. S.C.R. 147.

THE NEW YORK HERALD COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

THE OTTAWA CITIZEN COMPANY (DEFENDANTS) ..... } RESPONDENTS.

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*Nov. 18, 19.
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*Feb. 12.

AND

IN RE PETITION NEW YORK HERALD

AND

IN RE PETITION CANADA NEWSPAPER SYNDICATE.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Trade mark—"Buster Brown"—Validity of registration.

The term "Buster Brown" or "Buster Brown and Tige" for use as the title to a comic section of a newspaper cannot be registered as a trade mark.

The judgment appealed from (12 Ex. C.R. 1) was affirmed, Davies and Duff JJ. dissenting.

APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing the plaintiffs' action and petition and allowing the petition of the Canada Newspaper Syndicate.

The only question for decision on this appeal was whether or not the registration by the plaintiffs of the terms "Buster Brown" and "Buster Brown and Tige" as trade marks, the object being to use them as titles to a comic section of their newspaper entitled

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

(1) 12 Ex. C.R. 1.

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them to the exclusive use of such terms for that purpose and enabled them to prevent the respondents from issuing a comic section with the same titles. The Exchequer Court judge did not decide the question whether or not these terms could be registered, but dismissed the action on the ground that as the plaintiffs had issued these sections so entitled for several years without seeking for protection, they had become public property which any person could use. He also granted the petition of the Canada Newspaper Syndicate to have the said terms expunged from the registry of trade marks and refused that of the plaintiffs who asked to have also expunged the same or similar terms registered by the syndicate.

R. V. Sinclair K.C. and *D. H. McLean* for the appellants. The appellants acquired a property in the term "Buster Brown" by invention and user, and having registered it as a trade mark can protect their title in the courts.

The title of a newspaper can be registered as a trade mark. *Borthwick* v. *Evening Post*(1). And in the name of a periodical. *Gannert* v. *Rupert*(2).

The comic sections of the *New York Herald* are vendible and have commercial value. *Canada Pub. Co.* v. *Gage*(3); *Carey* v. *Goss*(4).

The appellant's trade mark has been upheld by the United States courts. *New York Herald Co.* v. *The Star Co.*(5).

Ewart K.C. for the respondents referred to *Rose* v. *McLean Publishing Co.*(6), and *The Joseph Dixon*

(1) 37 Ch.D. 449.
(2) 127 Fed. R. 962.
(3) 11 Can. S.C.R. 306.
(4) 11 O.R. 619.
(5) 146 Fed. R. 204.
(6) 24 Ont. App. R. 240.

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Crucible Co. v. *Guggenheim*(1), in support of his contention that the appellant could not acquire property in such a term as "Buster Brown."

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

The Chief Justice.

DAVIES J. (dissenting).—I concur in the judgment of Mr. Justice Duff.

IDINGTON J.—The appellant, in business in New York, published for some years an illustrated comic section of a newspaper of which the feature is the continued story of "Buster Brown," or "Buster Brown and Tige."

The originator of the idea would seem to have been some other publisher who had dropped the continuation of his publication before it was taken up in this copied and slightly modified form.

The appellant used *weekly* issues for its own newspapers periodically as the story developed and sold thousands of copies to other newspaper publishers to issue as sections of their newspapers.

In these latter cases the heading would be made to conform to the purposes of the respective publishers of these other newspapers by making the section wear the name and appear as part of such other newspaper.

The respondent was one of these other publishers for a time, but, being able to get some one else to continue the story, with inventions or imaginary ideas or want of ideas, independently in any case of what the appellant continued to publish, began and continued for some time the publication, as a section of its news-

(1) 2 Brews. (Pa.) 321.

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paper, of these new and independent relations of "Buster Brown's" doings and his name and supposed figure.

The appellant's managers conceived the happy thought of making trade marks of the name "Buster Brown" and "Buster Brown and Tige," and registering them under the provisions of "The Trade Mark and Design Act," and, having managed to get them registered, proceeded to the Exchequer Court to have justice done in the premises.

They failed. I will not say justice failed, but the suit failed.

Having got leave, because of the important issues raised, it appealed here.

The case of trade marks and their recognition by law as property preceded legislation requiring or facilitating their registration.

Our Canadian legislation in that regard preceded that in England by some fifteen years.

An Act, 23 Vict. ch. 27, of the old Province of Canada, which related to trade marks, was punitive in its character, and, next year, repealed by 24 Vict. ch. 21, of the same province, which provided for registration of trade marks as therein defined.

That definition has been in substance, and almost in the same words, adhered to throughout the many changes that have taken place, first, in extending the law to the whole Dominion, and, next, in modifying and extending the means for registration and the effect thereof, as well as providing for the registration and protection of industrial designs.

The decision of this appeal must turn upon the meaning of the definition given by section 5 of the Act, as it now stands in chapter 71, section 5, of the

Revised Statutes of Canada (1906), which is as follows:—

5. All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box, or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trade marks.

I do not think the alleged trade marks in question here fall within this definition of what may be registered as trade marks. It does not appear to me either that either of them is or ever was intended as a device to distinguish anything "manufactured, produced, compounded, packed or offered for sale" as described in this section. The plain, ordinary meaning of the words does not warrant putting such an interpretation on them.

The word "produced" is the only one in the definition that can at all be said to be capable of such extended meaning as is sought to be placed upon the section and that would be a straining of meaning of the word when we have regard to the setting in which we find it.

Moreover, when we look at the general scope and purpose of the Act, it seems quite impossible to suppose it was ever intended to protect property in a distinguishing mark such as this when applied to the kind of goods appellant vends when, as it claims, labelled therewith.

The production which the appellant sells is not a kind of paper, or of paper coloured in any particular way or covered with a peculiar kind of ink or set forms or figures. It is the nonsense that is produced

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by the brain of the man writing for the diversion of the idle that in truth is sold.

It may be that kind of brain product that copyright might amongst other things be extended to or that copyright might cover.

I am not, however, going to wander into the field of whether or not a trade mark can exist in such a name or names, or in the name of or title given any literary production of any kind, for I am quite sure it never was intended this section should apply to such a thing.

If it did, all that would be needed for a publisher of copyrighted works, when the copyright was about to expire, in order practically to add twenty-five years to the term of copyright, would be to register the title and defy any one to use it, though then at liberty to sell the thing itself without a title.

I think the distinction between copyright and trade mark registration was intended by the legislature to be, and that it must be, observed in applying this Act.

Our statutes and the English Acts are so different that, except for the fundamental purpose of determining whether any device used may, in its manner of use, be or not be a subject of such property as exists in law in a trade mark, the English cases are not very helpful.

To appreciate "the essentials necessary to constitute a trade mark," required by sub-section (*e*) of section 11 of our Act, many of these cases may be valuable.

But, whilst these essentials are necessary conditions to registration, I do not agree that the converse is true and that the Act extends to everything that

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might by any semblance seem to have such qualities as a trade mark.

When the cases in England turn as this does on the meaning of the Act providing for registration, the result may mislead unless this difference be observed.

I observe in the case of *Carey* v. *Goss*(1) the title to the name of a periodical was registered as a trade mark and the question tried out as to the infringement of registration and treated as if quite regular and, indeed, necessary to maintain the action.

No question seems to have been raised in regard to the point of whether or not it was properly registered.

Here, however, the right is expressly challenged on the ground I proceed upon.

I see also that the right to the exclusive use of the name of a periodical was tried in the case of *Rose* v. *McLean Publishing Co.*(2), without any reference to the Act in question or of registration. Possibly there had been registration and that fact was known to the parties.

But, seeing that the Act requires in cases where its protection can be invoked that there must be registration, and so much arguable material in that connection passed unnoticed, I would have expected to find reference to the matter unless all concerned had taken the view that I have, and that such a right of property as title to a publication did not fall within the Act.

The rights of the parties were decided on other grounds entirely.

I think the appeal must be dismissed with costs.

MACLENNAN J.—I agree in the opinion stated by Mr. Justice Idington.

(1) 11 O.R. 619.

(2) 24 Ont. App. R. 240.

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DUFF J. (dissenting).—In this case the facts have been fully stated in the judgment of the learned trial judge and it will be unnecessary to restate them.

Two questions arise; 1st. Can a combination of words be lawfully made a trade mark as applied to a series of comic sections of newspapers periodically published? 2ndly. Assuming that question to be answered in the affirmative, could the particular combination of words which the appellants have registered as their trade mark lawfully be registered as such? The first of these questions depends upon the construction of section 5 of the "Trade Mark and Designs Act," and with great respect to those who take a contrary view I really can have no doubt that such a part of a newspaper is a "product" "produced" by the publisher of the newspaper and therefore within the very words of the section. There is nothing in the statute or in the subject matter with which the statute deals seeming to require us to give to these words any signification less narrow than they import in their ordinary use; and we should not, of course, be justified in restricting their operation on any vague surmise respecting the policy of the Act. The argument addressed to us indeed was to the effect that the title of a periodical publication is in its nature incapable of becoming the subject of a trade mark right properly so called. That is a contention which I think is opposed to a stream of judicial opinion commencing at least as early as the year 1858 and embracing the views of judges of great experience in the subject and of very weighty authority. In *Clement* v. *Maddick*(1), Vice-Chancellor Stuart gave relief in an application to restrain the infringement of a trade mark alleged to exist in

(1) 1 Giff. 98.

respect of the title of a newspaper known as "Bell's Life in London." The applicant's right was in that case treated as a right resting on trade mark pure and simple.

> This is an application in support of the right to property. * * * Lord Cottenham in the case of *Millington* v. *Fox*(1) has declared that where a trade mark has been innocently and even unconsciously made use of to the injury of another the owner of the trade mark is entitled to the protection of this court.

These are the words with which the Vice-Chancellor opens his judgment at page 100. In *Dicks* v. *Yates* (2), at pages 663, 664, Sir George Jessel M.R. repeatedly during the course of the argument intimated the view that the title of such a publication might become a trade mark and in his judgment there is this passage:

> The adoption of the words as the title of a novel is not new. But even that would not make invention. It might make a trade mark, and entitle the owner of the novel to say: "You cannot sell another novel under that exact title, without any difference, so that the public will believe they are buying my novel when they are actually buying yours." That is trade mark, and that is intelligible. That would apply to newspapers and to serials in general.

In *The Licensed Victuallers Newspaper Co.* v. *Bingham*(3) Bowen L.J. puts the name of the newspaper touching its capacity to be made the subject of property as trade mark in the same category as a word stamped upon a stick of licorice. I do not think it is the most satisfactory way of dealing with the opinions cited to say simply, of Sir George Jessel for instance, that while he used the words attributed to him he meant to say something else. Neither do I think we ought to exert ourselves to discover some ground for restricting the ordinary meaning of the words

(1) 3 My. & C. 338. (2) 44 L.T. 660.
(3) 38 Ch.D. 139, at p. 143.

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used by the legislature in order to exclude from the operation of the Act that which at common law seems very clearly, I think, to have been the subject of property as trade mark. The American decisions are almost if not quite uniformly to the same effect.

It is argued, however, that the object to which the appellants seek to apply the combination of words in question, being only a part (sometimes indeed not even an integral or separate part, but a mere section of a page) of the newspaper itself, is for that reason outside the provisions of section 5. A comic section of a newspaper may, it seems, be printed on one or more sheets separated or joined together or only upon part of a sheet; but I really do not see that this circumstance makes it any the less a product or a thing produced by the publisher. If it could be contended that the term "comic section of newspaper" is not descriptive of anything having characteristic marks by which it can be distinguished from other parts of the newspaper, then the force of this objection would be apparent. But I do not think there is any ground for supposing that there can be any real difficulty in applying the description with sufficient certainty for all practical purposes.

It is a satisfactory confirmation of one's view to find that this very combination of words applied to this very thing has been held by an able and experienced American judge, Lacombe J., to be the subject matter of trade mark; *New York Herald Co.* v. *Starr Co.*(1); his judgment being affirmed on appeal by the Circuit Court of Appeals.

Touching the second question, the principal points made by the respondents are:

(1) 146 Fed. R. 204.

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(1). That since the appellants were, before registering the combination of words in question as trade marks, selling their newspaper, including the comic sections to which these words were applied, in Canada without the protection of copyright, and inasmuch as in the absence of any such protection it would be open to anybody to reprint the newspaper or the comic section including its title, the public thereby acquired the right to the use of the title itself on the principle *accessorium sequitur principale;* and

(2). That the terms "Buster Brown" and "Buster Brown and Tige" represent imaginary beings that have become a part of the common stock of ideas of English-speaking North America and that the terms have passed into the language as representing these beings as "Don Quixote" and "Pickwick" represent imaginary personages; the appellants having no exclusive right to describe these beings and their adventures can have no exclusive right to the names. The first of these points is that upon which the learned trial judge has proceeded; while I should differ upon any question of the kind raised by this appeal, with great hesitation, from the view of the learned trial judge, there seems to me to be some fallacy in the argument that assuming the public may reproduce the whole of one of the respondents' comic sections including its title without infringing any legal right, it follows from this that it may produce its own comic section under the distinctive title used by the respondents to designate theirs.

I have, moreover, already given my reasons for thinking that the title of a periodical publication may validly be made the subject of trade mark rights. The considerations indicated apply as well to a copyrighted publication as to a publication not protected by copy-

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right; and in at least one of the cases mentioned there seems to be no ground for supposing that any such protection existed. It is manifestly not consistent with this view to hold that the failure to obtain such protection in respect of the numbers of a periodical publication would disentitle the proprietor of a publication to assert a right of property in its title as founded on trade mark.

In the view I take of the statute I think, too, that the second of these objections cannot be allowed to prevail. The registration of a trade mark is something more than *primâ facie* evidence that the proprietor has a title to the exclusive use of it. Section 13, sub-section 2, reads as follows:

> Thereafter (that is to say after the registration of the trade mark) such proprietor shall have the exclusive right to use the trade mark to designate articles manufactured or sold by him.

The effect of the statute, I think, is that if the trade mark, so called, falls within the definition given by section 5 and the conditions of section 13 have been complied with, the registration alone confers upon the proprietor the exclusive right to the use of it. The right of action given by section 19 seems to be a right vested in any proprietor of a registered trade mark and a right which may be asserted against anybody who uses any such trade mark without the consent of the proprietor.

Section 11 of the statute provides for a number of cases in which the minister may refuse to register a trade mark; and sub-section (*a*) of that section would appear to be broad enough to embrace the very objections now under consideration. That sub-section gives the minister power to refuse to register if he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade mark. That does

not mean, I think, that the minister may refuse registration on the ground that the thing which the applicant proposes to register as his trade mark is something in which he has not acquired a property as a trade mark at common law; but that the minister may refuse registration if it is a case in his opinion in which the applicant has not made out a fair title to have conferred upon him the legal right to the exclusive use of the thing by the registration of it as a trade mark under the Act.

Assuming, however, that the question which the minister is to consider is whether such a legal right is already vested in the applicant at the time of the application, still the statute appears to have confided to him, subject to any reference under section 12 of the Act, the determination of this question; and where a statute has committed to a specified authority the determination of a particular class of questions it would be repugnant to establish principles to hold that the decision of the statutory authority acting within the scope of its duty is, in the absence of fraud or manifest error of law, open to review in a collateral proceeding. No such case is made here. The objection under discussion involves a question of fact which, supposing the respondents to be right in their legal contention, we must assume the minister has decided against them. "The Exchequer Court Act" itself, section 23, seems to provide means by which in a proper case steps may be taken to cancel the registration of a trade mark. Whether in this case grounds exist for such cancellation does not arise on this appeal.

These considerations seem sufficient also to dispose of the contention that the respondents in using the words in question merely as a descriptive heading of a part of a newspaper containing an account of the

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adventures of the imaginary beings denoted by the words, have done nothing amounting to an infringement of the appellants' rights. If the appellants have a valid trade mark in these words as applied to comic sections of newspapers then the use of the words as so applied would seem to be actionable at the suit of the appellants under the plain reading of section 19.

A large part of the argument for the respondents at Bar proceeded upon the principles assumed to have been established at common law concerning what are or are not essential characteristics of a trade mark. In reaching the conclusions above indicated, I have proceeded entirely on a construction of the statute; it appears to me that in construing such a statute there is some danger of being misled if one allow one's mind to be too freely influenced by what the common law may have determined to be the essential characteristics of a trade mark.

RE CANADIAN NEWSPAPER SYNDICATE.

I think the petitioners have no status to attack the appellants' trade mark. At the time of registration it is not alleged that the petitioners were using the combination of words registered by the appellants. I cannot see on the facts that they have any interest in the question of the validity of the registration other than that of the members of the public generally unless such an interest is acquired by the simple act of attempting to use it themselves. I do not think they can thus acquire such an interest. If on behalf of the whole public the trade mark is to be attacked there is a well understood procedure for that.

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Appeal dismissed with costs.

Solicitor for the appellant: *Donald Hector McLean.*

Solicitors for the respondents: *Ewart, Osler, Burbidge & Maclaren.*

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*May 5.

THE UNION INVESTMENT COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

MARTIN W. J. WELLS AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Practice—Appeal to Privy Council—Stay of execution—Security.

Where after judgment on appeal to the Supreme Court of Canada the losing party proposes to appeal to the Judicial Committee of the Privy Council the court will order proceedings on such judgment in the court of original jurisdiction to be stayed on satisfactory security being given for the debt interest and costs.

MOTION for stay of proceedings pending an application to the Judicial Committee of the Privy Council for leave to appeal.

In *Adams & Burns* v. *Bank of Montreal* (1) Mr. Justice Girouard in chambers refused an application for a stay of proceedings, pending an application for leave to appeal to the Privy Council, stating that he had consulted with his brother judges and they all agreed that it had been the rule invariably to refuse such stay. It was contended in the present case on behalf of the applicants that, as pointed out in Mr. Cameron's book on the Supreme Court Rules, p. 164, the present rule 136, which at that time was in force as part

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

(1) 31 Can. S.C.R. 223.

of general order No. 85, did not appear to have been called to the attention of the court either in the case of *Adams & Burns* v. *Bank of Montreal*(1), or in any other case where applications were made to stay proceedings pending an appeal to the Judicial Committee. The application, made after the judgment had been entered and certified to the court of original jurisdiction, was granted and the following order made:

"Stay of execution for a week granted to put in security to the satisfaction of the registrar for debt, interest and costs, the applicant undertaking that his application to the Privy Council will be made not later than June 20th, up to which date stay to operate if security put in as above."

Bethune, for the application.

Glyn Osler, contra.

On October 20th, 1908, in the case of *Montreal Light, Heat & Power Co.* v. *Regan* Mr. Justice Duff made an order staying proceedings on the judgment of the court in favour of the respondent for one month, and, if satisfactory security should be given for the debt, interest and costs on or before Nov. 20th, further proceedings to be stayed until an application to the Judicial Committee of the Privy Council for leave to appeal from said judgment should be disposed of, applicants to be at liberty to enter judgment to enable them to apply.

In the case of *The Byron N. White Co.* v. *Star Mining and Milling Co.* a similar order was made by the Chief Justice in chambers on March 23rd, 1909.

(1) 31 Can. S.C.R. 223.

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*Nov. 17, 18.
1909
*Feb. 12.

HERBERT LEWIS HILDRETH (PLAINTIFF) ..... APPELLANT;

AND

THE McCORMICK MANUFACTURING COMPANY (DEFENDANTS) .. RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Patent of invention—Anticipation.

Canadian patent No. 79392 for improvements in candy-pulling machines granted on Feb. 17th, 1903, declared void for want of invention having been anticipated by earlier inventions in the United States.

Judgment of the Exchequer Court (10 Ex. C.R. 378), reversed on this point.

CROSS-APPEAL from the judgment of the Exchequer Court of Canada (1) in favour of the plaintiff.

The plaintiff brought action for infringement of his patent for improvements in candy-pulling machines claiming damages and injunction. Several defences were set up, including the following: That plaintiff's invention was not new; that it was not useful; that the public were allowed to use the improvements before the patent issued; that it was not manufactured within two years after the grant of the patent so that any person could buy it; and that after the expiration of twelve months from the date of the patent it was imported into Canada. By the judgment of the

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

(1) 10 Ex. C.R. 378.

Exchequer Court the patent was declared void on the ground of non-manufacture for sale within two years all other grounds of defence except the last being decided in plaintiff's favour. Both parties appealed to the Supreme Court of Canada and when the case came on for hearing it was agreed that only the main appeal by the plaintiff's should be argued and the defendant's cross-appeal should stand over. On the main appeal the judgment of the Exchequer Court was affirmed (1).

At a later date the defendant's cross-appeal was heard.

Gibbons K.C. and *Haverson K.C.* for the cross-appellant.

Anglin K.C. for the cross-respondent.

The judgment of the court was delivered by

IDINGTON J.—A decision against the appellant of any one of several issues raised by this appeal and cross-appeal would, if final, be fatal to the appellant's case.

At the hearing of the appeal, in 1907, the parties agreed to confine the argument to the main appeal, and judgment was given as appears in the report then published (1).

The appellant, it is said, desires to appeal therefrom and hence the cross-appeal has been recently argued.

The chief issues raised thereby are that the appellant was not in fact the first and true inventor, and that the use by the respondent of the machine, which

(1) 39 Can. S.C.R. 499.

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it confessedly did use, was not an infringement of the appellant's patent.

It is also claimed that there was no novelty in the alleged invention as it had at the date of the application in fact become by public use thereof public property; and also that an importation into Canada by the appellant of one of his machines had the effect, by virtue of section 38, sub-section (*b*) of the "Patent Act," of nullifying the interest of the appellant in the patent.

A brief history of the appellant's relation to the claims he makes may help to understand the strength or weakness thereof.

He had been at the time of the trial, in May, 1906, a manufacturer of candy for twenty-five years. He kept a diary from which I quote and extract substance of events hereinafter referred to. As early as 1890 he recorded in it: "If I can invent some way of cooking it quick and pulling it by machine, also cut and wrap it by machine, then I would be all right. I will try when I get along a little further."

In 1894 he engaged a firm of machinists to get up such machines.

In May, 1897, the diary tells he had paid that firm $12,000 for wrapping and other machines which turned out useless, and that he was permitted by them to engage one Charlie Thibodeau, who had been working with them, to come to him and he would set up a machine shop of his own.

On the 29th of May, 1897, he accordingly entered into a written contract with Thibodeau whereby he agreed to enter his service for the purpose of perfecting and manufacturing such machines, and to give him "his best services and also the full benefit of any 'and

all inventions or improvements which he had made or might hereafter make relating to machines or devices in Hildreth's business."

He also agreed if Hildreth did not desire to patent any of said inventions or improvements to keep them secret.

Having, he claims, succeeded as to a wrapping machine on the 26th of December, 1897, he records in his dairy as follows:

> I made a little trial of my idea of a pulling machine, it is on the principle of hand-pulling. I drove two spikes in a board about eight inches apart and took a piece of iron in my hand and worked the batch around the spikes in the form of a figure eight. I think that is the principle we shall have to go on; we may have two hooks or pins pull apart drawing the candy and another hook or pin drawing it sideways and the two hooks go back again and take the candy once more and pull it out again either on a table or up on the side of the building same as hand pulling.

In November, 1899, he tried a pulling machine with rolls, but it would not work.

On the 30th of December, 1899, he records making a little experiment with the pulling machine. He adds there had never been one made or used to his knowledge.

On the 12th of February, 1900, the diary records as follows:

> Received a circular to-day from the Grand Rapids Steam Engine, Grand Rapids, Mich., of a pulling machine that they had got up. I sent letter to them for more information, it had a different principle than mine. I do not see how they can ever pull candy with it, but if it will I shall buy one until I can get mine finished; their machine seems more like a bread mixer than a candy-pulling machine.

On the 19th of the same month he sent them a telegram for one of their machines.

It arrived on the 8th of May following, and on the 10th a man came to set it up, and tested it on the 12th,

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when the appellant records it would not work successfully, and that "the principle is wrong."

Then he says he told Thibodeau to make up the model and told him how he wanted it.

On the 15th of the same month he tested a minature of his own and it worked very satisfactorily, and had added a "reversible motion to the hooks in conjunction with the figure 8." Two days later he tested the model and "it *worked fine.*"

On the 21st of May he notes he had written Grand Rapids in relation to their pulling machine, and adds "they have given it up for a failure."

On the 24th, 25th and 26th he records what he is doing in building his pulling machine and on the said 26th "we shipped Grand Rapids pulling machine back to-day a failure."

The 10th of June he records that his "works fine" and he will apply for a patent.

On the 21st September, 1900, he filed in Washington an application for a patent for this invention which is called hereinafter "the pendulum machine" and in his specification describing it says "the essential parts of the invention being a plurality of candy-hooks, a candy-puller and means of producing a relative in and out motion of these parts." This and more was subsequently amended, probably because too indefinite.

He described it as "a new and useful *improvement* in candy-pulling machines."

On the 23rd October, 1901, Dickinson, the inventor of the Grand Rapids machine, made his declaration, to found an application for patent, which was filed in the following month.

Then interferences at Washington induced the appellant to try and defeat Dickinson by acquiring the rights of invention of one Jenner, who had in fact, but how or when or where does not clearly appear, invented a machine much superior to either that of Dickinson or of the apppellant.

This was in 1902 and Jenner pursuant to his agreement with the appellant and in verification of his specifications as to his invention swore on the 31st October, 1902, for the purpose of making application for patent, that he believed "himself to be the *original* and *first and sole inventor* of the candy-pulling machine described and claimed in the said specifications." The application for a patent for this Jenner invention was filed at Washington the 15th of November, 1902.

Meantime, in July, 1901, Thibodeau, having been sued by the appellant on the 15th of the previous March or earlier to restrain him from using a machine he had invented for candy-pulling, produced it for inspection and comparison with the pendulum machine appellant claimed to have invented.

This Thibodeau machine the appellant saw then for the first time and he admits it was the invention of Thibodeau, yet attempts sometimes feebly and at other times more boldly to claim it to be in principle the same as his.

It is admitted, I think, to be in principle identical with the Jenner machine. Whether admitted or not to my mind it clearly is so.

The chief difference seems to consist in the transmission of the driving power by means of a chain in one and in the other by a duplicate set of cogged wheels.

This Thibodeau machine is that in use by the re-

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spondent and it is that use which is claimed by the appellant to be an infringement of the patent next referred to.

On the 12th of August, 1902, the appellant filed at Ottawa his application for a patent in Canada of the pendulum machine above referred to and on the 17th of February, 1903, patent was granted.

It was for an "alleged new and useful *improvement in candy-pulling machines.*"

How or why it comes to be thus designated, if as the diary asserts there never had been a prior candy-pulling machine in existence, is not explained.

We had before us in argument a model of each of the machines referred to which I will hereafter refer to as respectively the Dickinson, the Thibodeau and the Pendulum machine.

I was unable then, and after much reading of evidence and consideration of the whole matter am unable yet, to see how the Thibodeau machine can be said to be in any respect the same in principle as the Pendulum machine unless we are to seek for the principle in the motions necessary for pulling candy by means of hands and hooks on a wall or frame which it is said have been known for ages.

To use the same or similar motions was necessary in any method that might be adopted.

Even the appellant does not claim he has a patent on that, but seems to imagine there is some magic in the figure 8 that he has adopted and claims as his own ideal of the product of motion that must be got.

I cannot concede that he by his patent acquired in law any monopoly of the use of motions that may produce such a figure or semblance thereof, or that even when he got a machine that will produce in its paths

of motion such figure he has escaped from the consequences of copying another man's machine or its principle of action or that he will have debarred all others in Canada during the life of his patent from so combining well-known mechanical contrivances as to produce the necessary motions in handling and pulling candy, even if these motions were in and out or round about or intersecting paths of such a nature as should enable one to imagine a succession of figures "8" in tracing the paths the candy or parts of the machine may have followed.

It seems to me that the Dickinson machine produced and could not help producing intersecting paths that on inspection give evidence of some resemblance to a figure 8 if there be a charm in that. Of course the figure 8 it produces is not so elegant as that resulting from a use of the Pendulum machine.

When we come to pass this shadow and get to the substance of things in a comparison of these (Dickinson and Pendulum) machines, they are so nearly alike in their motions, and the Pendulum machine is so clumsy a contrivance that I think it was by a careful study of the former and an adherence, indeed a discriminating adherence, to its "mode or motion" that the Pendulum machine was arrived at; and that the rotary conception, so widely different, so much more useful, so much more readily seized by one who had the inventive faculty, and depended on that alone, freed from the trammels of a prior model, was possibly missed by the appellant.

Dickinson followed probably the baker's trough and mixer for his model and the appellant followed, at as respectable a distance as he knew how the Dickinson. It was necessary for him to differentiate from the model. Even Thibodeau, who was, as appellant

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evidently was not, an expert mechanic, could not make anything really useful of the appellant's conception and instructions, whatever they were, and dropped them and invented for himself a rotary machine.

If the internal evidence which the diary furnishes so amply, the external or objective evidence which comparison of the machines also supplies, and the history of the case, including appellant's own evidence, do not fully support my surmises relative to the appellant and his alleged invention, let us turn to his conduct for further cogent evidence of their correctness.

Why did he, if conscious of his own rectitude and capacity as an inventor, buy the Jenner invention?

If, as he swears, the principle of the Thibodeau, which is another Jenner, are the same as his Pendulum machine, why should he seek for support in the Jenner and buy it? He replies it was to antedate the Dickinson.

But again, how or why or on what grounds? It is not apparent on the evidence before us that any one would invest money in its purchase for that reason alone.

But he seemed afraid of Thibodeau's rotary machine when Thibodeau, the inventor of it, ventured to interfere with his claim at Washington.

It seems hard to believe that the appellant did not know when seeking to restrain Thibodeau why he sought to restrain him. If he knew that his machine was only something he pretends now identical in principle with his own, why should he feel disturbed?

But, however that may be, having found from inspection he got in July, 1901, what it was, why should he seek in 1902 to buy Jenner's, which was the same in

principle? Besides the priority of date already referred to he adds it was better to buy him off.

I find no ground for apprehension unless his was an imitation of Dickinson's. If the Dickinson principle had not been adopted why seek to antedate it?

I think it is not unfair to infer that he had not the confidence he now pretends in the rotary and the pendulum being the same in principle or his pendulum machine being entirely different from the Dickinson, and in fact a machine that worked "fine" whilst the other was a total failure and worthless.

Moreover, why did he knowing of the identity as he must after in July, 1901, seeing Thibodeau's which is identical with Jenner's induce Jenner on the 31st October, 1902, to swear he was the sole inventor of the machine? If his present contention be correct as to identity in principle of the Thibodeau or its equivalent the Jenner with his, he (Jenner) was only one of several inventors of the same thing.

The appellant seems to be in this dilemma. The development of his pendulum machine from Dickinson's seems much more easy, much more probable than to suppose that some one else merely developed the rotary machine in question from the pendulum machine.

It seems a fair test when we are asked to find the rotary machine in question an infringement of the pendulum machine to consider if it is at all probable that an ordinary skilled mechanic having once seen the alleged original invention could at once suggest and apply without the necessity for any inventive power whatsoever some other arrangement of mechanical contrivances to produce the same result.

If he could not, then he who constructs a new

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machine requiring inventive faculty is entitled to a patent, or to use as here without patent.

Of course, if that new machine be but an improvement on the other he inventing it must, if he apply for a patent, be confined to an invention by way of improvement. His use without patent must be, of course, subject to the like limitations.

But if, as I find here, the invention be entirely new and not merely an improvement, he would be entitled to his patent as for a new machine, or if he did not desire a patent, to use it free from restraint.

Even if in this case it is inconceivable that this rotary machine is not in fact founded on the earlier pendulum machine, then to my mind much less can it be conceived that was not anticipated by the Dickinson one still earlier.

Then again, the whole story of the appellant, for long years anxious to design a candy-pulling machine, beaten after years of speculation as to it, telegraphing to have the Dickinson machine sent him, shewing it to his skilled workman and to his attorney, and attacking immediately on its arrival with such feverish haste the problem he had so long failed to solve and coming to such sudden unexpected success and in one breath condemning as total failure that which he desired to have discarded, and self-approvingly recording how "finely" his own had worked when in fact it never was worth much, if anything, not only arouses suspicion, but when coupled with a pretty obvious resemblance between the two and all the other evidence and considerations I have adverted to, leads me to but one conclusion, and that is that the appellant never invented what he claims and is therefore not entitled to the relief he asks.

Nor do I think that the Thibodeau machine in question was an imitation of the appellant's. Indeed if the appellant had really supposed it was the result of his instructions to his servant he would, I suspect, have used it in applying for his Canadian patent for it was so much superior to his pendulum machine.

We have to bear in mind that it is the appellant's conception we have to consider and not that of his hired man. His long years of meditation and failure and the measure of his capacity to understand mechanical principles as shewn by his evidence do not lead me to conceive of the sudden inspiration he got coming to him save what was derived from the use he made of the Dickinson machine.

As to the grounds of his public user giving possession to the public, I do not think, in the view I take, it is necessary to follow that matter very far.

The use extended over several years under such circumstances of publicity that I would, in consequence of the view I have taken of the appellant and his case, feel inclined to seek for corroborative evidence that measures were really taken to protect his invention from publication.

In his attempt to establish its utility by his statements as to its being used and yet hand labour being continued until the rotary machine was installed when both the pendulum machine and hand labour disappeared together, one is at a loss to know exactly what conclusion to arrive at regarding his veracity on this point of public use.

As to the importation I incline to think it was of the substantial parts of the machine and hence an importation of the invention. See interpretation of the word in the Act. I have not, however, arrived at a

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final opinion on that as it seems unnecessary to follow the matter further.

I think the cross-appeal should be allowed with costs of appeal and of the trial.

Cross-appeal allowed with costs.

Solicitors for the appellant: *Blake, Lash & Cassels.*

Solicitors for the respondents: *Gibbons, Harper & Gibbons.*

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HÉLOÏSE LEMAIGNAN DEKÉRANGAT (PLAINTIFF) ..... APPELLANT; *Nov. 20, 23. *Dec. 15.

AND

THE EASTERN TOWNSHIPS BANK (DEFENDANT) ..... RESPONDENT.

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

Negligence—Sale of ruined building—Personal responsibility of vendor.

Where a ruined building is sold by A. to B., B. engaging himself to remove the materials from the ground, there is no responsibility imposed upon A., under the provisions of article 1054 of the Civil Code of Lower Canada, in respect of injuries sustained in consequence of the negligence of B. in the removal of the materials, as A. had no control over the operations of demolition and removal by B. and his workmen.

Judgment appealed from (Q.R. 17 K.B. 232) affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), setting aside the judgment entered upon the verdict of the jury, at the trial, against the bank, and dismissing the plaintiff's action against the bank, with costs.

The appellant brought the action to recover damages in consequence of the death of her husband, alleged to have been caused by the negligence of the respondent. The respondent was the owner of a build-

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

(1) Q.R. 17 K.B. 232.

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ing, in the City of Montreal, which had been seriously damaged by a fire, and, after attempting to make repairs, had sold it to a contractor, named Dagenais, who was also a defendant in the action. Dagenais had agreed to remove the materials in the ruined building and, while the operation of demolition was in progress, the cornice, which had been insecurely attached by ropes, and a portion of the walls, fell upon the deceased, who was then engaged in the removal of a fence which had been placed round an enclosure upon the sidewalk of the street below, and he died in consequence of the injuries thus received. The negligence charged against the bank was that the necessary precautions for the safety of persons in the vicinity of the ruined building, and required by the city by-laws, had not been taken either by the bank or by Dagenais, who was alleged to have been a contractor employed for the purpose of the demolition of the ruin.

Upon a verdict by the jury at the trial, judgment was entered in favour of the plaintiff for $5,500, against the bank and Dagenais. On an appeal, the Court of King's Bench, by the judgment now appealed from, set aside the judgment of the trial court, in so far as it affected the bank, on the ground that the accident was wholly due to the fault of the purchaser of the building and that he was not an agent or employee of the bank for whose acts it could be held responsible.

H. J. Elliott K.C. and *Beulac* for the appellant.

J. E. Martin K.C. and *Duff* for the respondent.

THE CHIEF JUSTICE agreed that the appeal should be dismissed with costs.

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Girouard J.

GIROUARD J.—Je n'ai aucune hésitation à confirmer le jugement de la cour d'appel qui me paraît inattaquable. Je pourrais purement et simplement me contenter d'adopter les raisons données par le juge-en-chef Taschereau; mais, comme la cause est importante, il est peutêtre bon de résumer en quelques mots le point en litige.

Deux règlements de la ville de Montréal déterminent la manière de faire des démolitions de bâtisses; l'un (No. 260) lorsque ces bâtisses sont dangereuses et ont été condamnées par l'inspecteur; et l'autre (No. 107) lorsqu'il s'agit d'une démolition ordinaire dans le but de reconstruire. Il est admis que la bâtisse en question n'était pas dangereuse et que sa démolition n'a pas été ordonnée par l'inspecteur comme telle. Il s'agit donc d'une construction nouvelle. Un incendie ayant détruit le premier étage et endommagé le deuxième, il fut d'abord question de réparer ces dommages et un entrepreneur fut choisi pour l'execution des travaux nécessaires. Cet entrepreneur donna avis de son intention, aux désirs des règlements. Mais on s'apperçut bientôt qu'il valait mieux démolir toute la bâtisse et en construire une nouvelle plus moderne. A cet effet l'intimée vendit tout l'édifice à un nommé Dagenais, entrepreneur bien connu de Montréal. Elle ne garda, bien entendu, aucun contrôle sur l'entrepreneur, qui, aux termes de l'article 415 du code civil, devint propriétaire de la dite bâtisse. Il procéda à la démolition et pendant qu'on était à enlever la corniche au haut de l'édifice, le câble qui la retenait se cassa et la corniche alla tomber sur la tête d'un ouvrier occupé dans le moment à élever une clôture sur le trottoir. La cour d'appel a decidé que l'entrepreneur, propriétaire de la bâtisse,

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était seul responsable et nous croyons qu'elle a eu raison. L'article 1054 du code civil est formel. Le propriétaire n'est responsable que de la faute de ceux dont il a le contrôle. On a cité certains arrêts des cours de France où des distinctions sont faites dans le cas où les règlements municipaux imposent au propriétaire certaines précautions pour éviter les accidents. On cite aussi l'article 479, par. 4, du code pénal; mais nous n'avons aucune semblable disposition soit dans le code civil, soit dans nos lois criminelles. Tout ce que nous avons ce sont les règlements municipaux; et le règlement No. 107, qui gouverne cette mattiere, est formel. Le devoir d'enlever une clôture et de prendre d'autres mesures de précaution pour éviter les accidents en cas de démolitions et constructions est imposé à l'entrepreneur et non pas au propriétaire. Voir section 2. La section 9 dit également que c'est l'entrepreneur qui est responsable des dommages. Voir Dalloz, Jurisprudence Générale, 1869, partie, 2, p. 153.

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

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

IDINGTON J.—I agree this appeal should be dismissed, but cannot say I agree in the reasons given by my brother Girouard J. in notes I have had a chance of perusing.

It seems safe to say that there was a sale of material which, so long as undisturbed at the part we are concerned with, was no menace to any one. When the buyer paid his cash instalment of price he was master and no one could or did control him.

I hesitate, with great respect, to adopt the opinions of those who go further and place the case as if identical with that of a contractor doing the same work.

The difficulty I have is that, when a sale is made, I cannot see how any conditions can be attached to it requiring in the buyer any sort of qualification as to his capacity or equipment for removal of that which he buys, whether a house or other material such as piles of lumber or stone. In the case of the contractor the capacity may well have to be looked to by him letting the work.

I do not find in the by-laws of Montreal that provision for the case of removal of buildings which was assumed in argument to exist and which public safety needs.

Nor do I see how the stipulations properly made for the buyer assuming all risks could alter the legal quality of what was being contracted for or the consequences thereof.

These stipulations were merely the result of abundant caution.

MACLENNAN J.—I agree in the opinion stated by Mr. Justice Girouard.

DUFF J.—I agree that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Goldstein & Beullac.*
Solicitors for the respondent: *Heneker & Duff.*

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*Oct. 27-29.
*Dec. 15.

ARMITAGE RHODES AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

JOSEPHINE PERUSSE (PLAINTIFF) ..... } RESPONDENT.

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

Dedication of highway—Conditions in Crown grant—Access to beach—Plan of subdivision—Destination by owner—Limitation of user—Long usage by public—Acquisitive prescription—Recitals in deeds—Cadastral plans, references and notices—Evidence—Presumptions.

A strip of land, extending from a public road to the River St. Lawrence, formed part of a beach lot granted by the Crown, in 1854, on condition that, in case of subdivision into building lots, "a sufficient number of cross-streets shall be left open so as to afford easy communication between the public highroad, in rear of the said beach lot, and low water mark in front thereof." Prior to 1865 the lot was subdivided and, on the plan of subdivision, the strip of land was shewn as a lane or passage. Reference to this lane or passage was made in a deed of sale executed by the owner, in 1865, and the cadastral plan of the municipality, made in 1879, for registration purposes, shewed it as a public road. In 1881, in connection with the registration of charges on the land, the owner made a statutory declaration and gave a notice to the registrar of deeds, as required by the "Cadastral Act," describing the strip of land in question as "a road 20 feet wide." It was also shewn that, during more that thirty years prior to the action, the strip of land had been used as a lane or passage by the general public.

Held, affirming the judgment appealed from (Q.R. 17 K.B. 60), Idington J. dissenting, that these circumstances constituted complete, clear and unequivocal evidence of the intention of the owners of the beach lot to dedicate the strip of land in question

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

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for the purposes of a public highway, that no formal acceptance of such dedication by the corporation of the municipality was necessary to render such dedication effective in favour of the general public, and that, even if there had originally been any limitation reserved as to the use thereof by a special class of persons only, it had become a public highway by reason of long user as such.

Although no right of ownership can be affected by cadastral plans, they must, in view of their publicity, be considered as having some probative effect in respect to persons having interests in the lands described therein.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Quebec, which maintained the plaintiff's action with costs.

By her action, the plaintiff claimed the right to a declaration that a strip of land between St. Lawrence Street, in the Town of Lévis, and the River St. Lawrence, was by destination and dedication intended for and, by long user, had become a public highway, and asked to have an obstruction removed, and for damages.

The judgment of the Superior Court, rendered by Mr. Justice Lemieux, declared the land in question to be a public highway, ordered the defendants to remove the fence which had been placed across it, and that the defendants in warranty, who had taken up the *fait et cause* of the principal defendant, should indemnify him against the damages, interest and costs which were awarded to the plaintiff.

The circumstances of the case and the questions at issue upon this appeal are stated in the judgments now reported.

(1) Q.R. 17 K.B. 60.

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

C. E. Dorion K.C. and *Eusèbe Belleau K.C.* for the respondent.

THE CHIEF JUSTICE.—By the action out of which this appeal arises the plaintiff (now respondent) asks for a declaration that a small strip of land leading from St. Lawrence Street, in the Town of Lévis, towards the River St. Lawrence, is a public highway. The appellant, who sold the property to the defendant, Vézina, intervened as his warrantor and, taking up the instance in the cause, denied that the strip of land in question was a public road or had ever been used as such. The trial judge held in favour of the plaintiff and, on appeal to the Court of King's Bench, his judgment was affirmed, Mr. Justice Bossé dissenting.

The question at issue is a very narrow one and in my opinion depends largely for its solution upon the terms of a grant of the foreshore over which the road passes made by the Crown to Wm. Rhodes, father of the appellant, by Letters Patent, in 1854.

At that time the beach was open to the public. Certain *censitaires* referred to in the grant, and some of whom are represented by the plaintiff, owned property to the south of the highway now known as St. Lawrence Street, which separated their lands from the River St. Lawrence, at this point both tidal and navigable. It appears by the conditions of the grant that these *censitaires,* under the impression no doubt that they had, as riparian owners, a claim on the foreshore, sold some beach lots to Rhodes. Further there is evidence that during the high tides of the spring and fall the river crossed the highway and

flowed onto the lands to the south. It might possibly be contended on the facts that the *censitaires* were then riparian owners and entitled as such to a right of access to the river. *Lyon* v. *Fishmongers Co.*(1). However this may be it can at least be said of them, adopting the language of Lord Cairns in *Metropolitan Board of Works* v. *McCarthy*(2), at page 252, that they had two highways, the one highway being a road or a street, and the other, immediately beyond and abutting upon the road or the street, being a highway by water. It is further proved as a fact that the general public had free access to and from the river from the highway which ran along the shore and in daily contact with the ebb and flow of the tide.

Briefly stated these were the conditions existing when the grant was made and in the light of these conditions we must construe the grant in which are provisions not usually found in such instruments and evidently inserted for the purpose of meeting the exceptional circumstances, as the effect of the grant must be, if the beach lot was laid out, as contemplated, in building lots, to cut off the right of access and destroy the highway by water.

The lot granted by letters patent contains a superficies of 96,198 feet in what is now the Town of Lévis, immediately opposite the City of Quebec, and proved, as established in this record, a most valuable concession. The money consideration for the grant was £656 19s. 4d., of which one-quarter was payable in cash and the balance in four equal annual instalments. There are other obligations imposed on the grantee with respect to the building of wharves which

(1) 1 App. Cas. 662. (2) L.R. 7 H.L. 243.

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all persons are to be permitted to use for the moorage of vessels and to which free access is to be given both from the river and the highway; and finally there is a clause which is for our present purpose the most important and reads as follows:

> Provided always and these our letters patent are granted upon the *express condition* that our said grantee, his heirs and assigns do and *shall renounce and give up all and every claim against and shall hold harmless all and every the censitaires holding lands in the immediate rear of the beach lot hereby granted, for or by reason of any sale or transfer of property by them or any of them heretofore made to our said grantee or of right of property in the said beach lot or any part thereof; and further that, in case the said beach lot shall at any time hereafter be laid out* for building lots, *a sufficient number of cross-streets* shall be *left open* so as to afford *easy communication between the public highroad* in rear of the said beach lot and low water mark in front thereof, and that such streets shall be made in the manner and of the dimensions that shall be prescribed by municipal regulation then lawfully established.

What is the meaning of the latter part of this clause? Is it not, under the circumstances to which I have referred, equivalent to a reservation of so much of the beach lot as might be necessary to give, by means of a public highway, easy communication from the public street to the river in case the beach lot is thereafter laid out for building purposes? This appears to me to be very clear. In the first part of the proviso it is made an express condition of the grant that Rhodes renounces and gives up all claims against the *censitaires* which he may have by reason of the sale made by them to him under the erroneous impression no doubt that the property in the foreshore passed to them under their deeds of concession from the seigneur; then—the private interests of the *censitaires* being protected—the interests of the general public are safeguarded in the second part. The Crown, as owner of the foreshore, had undoubtedly the right to cut it

up and dispose of it as it deemed best; but clearly in so doing it owed a duty to the general public, irrespective of the special rights of the riparian owners to protect them in the enjoyment of the common law right of *accès et sortie* to the river which they then had and of which they must necessarily be deprived in the contingency then foreseen that the beach might be laid out for building lots. It is not to be assumed that the Crown would be more solicitous for the private interests of certain individuals than for the common law rights of the general public, and there can be no doubt in my mind, reading the whole grant, that it was as clearly the intention of the Crown to protect the right of *accès et sortie* to the river as it was to effect a settlement of the disputes then existing between Rhodes and the *censitaires*. That Rhodes so construed his title appears by fair inference from several deeds to which he was a party and by his acquiescence in the use made of the strip of land now in question by the general public during many years.

Apparently, at some time previous to 1865, it was decided to lay out the property conveyed by the Crown to Rhodes, or at least that portion of it lying to the east, in building lots, as contemplated by the grant, and in that connection a plan is said to have been made by one O'Brien, land surveyor. This plan was not produced at the trial, although diligent search was made for it by both parties, and there is no direct evidence that it was prepared under the instructions of Mr. Rhodes, but both courts below have come to the conclusion, as warranted by the evidence, that such a plan was made and existed in 1865. In that year, Rhodes, and others who had acquired an interest in the property with him, sold a portion of it to one Simp-

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son, now represented by the respondent, and in the deed of sale the property is described in these words:

A certain lot or parcel of ground situate and being at the place called Rhodes's Cove, heretofore McCaw's Cove, in the town of Lévis, containing fifty-nine feet in front and gradually increasing in width from front to rear until at its extreme depth it measures seventy-six feet by fifty feet in depth, the whole more or less, English measure, bounded in front towards the south-east by the *public highway* or cove road, in rear toward the north-west by a *reserved road or street* on one side to the south-west by lot number three sold to the said William Simpson and on the other side to the north-east by a *lane or passage of the width of twenty feet between the property above described and that of Benjamin Huot dit Saint Laurent together with the right of way over the said passage in common with the neighbouring proprietors as the said lots are laid down* and distinguished under the numbers one and two on the plan of a *large extent* of property drawn up and prepared by G. P. O'Brien of Quebec, land surveyor, and deposited in the office of Noel Hill Bowen, one of the subscribing notaries.

This plan here referred to, known in the record as the O'Brien plan, was evidently from the use made of it in this deed of sale prepared for the purpose of laying out the beach in building lots and if not made under the instructions of Rhodes and his associates is so fully adopted by them and made part of this transaction that they and their successors in title should not be allowed to repudiate it or treat it otherwise than as conclusively binding upon them for all the purposes of the deed. The property sold is described by metes and bounds, it is true, but also by reference to the numbers on the plan which is said to have been deposited of record in the office of one of the subscribing notaries. It would be impossible to identify the plan and the deed more closely. It further appears by the terms used to describe the boundaries of the lot sold that the strip of land now in question is called by the vendors a lane or passage (lane is included in the word road under the Municipal Law of

Quebec, art. 19, par. 27), and this lane is said to connect the public highroad on the southeast with a reserved road or street on the northwest. The public highroad referred to being the road to the rear of the beach lot and between which and low water mark easy communication must, in the terms of the grant, be given so that this lane is the means of access reserved from the public highway to the river and the only means of access which is proved to exist. It is quite true that the beach lot does not appear to have been actually divided into and sold for building purposes except to a limited extent, but the condition of the grant is that a street is to be left open to afford easy communication between the highroad and low water mark not, as argued here, when the beach lot is divided up and sold, but when it is laid out in building lots.

Next in the order of time we have the cadastral plan prepared in 1879 by the public officials of the province for registration purposes and on this plan the strip of land is indicated as a public road. I concede that no right of ownership is affected by any error in the cadastral plan; but it is impossible to imagine that this plan which the law requires to be kept in a public office for inspection and correction by parties interested is not to be considered as of some probative effect. It was open to examination and no doubt would and might have been altered if it erroneously represented the conditions then existing.

Further, on the 5th of August, 1881, Rhodes made a declaration in writing, as required by the "Cadastral Act," in connection with the renewal of the registration of a ground rent due to him on one of the lots sold to St. Laurent, which forms part of the beach lot, and

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in that declaration this strip is again described as "a road 20 feet wide."

We have, therefore, as the foundation of the theory of dedication: 1st. The grant which in effect provides in certain contingencies which have been held by both courts to have arisen for easy communication from the highroad to the water; 2ndly. The O'Brien plan adopted by Rhodes which purports to lay out the beach in building lots, with this lane or passage marked on it; 3rdly. The deed to Simpson, in September, 1865, with the lane or passage again referred to; 4thly. The cadastral plan on which the strip of land appears as a highway; 5thly. The notice to the registrar in which Rhodes describes the strip of land as a road.

In these circumstances, if complete, clear, unequivocal evidence of an intention to dedicate the strip of land is required, have we not got in such a case as this where the land came to the grantee originally burdened with the obligation to give easy communication over it between the public highroad in the rear and low water mark in the front?

There is also the uncontroverted evidence of usage by the public, during more than thirty years, of this lane or passage; and if originally it had been reserved for the use of the proprietors and tenants of Rhodes, has it not, by reason of this long usage, become a public highway?

See Ancien Denisart, *vo.* "chemin," no. 11:

Un chemin particulier devient chemin public par la seule possession du public.

Idem, par. 3, No. 1:

Les simples sentiers dont nous parlons dans le paragraphe suivant doivent aussi être mis au rang des chemins publics, quand le public est en possession de s'en servir depuis longtemps.

It has been argued that Rhodes may have intended by the deed to Simpson to create only a servitude of passage, but that contention fails entirely. Such a servitude, *i.e.*, a real servitude is a charge imposed on one real estate for the benefit of another belonging to a different proprietor. Where is the servient and dominant estate here? There is no reference to a particular dominant land.

Planiol, vol. 1, p. 590:

Pour qu'il y ait véritablement servitude, il ne suffit pas qu'un propriétaire soit gêné dans l'exercise de son droit; il faut qu'il y ait un *fonde dominant*. C'est là le point qui doit toujours être considéré, si l'on veut éviter cette confusion.

Mr. Justice Bossé relies upon the fact that the dedication was not accepted by the corporation, but this is not necessary; the dedication was not to the corporation, but to the public. There could be a valid acceptance by the public user of the way and, under the Municipal Code of Quebec, a road in use for ten years and divided off on each side from the remaining land, as this was, becomes municipal by mere lapse of time. Art. 749 C.M.

The appeal should be dismissed with costs.

GIROUARD J. agreed with the Chief Justice.

DAVIES J.—I concur in dismissing this appeal and confirming the judgment of the Court of King's Bench, for the reasons given by the Chief Justice.

IDINGTON J. (dissenting).—In 1854 a patent was issued granting the late Mr. Rhodes what was called therein lot No. 2 defined by metes and bounds and forming part of the foreshore lying adjacent to a high-

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way, now known as St. Lawrence Street, which, on its side next the foreshore thus granted, skirted the same at high water mark.

The frontage of this grant extended 446 feet along this street and ran back therefrom several hundred feet to the low water line of the river.

To comply with one of the conditions of the grant, a wharf was built of about thirty-five feet in width running at right angles to the said street some two hundred and fifty feet from the street across the beach and towards the said low water line.

It is alleged that next to that wharf three small lots, having frontage of 75 feet altogether on the said street and fifty feet in depth, were laid out and sold, in 1865 or previous thereto. Another lot some distance to the eastward and of thirty-three feet front on the same street had been sold earlier and is No. 7 on later cadastral plan. It is deeper than these others. Next to that on its easterly side was another piece now called No. 6 on that plan.

That seems all that had been done up to the 5th September, 1865, or eleven years after the grant, when a deed was made by Rhodes to one Simpson, under whom respondent claims, of a lot, known now as No. 12 on the cadastral plan, having a frontage on the St. Lawrence Street of fifty-nine feet and a depth of fifty feet and widening out so as to be wider in the rear than in front.

The configuration of these lots when regard is had to their varying sizes and shapes and depths, indicates they were not the result of any plotting of the ground as a whole or even of any considerable extent of it, but the result of bits having been carved out as occasion required.

The reference in the deed last mentioned to lots one and two as appearing on such a plan by one O'Brien is not at all inconsistent with this view. A plan may have been projected but discarded when lots would not sell.

If it had been adhered to I think we would have had the fact demonstrated by careful comparison of the contents of all the other deeds and records in any way attributable to Mr. Rhodes instead of being asked to make a few guesses, and indeed guesses inconsistent with the very terms of this one deed.

In the absence of evidence of original numbers of lots on either side of it, I, with great respect, fail to see how, as the majority judgment of the court below has it, this land was without a number.

A space of twenty feet fronting on St. Lawrence Street was thus left between the said lot No. 7 and this Simpson lot.

The heirs of Rhodes shortly before this suit sold this space.

Respondent claims this space had been dedicated as a highway and that she, one of the public, entitled as such to use such highway, had been specially injured beyond the rest of the public by the building erected thereon by the purchaser.

The appellants as warrantors of title of the said space have defended to protect their purchaser.

She puts her claim relative to the dedication of this space as street in a two-fold way. She says Rhodes was bound by the conditions of this grant to furnish a cross-street, and although conceding he was not bound to locate it in this exact spot yet as he left a space for a passage way it must be attributed to him that he intended such passage way as part fulfilment of the

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obligation resting upon him and, hence, to be used as a public highway, and that in any event he intended to and did dedicate this space as a public highway and again that by reason of the condition imposed upon him we can the more readily infer such intention.

I think, whether we consider the question raised to be one of dedication or of the discharge of a duty cast upon the grantee by virtue of the terms of the patent granting him a certain area of foreshore it must be determined by what we find to have been the intention of the grantee.

The condition in question amongst numerous other provisos and conditions contained in the patent is the following:

> Provided *always, and these our letters patent are granted upon the express condition, that* our said grantee, his heirs and assigns do and shall renounce, quit and give up all and every claim against and shall hold *harmless all and every the censitaires holding land in the immediate rear of the beach lot hereby granted, for or by reason of any sale or transfer of property by them* or any of them heretofore made to our said grantee or of right *of property in the said beach lot or any part thereof,* and further that *in case the said beach lot shall at any time hereafter be laid out for building lots, a sufficient number of cross-streets shall be left open so as to afford easy communication between the public highroad* in rear of the said beach lot and low water mark in front thereof, and *that such streets shall be made in the manner and of the dimensions that shall be prescribed by municipal regulations then lawfully established.*

Let us consider the peculiar terms of this condition. No one arguing seemed able to explain the purpose of the first part. Possibly the intended cross-streets had some relation to the rights referred to and never had any relation to the rights of the general public. Passing that and assuming that the convenience or possible right of the general public was within the scope of the purpose of this provision for cross-streets when was it to become operative? It is plainly

written that it was only *in case the said beach lot shall at any time hereafter be laid out for building lots* that the cross-streets were to be provided. No such thing has happened. The trifling grants made for building lots are, as a whole, but a mere fractional part of the beach lot which, taking this literally, means the whole lot.

Read, however, not literally, but in a broader way as merely anticipating some substantial approximation of the whole being laid out in building lots, necessitating and entitling the public to demand the cross-streets in order that they would not be inconvenienced, can any one, looking at what happened, conceive of such a provision as this alley afforded, as meant, to meet such a case as that?

Plainly the scope and purpose of the whole grant was formed upon a vision of immediate or early realization of something that has not even yet come to pass.

The bright outlook of 1854 probably became overcast and the hoped-for, expansive, busy harbour turned out a dream.

It seems to me absurd to attribute to any sane man the intention of laying out, as in conformity with what was expected and provided for, a cross-street formed in such a zigzag fashion as this alleged cross-street.

Can any one imagine such a thing deliberately presented either to the municipal council or the officers of the Crown for approval had the events calling therefor arisen?

But if the shape of the thing is not of itself enough to prove the absurdity let us see what was stipulated for in the condition. These cross-streets were to have been made

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in the manner and of the dimensions that shall be prescribed by municipal regulations then lawfully established.

23 Vict. ch. 61, sec. 40, sub-secs. 10 and 11, are as follows:

10. No front road, opened after the first day of July, one thousand eight hundred and fifty-five, shall be less than thirty-six feet French measure, in width, between the lines of the fences on each side thereof;

11. No by-road and no road leading to a banal mill opened after the day last aforesaid, shall be less than twenty-six feet French measure, in width, between the lines of the fences on each side thereof.

These sections continued to be law until the Municipal Code of the Province of Quebec, which slightly modified them in terms used in the sections 768 to 770 thereof which do not, however, touch the case in hand.

The law was so continued by that code till the law, as amended by 53 Vict. ch. 47, required roads in cities, towns and villages to be sixty-six feet wide. Of course special legislation or leave given, as once was provided for by the Lieutenant-Governor in Council, are to be excepted, but these are not in question here.

I am, with respect, quite unable to understand how anything done, as all that was done, which is relied upon here for dedication of a street can be held such or at all in execution of the condition of the deed in face of the express statutory requirements shewing it would be contrary to this law and thus to the above cited proviso of the grant.

It is, however, seriously urged that the terms of the said deed to Simpson imply an intention to dedicate.

But for the adoption of the argument I should have thought such an inference to be absolutely inconceivable. I quote the following from the description in said deed:

Bounded in front, towards the south-east by the public highway or cove road, *in rear towards the north-west by a reserved road or street* on one side to the south-west by lot number three sold to the said William Simpson and on the other side to the north-east *by a lane or passage of the width of twenty feet between* the property above described and that of Benjamin Huot dit Saint Laurent *together with the right of way over the passage in common with the neighbouring proprietors as the said lots are laid* down and distinguished under the numbers one and two on the plan *of a large extent* of property drawn up and prepared by G. P. O'Brien.

The cove road is now St. Laurent Street. The reserved "road or street" in the rear is thirty-six feet in width, being the then usual width of streets. Clearly it was intended as the words and width imply to have this reserved road become a permanent street. But when the description comes to the north-east side and refers to this land in question the words used are changed to read "by a lane or passage of the width of twenty feet." Clearly something different from the other road or street is meant and the width is what did not conform to statutory municipal widths as the other might fairly claim to have done. And, moreover, when we read further and find that there is specially assigned to the grantee a right of way thereon in common with the neighbouring proprietors of the said lots its use when thus restricted is quite inconsistent with the notion of absolute abandonment to the whole public. If this latter had been intended it would have been so much easier to have used the same language as in the preceding description of the rear boundary. Besides, how can we suppose such difference of widths intended for these respective streets?

The desire to exclude all the public therefrom but those desiring and requiring communication with the limited number of the neighbours or any of them or they with others beyond their respective premises, is quite conceivable and that such a narrow passage

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ought not to be thrown open to general use hindering its ready use by those few evidently intended to benefit by it is also so.

For reasons one may suspect this right not being open we are asked to imply something else.

In many ways the expected development fell short. We may guess many things as to these plans for development, but this guess of including the alleged street now in question as part of a public highway seems the most hopeless of many that are open to one reading the evidence and plan which probably presents but a fraction of what Mr. O'Brien had begun.

By reason of the obvious failure of the scheme as a whole, and of demands for building lots there, the general convenience of the public never had been disturbed for want of cross-streets. If this outlet had been occupied, and all the lands Rhodes alienated had been built upon, it would have withdrawn only about a third of the frontage from public use. But to this day lot 7 is unoccupied and probably nothing was built on in 1865. The wharf was and is no doubt travelled over. The one half of the entire frontage granted Rhodes has never been laid out into lots or occupied. Hence it never occurred to anybody to ask for a cross-street or to the council to adopt this as a cross-street, much less to Rhodes, in 1865, to dedicate such a street as alleged by such curious methods as alleged.

The next thing claimed to be important in support of the respondents' contention is that in the renewal of registration of a ground rent to comply with new enactments he on the 5th August, 1881, referred to the said lot No. 7 as bounded to the south-west by a road of "20 feet wide."

This is not inconsistent with the road being of the private character originally indicated, though if followed up and coupled with other things it might start a new basis for an express case of dedication or be held as an adoption in that sense of previous public use as quite justifiable and in accord with his intention to dedicate.

The fact is, however, even this equivocal description arose from a palpable error in following some one else's error, for which Mr. Rhodes was not responsible, and a few days later his renewal of his registration of his rights resulting from the letters patent is made in such a way as to shew he claimed this very land and other parts as being one lot, "8a," as they appear on the cadastral plan.

Besides all this, from 1873 down we have evidence that this lot thus named "8a" was assessed and taxes thereon paid by Mr. Rhodes and his heirs or representatives, almost, if not altogether, continuously.

This is quite inconsistent with a settled purpose to dedicate and with the accidental use of the word road as an indication that he had already dedicated.

In 1879, or thereabout, the Intercolonial Railway was built through and along this beach and altered, no doubt, the original purposes and plans of Rhodes and others, respecting these properties. Yet no new building lots seem to have been demanded or need for the cross-streets arisen.

The contractor for this railway, which was built by the Crown, left an opening in the trestle work carrying that railway along the beach.

Nobody pretends this was done at the request of Mr. Rhodes. It was doubtless done at the request of his grantees or their assigns.

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Their doing so was quite in accord with an extension of the rights reserved to *them* as shewn by the deed to Simpson.

How it created any right in the general public or is evidence in itself of dedication I am unable to understand.

Lastly, we are asked to find that such general use of this alleged road was for a long, continuous period made by the public with the knowledge of Mr. Rhodes as to furnish proof of dedication.

I should be sorry to deprive any man of his property by giving the effect claimed to such meagre evidence of general and continuous user by the general public as we have here. Nor as I understand would any one else but for the supposed dedication being held conformable to the above-quoted proviso in the grant despite the obvious conflict therewith already referred to.

Indeed, to hold this evidence as sufficient for such a purpose would be a menace to the rights of many good-natured people whose property has been for years crossed without consideration of such an effect as possible.

The proprietor did not live where this alleged crossing took place. No one testifies he ever was aware of it.

It is conceded this foreshore was used as such spaces, when ungranted and unoccupied, always are used by the public or at all events those of the public having access thereto.

Doubtless this use was expected to continue and continued after the grant as freely as before on all parts thereof unoccupied by grantees of Rhodes.

Until the building of the Intercolonial Railway the

public had, as well as over this, free access, as open as ever, over the remaining unalienated frontage and the wharf to reach the river.

The municipal council, in or about the year 1868, widened and improved St. Lawrence Street, and in doing so erected a sea-wall, so to speak, to prevent the street from being inundated.

At the point where this alleged 20 feet wide street, which it is claimed was becoming dedicated by virtue of this user, joined this St. Lawrence Street the wall so erected was about six feet high above the land in question and one desiring to step from St. Lawrence Street on to this new street had that difficulty to overcome, or jump down into a hole.

Nay, more, it was so dangerous that a barrier was erected, consisting, it is said, of two oars nailed up at this entrance, to prevent passers-by falling into the cavity.

Those, therefore, desiring to use and thereby accept for the public this proffered dedication had to jump over or go round this barrier. They did the latter by means of crossing the end of lots 7 or 12. In course of time the rubbish thrown there or drifted by the tide there partly filled up the hole and made it easier of access, and hence we have varying estimates of its depth.

It seems a pretty strong thing to impute upon and only upon such evidence an intention on the part of the proprietor to dedicate.

But what of the acceptance necessary to complete dedication?

The council usually represents the public in relation to such acceptance. They did not do so here.

Again, when the user in time has by a continuous

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assertion of such right taken on a definite form so that apparently a public way has been created, those concerned are not usually slow to ask their municipal council to improve what seems to have grown by common consent to be a public road.

Nobody ever thought of such a thing in relation to this alleged road. Why? It needed certainly something done to facilitate travel if that travel had really existed which ought to evidence either acceptance of a dedication by long use or abandonment of property thereby. Is it not obvious that either the travel did not exist to justify such a conclusion or that every one knew it was a mere piece of private property over which only some persons could, as of right, pass, and that all the travel done by others beyond these was of the trifling character that would not warrant either the council to assume it or any one to ask them to assume it and fill up the space so as to make it bear some resemblance to a public way.

All this time the tide is going in and out over this alleged highway and nobody caring until some person recently in connection with some work on the Intercolonial Railway saw fit to fill it up level with the street and render it travellable.

Inasmuch as no point was made and argued of the peculiar nature of the title Mr. Rhodes got as grantee of the foreshore (see the case of *Lord Fitzhardinge* v. *Purcell*(1)), I have not rested my conclusion upon such considerations, but I may be permitted to doubt if there ever could have been a dedication in the ordinary sense of this land for a public highway, and if there ever could be invoked by the respondent (even if not impliedly restricted to a user in common with the

(1) (1908) 2 Ch. 139.

specified neighbours) any such rights as she asserts except by and through the intervention of the Attorney-General by way of insisting upon the due observance of the proviso above quoted from the grant.

Had the need for "easy communication," which is the gist of the proviso, arisen and such a proceeding been taken by the Attorney-General, how could Rhodes have answered it by alleging or tendering this zigzag space only twenty feet wide at the place in question as an "easy means of communication."

Such are the several, and as I find insufficient, grounds of the claim when each is taken in detail.

And if taken as a whole I fail to see how they can found in law such a claim as set up by the respondent.

I therefore conclude the appeal should be allowed with costs here and in all the courts below.

MACLENNAN J.—I would dismiss the appeal for the reasons given by the learned Chief Justice.

DUFF J. concurred in the judgment dismissing the appeal.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Belleau, Belleau & Belleau.*

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LEONARD VAUGHAN AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

THE EASTERN TOWNSHIPS BANK AND WILLIAM H. COVERT (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Irrigation—Rivers and streams—B.C. "Land Act, 1884" and amendments—Pre-emption of agricultural lands—Water records—Appurtenances—Abandonment of pre-emption—Lapse of water record.

Where holders of separate pre-emptions of agricultural lands, under the provisions of the "Land Act, 1884," 47 Vict. ch. 16 (B.C.), and the amendment thereof, 49 Vict. ch. 10 (B.C.), with the object of vesting their respective pre-emptions in themselves as partners, surrendered the separate pre-emptions to the Crown, and, on the same day, re-located the same areas as partners, obtaining a pre-emption record thereof in their joint names, the joint water record previously granted to them, as partners, in connection with their separate pre-emptions, cannot be considered to have been abandoned. The effect of the transaction caused the areas to become unoccupied lands of the Crown, within the meaning of the statute, and, upon their re-location, the water record in connection therewith continued to subsist as a right appurtenant to the joint pre-emption.

Judgment appealed from (13 B.C. Rep. 77) reversed, the Chief Justice and Duff J. dissenting.

APPEAL from the judgment of the Supreme Court of British Columbia(1), reversing the judgment of Morrison J. at the trial.

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

(1) 13 B.C. Rep. 77.

The defendants, Vaughan and McInnes, held separate pre-emption records, and, as partners, a joint water record, dated 20th January, 1888. On 28th October, 1889, they recorded what was styled an abandonment of their respective pre-emptions, relocated the same areas as partners, and, on the same day, applied for and recorded these areas as a new pre-emption in their joint names, in partnership, under the provisions of the "Land Act, 1884"(1), and the Act amending that statute(2). Nothing was done in respect to the water record which was allowed to stand, as previously, in their joint names, "Vaughan and McInnes." At the same time the pre-emptors swore to an affidavit, in the form required by the statute, stating that the areas were "unoccupied and unreserved Crown lands, within the meaning of the statute * * * staked off and marked * * * in accordance with the provisions of the 'Land Act.'"

The grant of water to Vaughan and McInnes was for 99 years from the 20th of January, 1888. On 25th March, 1899, the respondent Covert obtained a grant and record of the same water rights for an indefinite period, and, some time before the commencement of the action, transferred his lands, adjoining those of Vaughan and McInnes, and his water record to the other respondent, the Eastern Townships Bank. The bank subdivided the lands into small fruit farms and constructed an irrigation system for the use of these plots of land. Covert's water record was indorsed by the recording officer with a memorandum, as follows: "Error in not making out application on the 18th October, 1887," and the bank, claiming that this had the effect of antedating their water record to the 18th

(1) 47 Vict. ch. 16 (B.C.). (2) 49 Vict. ch. 10 (B.C.).

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of October, 1887, and giving it priority over the appellants' record, brought the action to restrain them from using the water in priority of the respondents and also attacking the validity of the appellants' record. The trial judge, Morrison J., dismissed the action and, on appeal, his decision was reversed by the judgment from which the present appeal is asserted.

J. A. Macdonald K.C. for the appellants.

S. S. Taylor K.C. and *H. C. Hamilton* for the respondents.

THE CHIEF JUSTICE (dissenting).—I dissent from the judgment allowing this appeal for the reasons stated by Mr. Justice Duff.

DAVIES J.—I concur generally with my brother Maclennan in his conclusion to allow this appeal and to restore the judgment of the trial judge dismissing the action, but I desire to add some words of my own.

The ground upon which the Supreme Court of British Columbia rested their judgment was that the appellants, Vaughan and McInnes, had abandoned their separate pre-emptions at the time they took out their joint pre-emption and that their water record which had been obtained in connection with the pre-emption consequently lapsed.

A number of other points were raised by the respondents either as invalidating the appellants' record or as giving priority to that of the respondents. I do not intend dealing with these at any length: I think the want of certainty alleged in the defendants, (appellants') record from the absence in it of the name

of the creek sufficiently covered by their application for the record which application is identified in the record itself by its official number and contains the clerk's name.

I agree for the reasons stated by my brother Maclennan that it would be impossible under the facts to make the respondent Covert's record relate back from the 25th March, 1889, to the 18th October, 1887, as contended for.

The substantial point on which the judgment of the court below proceeds was that there was such an abandonment by the appellants of the land of which they had severally pre-empted 340 acres and of their "lawful occupation and *bonâ fide* cultivation" of the same as necessarily destroyed or forfeited their water record and caused it to lapse.

I am unable to reach the conclusion of the court below that there was any such abandonment.

I agree that in order to obtain and retain a water record under this statute several things must exist and concur. The applicant or applicants must (*a*) be entitled to hold land and (*b*) must also be "lawfully occupying and *bonâ fide* cultivating lands" in connection with which and as appurtenant to which he may record and divert so much water from the natural channel of any stream, lake or river adjacent to or passing through such land as may be reasonably necessary for agricultural or other purposes, and the commissioner for the district may allow. The 43rd section of the statute of 1884, as cited by my brother Maclennan, is the governing section.

In the case of the respondents these conditions existed at the time they obtained their water record. The fact that they obtained a joint water record while their pre-emptive rights were several in the land does

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not appear to me by any means to be fatal. Though they had each separate pre-emptive rights in 320 acres they worked all the lands in partnership and their occupation and cultivation of the lands were joint. The statute in its 19th section expressly contemplates the case of several persons uniting in partnership for the purpose of pre-empting, holding and working land and expressly declared such persons to be eligible to pre-empt as a firm an area of land to the extent to each partner of 320 acres in that part of British Columbia. But there is nothing in the statute which in my opinion prevents separate pre-emptors whose lands were so relatively situated that one water record in their joint names would enable them more satisfactorily to obtain the supply of water required for irrigation or other agricultural purposes from making an application in their joint names and obtaining a joint water record to be utilized for their several farms or holdings.

I have not heard any satisfactory reason advanced why that should not be so. The statute certainly does not expressly prohibit such a course being taken, and I can easily conceive of situations existing which would makes such a course very desirable, if not necessary, as well from a pecuniary standpoint as from the physical situation of the lands relatively to the water sought to be obtained.

The defendants then having separate pre-emptive rights in the 640 acres which they worked in partnership, obtained their joint water record, necessitating the construction of one ditch only to carry the water to their lands. In this I think they were not acting outside of either the letter or the spirit of the statute.

Afterwards, deeming it desirable to consolidate their separate pre-emptive rights in one joint pre-emp-

tion and finding the statute prohibited any transfer of any pre-empted land until after the issue of a Crown grant of the same, they went to the proper officer to effect their purpose by surrendering up their separate pre-emptions and taking out a joint pre-emption. As Vaughan in his evidence says:

> I told him (the officer) to put the lots in partnership; I turned over the old records and he made new ones.

The necessary formal application to record in their joint names as pre-emptors the 640 acres and also the statutory declaration to accompany it were duly made.

This it is which is said to amount to an abandonment and to work a forfeiture of their water record. But an abandonment of what? Not of the lands, certainly. These continued in the possession and occupation of Vaughan and McInnes as they had been all along, and continued to be cultivated in partnership as they had been. No other person was or could be in such occupation or cultivation while the defendants remained in them. No suggestion ever was made of any intention to abandon the lands or their possession or occupation. No evidence of such intention was or could be given because it would be contrary to the fact. As a fact there was no abandonment and no intention to abandon, but on the contrary a clear undoubted intention to continue in the joint occupation and cultivation of the 640 acres.

The pre-emptors continued on without a break in their *bonâ fide* occupation and cultivation of the pre-empted lands, the sole and only change being that the separate pre-emptions were changed into a joint one. But this mere change in the title would not alone, in my judgment, operate to work a forfeiture of the water record which was appurtenant to their lands. The

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change was doubtless made in order that their water record being joint, their pre-emptive rights might agree with it. But the conditions necessary, in my opinion, under the statute to obtain a water record or right and to retain such right, namely, the existence of a person or persons entitled to hold lands and their "lawful occupation and cultivation" by such persons continued in the case of defendants, appellants, and their lands, and the mere change in the manner in which the title to the lands was held was not in itself fatal to their water rights. Looking at the substance of the transaction it cannot in my opinion be fairly said that there was any such abandonment as that contended for or any abandonment of the lands at all, or of the manner in which they had all along been occupied and cultivated. The most that can be said is that as they desired to change the tenure or title by which they held the lands from separate pre-emptions of moieties to a joint pre-emption of the whole and that as the statute prevented the accomplishment of their purpose by the customary methods of transfer until the Crown grant issued, they were compelled to resort to the method they adopted of surrendering their several pre-emptions and taking out instead a joint pre-emption. But such mere change in the manner of holding their title did not in any way affect their occupation and cultivation of the land or the necessity which presumably existed for the water their record entitled them to divert. The object of the prohibition of transfer until after Crown grant was issued I take it was to insure as far as might be possible that only *bonâ fide* occupiers and cultivators should hold and enjoy pre-emptive rights. It was to prevent the speculator and the many outside parties not being *bonâ fide* occupiers or cultivators from becoming the owners by purchase of these rights. Such

prohibition never was nor could be intended to prevent several *bonâ fide* occupiers and cultivators who had taken separate pre-emptions from surrendering their several and separate rights and changing them into joint ones, if they desired to work their holdings in partnership, or on the other hand prevent those who had made their pre-emptions joint under the statute from surrendering and changing their interests to several ones. To say that they could only do so under penalty of forfeiture of their water rights which presumably were essential to the profitable enjoyment of their holdings is to import into the statute an object which I am satisfied was not that of the legislature, and to put a construction upon its sections which they will not fairly bear.

A statutory water right appurtenant to a piece of land for the purposes of its proper and profitable occupation and cultivation might properly be forfeited and lost by its owner abandoning his holding. But in every case I take it whether there has been an abandonment or not must be a question of fact. In the circumstances of the case before us I find not an abandonment of the lands for the proper cultivation of which the water record was granted, but a mere change in the title, of the holders or occupants from several pre-emptions to a joint pre-emption so as to enable them more effectively in their opinion at any rate to cultivate and develop their holdings.

Then it is said that in order to obtain the joint pre-emption they were obliged to make and did make a false declaration in stating the lands to be

> unoccupied and unreserved Crown lands within the meaning of the "Crown Land Act."

I do not agree to that. Whether the affidavit was false or true depends upon the construction of the

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statute. The statement that the land was unoccupied Crown land does not mean that *the applicant* was not in its occupation. What I take it to mean is that no other or third person occupied it. In the very nature of things the plaintiff must have been an occupier when he made his application because the statute in its 5th section expressly requires any intending pre-emptor to go upon the lands he intends pre-empting, and if the lands be unsurveyed first place at each of its angles or corners a stake or post, and further requires him to fix upon each post a notice in the following form:

A. B.'s land N.E. post:—A. B.'s land N.W. post, and so on as the case may be.

It is only after the intending pre-emptor has complied with these statutory requirements that he can make his application and if he obtains his record without having so staked and marked his land the statute goes on to say "he shall have no right at law or in equity therein."

These essential pre-requisites go to shew that when he makes the declaration that the lands are unoccupied the meaning is unoccupied by any person other than the applicant. It would seem absurd that an intending pre-emptor staking out his land and complying with the statutory requirements of proclaiming by notice on the four corners of the land, that the land was his should, if he left his wife and children in a camp upon the land while he journeyed perhaps hundreds of miles to the proper officer to complete his pre-emption, be guilty of perjury if in his declaration he called the land unoccupied. It would be in my opinion unoccupied Crown lands within the meaning of the statute it after having been surveyed, staked and proclaimed as his by the applicant, he, in order to prevent it being

"jumped," or for any other reason, left his wife or agent in possession while he himself travelled away to complete his title.

For these reasons I am of the opinion that the appeal should be allowed with costs and the judgment of the trial judge restored.

IDINGTON J.—The questions raised by this appeal turn upon the correct interpretation of the provisions of the "Land Act, 1884," providing by said statute and also some amendments thereto for the diversion of water from the streams in British Columbia.

The legislation in question is a clear invasion of the ordinary common law rights of riparian proprietors and others whose properties may become subservient to the rights given to affect the purposes of the Act.

To carry out the provisions of the Act, officers of the Crown are entrusted with the duties of receiving applications from those desiring to avail themselves of the provisions of the Act to acquire such rights of diversion as the Act enables to be given.

It is part of the duties of these officers receiving such an application to see that all the conditions preliminary to such acquisition have been complied with and when complied with, to make a record of the grant which is made when he finds these conditions to have been complied with.

Hence the rights thus acquired are called water records.

The same officers who discharge these duties also have charge of the selling or entering and granting applications for the purchase of Crown lands in the district for which they are appointed. When granted and recorded this right of purchase is spoken of as a pre-emption right or record.

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Each of the appellants, Vaughan and McInnes, acquired as results of such applications for purchase a pre-emption right to certain lands that adjoined each other and could be usefully served by the same ditches or water system conveying water from a creek known as "fourth of July" creek.

They occupied these lands over which they had thus respectively acquired such rights of pre-emption.

Though each thus had his separate title by way of pre-emption they carried on the business of farming these lands in partnership.

Their occupation was joint, but the root of each title to occupation was several, and when each occupant entered on or was in occupation of the land pre-empted by the other he was dependent on the will of that other or the contract he had with that other to maintain his right to such occupancy.

That occupancy might be jointly with or in substitution of the other as agreed, provided always such substitution was not entire or in conflict with the conditions imposed "of continuous settlement."

It is necessary to understand these elementary propositions clearly in order that we can see if such persons fall within section 39 of the Act in question which reads as follows:

> 39. Every person lawfully entitled to hold land under this Act, or under any former Act, and lawfully occupying and *bonâ fide* cultivating lands, may record and divert so much and no more of any unrecorded and unappropriated water from the natural channel of any stream, lake, or river *adjacent to* or passing through such land, for agricultural or other purposes, as may be reasonably necessary for such purposes, upon obtaining the written authority of the commissioner of the district to that effect, and a record of the same shall be made with him, after due notice as herein mentioned, specifying the name of the applicant, the quantity sought to be diverted, the place of diversion, the object thereof, and all such other particulars as such commissioner may require. For every such record the commissioner shall charge a fee of two dollars;

and no such person shall have any exclusive right to the use of such water, whether the same flow naturally through or over his land, except such record shall have been made and such fee paid.

The statute does not define what is necessary to constitute a person lawfully entitled to hold land under this or any former Act. This Act excludes by implication, aliens, unless complying with the terms laid down promising to become British subjects. Another Act, 47 Vict. ch. 2, expressly excludes Chinese.

Each of these appellants who obtained the water record seems to have been qualified. No contention was made to the contrary in this regard. I therefore assume them qualified.

Each of these appellants under the relations formed towards each other and these lands were lawfully occupying and *bonâ fide* cultivating the lands in question.

When we have regard to the purview of the Act we must surely conclude that it is the "lawfully occupying and *bonâ fide* cultivating" that is desired to be served by this allotment of water.

This phrase appears in more than one place in the Act. As a test of the meaning of the Act that is in a measure of some value.

But beyond all that what could be the purpose of such legislation invading, as already said, what was ordinarily looked upon not only as an incident of the ownership of real property, but so much part and parcel thereof as to seem almost inseparable therefrom if it were not to be the means of supplying water to the cultivator?

What we have to find under this section is a personal status for which the applicant or applicants must be qualified, first, by a general capacity to hold

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real estate; and, secondly, that he or they occupy and cultivate land.

No other condition or requirement of any kind is named in the statute or is referred to in the application for a water record, or in the water record itself.

Why should we seek to import one? How can we if we so sought to do?

The language used does not warrant our doing so. It is so clear and so express on this point as, I submit, to forbid us doing so.

Now let us see if the appellants have that required personal status. Each was when the water record was applied for and got, in lawful occupation of and *bonâ fide* cultivating land which needed the use of water.

Nay, more, it is proven that together they lawfully occupied and cultivated as partners each with the other that other's land, and thereby were fully qualified even if some specific land must be also had in view unless the ordinary rights of land owners to so assemble their rights of occupation and cultivation are to be denied them.

There is in this last regard I submit no colour of reason for such a suggestion unless it is found in the prohibition of section 24:

> 24. No transfer of any surveyed or unsurveyed land pre-empted under this Act shall be valid after a Crown grant of the same shall have been issued.

This section has been considered by the courts of British Columbia in two cases, *Turner* v. *Curran*(1), where an agreement to sell outright a pre-emption claim was held void, and *Hjorth* v. *Smith*(2), where a deed having been executed before patent of a pre-empted lot of land purported to convey it, but was only intended to operate after the patent was issued and to

(1) 2 B.C. Rep. 51. (2) 5 B.C. Rep. 369.

effect that purpose it was delivered as an escrow and after the issue of the patent was held valid.

This latter judgment proceeded on the ground that the instrument did not come within the express terms of the prohibiting a transfer of the land so pre-empted. See also *Meek* v. *Parsons*(1).

In like manner I fail to see how the agreement between the defendants to work the lands each was entitled to in partnership could come within the prohibition. It does not seem to me that such an agreement or acting upon it could offend against or come within the evil at which the section aimed.

It is, however, contended further that the grant of a water record must be held as intended to have been appurtenant to some specific land. Why so? The statute does not in terms or by any reasonable implication thereof make it so.

Let us test it by what would be the result of a conveyance of the land.

Bouvier's Dictionary (vol. 1, p. 158) defines "appurtenances" as follows:

> Things belonging to another thing as principal, and which pass as incident to the principal thing.

Burton on Real Property (8th ed.), p. 353, par. 1145, repeating Coke on Littleton, says:

> In general everything which is appendant or appurtenant to land will pass by any conveyance of the land itself, without being specified, and even without the use of the ordinary form "with the appurtenances" at the end of the description.

Then we find the interpretation given by authorities cited in Gould on Waters (3 ed.), p. 465, dealing with similar legislation is stated as follows:

> The ditch when completed is not a mere easement or appurtenance.

(1) 31 O.R. 529.

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I do not find the cases he refers to in the foot note to the text bear directly on the point, but the cases of *Strickler* v. *City of Colorado Springs*(1), and *Bloom* v. *West*(2), are well worth looking at and held as just quoted.

The greater part of the land might be granted, one part to one, another to another, or for some other purpose to which this never could be supposed to be appurtenant.

Or as intensive farming progressed a few acres of a whole section might require all the water so granted. Yet if anything in the theory that it was appurtenant a man may have after spending large sums of money on such improvements his whole property tied up in an undesirable way.

It would, I submit, be the part of wisdom to proceed slowly before grafting on to any statutory right, though having in some respects some relation to the use of or use for land, the intricate technical character of real property rights at common law or derived from ancient statutes; especially when the statutory right under consideration shews as clearly as this one does that it had not had that consideration given to it that would render the grafting process a success. Moreover, the statute does not imply any permanency of title as needed to entitle one to apply or receive a grant so long as there exists land lawfully occupied and cultivated and the party is not a mere trespasser.

The legal right given by this statute is, I think, analogous to that given householders in cities to be supplied by municipal or other corporations with light or water.

The right often, if not always, exists in the house-

(1) 16 Col. 61. (2) 3 Col. App. Rep. 212.

holder on the line to insist on a supply of light or water because he therein fulfils the primary condition entitling to such supply.

But who ever heard of such a right as so appurtenant to the land that a purchaser and grantee thereof could insist on the actual fulfilment of the personal contract which the vendor may have had, for years yet to run, at the time of sale?

In actual practice the term of ninety-nine or eighty years now in question may not seem to have much relation to the not uncommon term of a few years.

But in what essential is there any difference in legal principle?

The radical error in the judgment appealed from is that it assumes as necessary to the grant or holding it that there must be unity of title in the privilege or franchise given by the statute and in the property which it is used to benefit or improve whilst the statute clearly neither expresses any such thing nor implies it as necessary in any way, but plainly expresses merely the lawful occupation and cultivation.

Nay, more, to insist upon this unity of title in such a statute as before us where so many contingencies, qualifications and conditions are left unprovided for would be to defeat the purpose of the Act.

The whole chapter of Gould on Waters devoted to this branch of law is replete with such material as to suggest many reasons for holding this statutory right as it existed under the Act now in question and before later developments did not proceed upon any such theory as the water record becoming appurtenant to any land.

It could not in case of a sale of part perhaps even of the greater part of the land be conceivable as appurtenant to that sold. It is not severable in that way.

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It requires a special bargain in such case and does not pass.

Indeed it might well be designed that part should pass and remainder be left without water.

All this remained unsettled, unprovided for, when this water record in question was granted. The statute as amended alters much of this, but cannot bear on this case.

I do not urge that the water records could not be made appurtenant by contract. Nor do I say that a statute might not be framed to have the same effect or pass any opinion on the statute as now amended.

I merely desire to enforce the argument that this statute had not made the water record appurtenant when first creating it and, hence, neither being so necessarily nor made so by express terms is not appurtenant.

The statute as amended in 1886 provided that transfers, etc.,

> shall be construed to have conveyed and transferred, etc., * * * any and all recorded water privileges in any manner attached to *or used* in the working of the land pre-empted or conveyed, etc., etc.

How far does that carry us? It simply provided for giving *primâ facie* effect to the probable intention of parties making and receiving such transfers and recognizes a right not hitherto existing to transfer a water record.

It would seem quite clear, apart from any inference drawn from the existence and frame of this amendment, that the water record had not up to that time been assignable.

It was necessary to confer and define the extent of the power to assign, and in doing it this very class of cases was omitted for the section carefully restricts its operation to the transfers

of any pre-emption right where the same are or were permitted by law.

Any argument to be derived from it seems to me distinctly against such a position as taken here by respondents, that inherently these water records had been appurtenant to any land. It does not matter if in a dozen other classes of cases the right has become appurtenant so long as it has not so become in this.

It helps, moreover, appellants' case, when we have to consider the question upon which the whole case turned in the court below, to keep in view this obvious exclusion of this very case inherent in the amendment. Even if the right were appurtenant I think, for reasons I am about to state, it had not been forfeited.

Let us consider then, what is relied on to forfeit appellants' rights.

What happened was this. These appellants, Vaughan and McInnes, desired to extend their relations as partners to a joint interest or ownership of pre-emption in the lands hitherto held separately.

They presented their wishes on the 28th October, 1889, to the commissioner and on that day with his sanction and approval (as attested both by his swearing them to the affidavit taken, and the evidence of Vaughan, as well as what I infer from the date and form of the application on his printed form possibly written in if not by himself by his express directions, and from his writing across the face of their pre-emption certificates the alleged abandonment thereof) signed an application for a pre-emption of the combined properties of both and made the usual affidavit therefor.

Section 24 prohibited a transfer from one to the other and this mode was adopted of bringing about the desired result.

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What legal effect had this proceeding? Most obviously it was either effective or a nullity.

The latter was entirely contrary to the intention of the parties, yet if illegal it must be held to have been and to be null.

In either alternative it cannot help the respondent.

If it effected nothing the so-called surrender was null.

The rights of the parties could not be so destroyed. They remained in lawful occupation throughout and continued cultivating jointly their lands.

It is treated in the judgment appealed from as effective to terminate the right of appellants.

In this I cannot agree. The Crown alone had the right to affirm this alleged termination of these pre-emptive rights.

If anything flowed therefrom, let us suppose, if we can venture so to suppose, the Crown had instituted proceedings to have it declared that the pre-emption had ended, because one of the officers of the Crown had in course of this written across one corner of the certificate the words, "abandoned 28th October, '89, W.D., Assistant Commissioner of L. & W.," and set thereto his own initials. Can any one say such a claim would in any court of justice have been maintained? See the case of *Lytle* v. *State of Arkansas*(1), at p. 333.

It is said there must be a time during which the appellants' rights were suspended, yet they were in occupation.

Then they must have been on this theory of suspension and surrender trespassers during that time. Could the Crown have maintained a suit for trespass done during that time? The answer would be that, until something more was done by the Crown, they were

(1) 9 How. 314.

tenants at will or on sufferance and, thus, in the lawful occupation and cultivation which alone can be urged when assuming it must continue as the basis of right to hold the water record.

Again, the surrender relied on is a myth. The applicants signed nothing and did nothing but hand conditionally their certificates of pre-emption to the officer. His act in writing thereon was unauthorized unless he had power to do effectively what they desired and trusted to have done. Meantime the water record was not touched in any way. How then can it be held to be affected? Whilst the statute requires at its granting a personal status in him applying for it there is no provision for the qualification continuing.

The legislature seemed to assume that such a thing as a desire to hold when no longer useful was not likely to arise.

At all events no such case was specially provided for.

I do not doubt that in law it was provided for by the implied consideration for and thus become virtually a condition inherent in the grant that it should be made useful.

But in that case it would not end as a matter of course.

It would require something done at the instance of the Crown by a proceeding in a court in a proper way shewing that in fact the consideration for the grant had failed.

The right would not terminate automatically, as it were. No statute or law had said so and this mode of relief was not one the respondents could insist upon.

This is entirely another consideration from that other argument used that the water would revert to the Crown, in which, I think, there is much to be considered.

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But if what I have said be not effective in maintaining my argument I doubt if it would gain any added strength from this other.

What I have set forth as above seems to me clearly to establish by a strict adherence to elementary principles and the language of the statute that the appellants are entitled to succeed.

The numerous points taken and arguments adduced on either side beyond those directly or incidentally implied in the foregoing have received due consideration, but need not be dwelt upon at great length.

The date of the notice founding the appellants' application I think erroneous. We must now at this time assume the assistant commissioner adjudicated properly on so very obvious a matter. Besides there is the view taken in this court in the case of *Martley* v. *Carson*(1).

As to the alleged priority of the respondents' claim it is not supported by such evidence as at this distance of time should be called for in light of nearly twenty years of acquiescence in a condition of things that it would be most unjust for that reason alone now to disturb. It has to stand or fall by its own strength and adds nothing to anything else in the case on which the respondents might rely.

The ground taken by respondents that the water record of appellants does not designate the purpose for which the water is to be used on the creek in respect of which the water record is granted supported by a reference to sections 43 and 44 is deserving of notice, not from any strength to be found in it, but as one of those assumptions of law and fact that I respectfully submit have wrought so much confusion in this case.

The Act does not by these sections or anywhere

(1) 20 Can. S.C.R. 634.

expressly require that the exact purpose for which the water is to be diverted should be stated in the application or defined in the record of grant. There are certain things pretty evidently required by these sections. They are the personal status or qualification of the applicant already dwelt upon, that the water shall be for agricultural or other purposes, that the quantity be specified, and the object. Now surely what has been adjudged by the commissioner and done in pursuance thereof must be taken at this late date in light of the evidence before us to have got itself defined to the satisfaction of him in whom was reposed the judicial power to determine. More than that due consideration of the whole involved in this minor inquiry drives me to conclude that the adjudication must have proceeded upon a consideration of what quantity of *cultivatable land* was within a reasonable time likely to be in need of water and that the extent of land already cultivated would be some index thereof and that it was not the irreclaimable rocks which for aught we know may have formed nine-tenths of the entire land in question that would or could be considered by the commissioner.

All these and like considerations, as well as extent of supply, and possible needs of others, were entrusted to the commissioner to pass upon before he sanctioned priority.

Time has settled the boundaries of what he assigned and tells us thus what he did. But at no time does it seem that he or any one else had ever to consider to what land or part of land this grant so recorded should become appurtenant as one would expect to have found if the legislature had felt concerned in that sort of question instead of leaving it to be held in gross to become if need be appurtenant to

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what events might prove it fitting it should be, and the proprietor determine.

That brings me to suggest that the judicial nature of the inquiry entrusted to the commissioner was of such a character that unless he was clearly without any jurisdiction to pass upon appellants' first application for water in the way and to award as he did we have no right to disturb his decision which has remained unchallenged for nearly twenty years, nor has the respondent any right now when he failed to shew cause at the proper time before the commissioner as against appellants' application made, as it was always known to be, jointly.

This same judicial character of the functions the assistant commissioner had to discharge renders it quite needless to notice at length the rather absurd sort of proceeding relied upon as having the effect of ante-dating respondents' grant to the detriment of the appellants without ever calling upon them to shew cause.

Taking into account the various considerations above as well as others not adverted to and section 3 of the amendment of 1886 and some other sections and having regard to the principles upon which the case of *Osborne* v. *Morgan*(1) proceeds, though possibly distinguishable from this case, there may be grave reason to doubt the status of the respondent herein.

It has become unnecessary in my view to pass upon the same. Being so, it is also undesirable to do so, as it might involve considerations detrimental to the rights of the respondent which in no way affect, or, in my view, now concern the appellants herein.

I think the appeal should be allowed with costs

(1) 13 App. Cas. 227.

here and in the court below and the judgment of the trial judge be restored.

MACLENNAN J.—The first question in this appeal is the date of the respective water records of the parties.

The Vaughan and McInnes application for a record was on the 15th November, 1884, and the Covert application on the 18th September, 1887. Both applications are in the same form; they are in reality not applications, but notices of *intention* to apply under section 43 of the "Land Act, 1884," for permission to divert 300 inches of water from the Fourth of July Creek.

That section authorizes persons lawfully occupying and cultivating land to divert water for agricultural purposes

upon obtaining the written authority of the land commissioner to that effect.

The section also requires that a record be made of the same with him, specifying certain particulars. A fee of $2 is required to be paid, and the section declares that no person shall have a right to use such water without such record having been made, and fee paid. The Vaughan and McInnes record, hereinafter called the Vaughan record, was made on the 28th January, 1888, and is expressed to be made under the said section 43; while the Covert record is dated the 25th March, 1889. That is its form and date, and if there was nothing more in the case, there would be a clear and undoubted priority of the Vaughan record of more than a year.

It is sought, however, to make the Covert record relate back to the 18th of October, 1887, by evidence that Covert, not having received his record for a long

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time, made application to the commissioner, and obtained it in the form and on the date above mentioned, but with a memorandum written across it and signed by the commissioner in these words:

Error in not making out application on the 18th October, 1887.

A receipt is also produced, dated on the 25th March, 1889, for $2, the fee required by the statute to be paid for such records. On this receipt also is indorsed a similar memorandum to that upon the record, except that it says

error in not making out *record* instead of *application.*

Mr. Covert in his evidence said he had sent a sufficient sum with his notice of application to cover the $2 required to be paid for the record. The commissioner evidently did not acknowledge that he had received the fee with the application, but required and received it at the date of the record, and the only receipt which he gave was of the same date as the record.

Assuming that Covert did with his application enclose money enough for the record fee, I think it is impossible to hold that his record can relate back to the 18th October, 1887.

Section 46 of the Act declares that priority of right to water privileges, in case of dispute, shall depend on priority of record, and there was no record made for Covert until the later date. There had only been a *notice* of *intention* to *apply* for one, and when Randall, his agent, went for the record he saw the notice still sticking up in the office. It is beyond all possible controversy that there was no *written authority,* and no *record* made by or with the commissioner, such as the statute requires, until the 25th March, 1889.

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The record of the appellants, therefore, assuming it still to exist, has clearly priority over that of the respondents.

It is contended, however, that the Vaughan record lapsed and came to an end on the 28th of October, 1889, when Vaughan and McInnes surrendered to the commissioner their individual pre-emptions and obtained a joint pre-emption instead.

Previous to that date Vaughan and McInnes had separate pre-emptions of adjoining parcels of land each containing 320 acres, but had been occupying and cultivating them jointly, in partnership.

On that day they applied to the commissioner to change their several pre-emptions into a joint pre-emption of both parcels, a kind of holding and enjoyment authorized by section 19 of the Act.

The statute, however, section 24, presented a difficulty. That section prohibits transfers of pre-emptions until after a Crown grant has been issued. But for that prohibition all they would have had to do was for each of them to make a transfer of his pre-emption to some third person, who should then transfer both pre-emptions to the two, to be held in partnership.

Although they could not transfer to a subject, they could transfer to the Crown, the Crown not being bound by the statute.

This they did: they surrendered to the Crown. It is immaterial whether the act was called a surrender or an abandonment. That is merely a question of words. They did not abandon, and did not intend to abandon. They remained in possession as before. They revested the title in the Crown and the commissioner immediately granted them a pre-emption in partnership, a perfectly regular and legal transaction.

The question then arises: What effect had this

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transaction with the Crown upon the joint water record? They did not expressly include that in the surrender. That was not necessary, for it was already held in the very way they wished to hold it. But, I think, it was not necessary for another reason. I think that, being appurtenant to the pre-emption, it was surrendered with them because vested in the Crown along with them, and was re-vested in the pre-emptors as appurtenant to the land.

The contention of the respondents on the other hand is that when the pre-emptions were surrendered, or abandoned, to the Crown, the water record came to an end, being severed from the pre-emptions to which it belonged, and ceased to have any further validity.

In my opinion when a water record has been obtained for a pre-emption, and has been acted upon by the making of the necessary ditch, and the enjoyment of the water for the purposes of the land, the water record or right thereby becomes appurtenant to the pre-empted land. That being so when the pre-emption was surrendered to the Crown the water right passed with it without any express act or mention; see Williams on Real Property (ed. 1892), p. 391, and authorities there cited. And for the same reason when the pre-emption was granted again the water right passed with it to the grantees. By section 25 of the Act it is provided that on the death of a pre-emptor his representatives must prove title and enter into possession within one year; otherwise the pre-emption with all improvements shall be forfeited to the Crown. There is no mention of water records, that being regarded, as I think it is in law and in fact, one of the improvements, and a most important improvement of the land, and appurtenant thereto.

Suppose the case of a pre-emptor with a water

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record dying without heirs, could it be supposed for a moment either that the water right lapsed and did not pass to the Crown with the land or that the Crown had lost its priority? Or suppose that a pre-emptor with a water right in operation, and, having made improvements, abandoned possession, whereby his pre-emption became forfeited and vested in the Crown, would the water right not also vest in the Crown, as an appurtenance to the land, the same as all other improvements?

Besides all this, the amending Act of 1886, ch. 10, sec. 1, expressly provides that all assignments and transfers of any pre-emption right when permitted by law shall be construed to convey and transfer any and all recorded water privileges in any manner attached to or used in the working of the pre-empted land. Can it be said that what was called a surrender or abandonment was not an assignment or transfer?

It is further objected that Vaughan and McInnes made false statements in their joint affidavit in support of their joint application. The statements referred to are (1) that the land was unoccupied and unreserved Crown land within the meaning of the "Land Act," and (2) that they had staked off and marked the land in accordance with the provisions of the "Land Act, 1884." It must be admitted that these statements were not strictly accurate. In making affidavits they followed the statutory form in such cases, but the statements were not intended to mislead the commissioner and did not and could not mislead him, for he knew all the facts. In a certain sense also the statements were true. The lands were in fact unreserved and they had been unoccupied by any one except the applicants, and they had also been staked

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off and marked by them, in order to obtain their previous pre-emptions.

I think there is nothing in this objection.

It is also objected that when Vaughan and McInnes on the 15th November, 1884, made application for their joint record, they were not qualified to do so, as required by section 43 of the Act, inasmuch as they were not then lawfully occupying and *bonâ fide* cultivating lands. The section, however, does not say that the application may not be made before occupation or cultivation. It is at the time of the record that there must be occupation and cultivation, and it is not disputed that there were both occupation and cultivation at the date of the record. But if there had been any irregularity in obtaining the record it would seem to be cured by section 3 of the amending Act.

Upon the whole I am for these reasons of opinion that the record of Vaughan and McInnes was not invalid or lost for any of the reasons alleged, and that the appeal should be allowed with costs both here and below, and that the judgment at the trial should be restored.

DUFF J. (dissenting).—The controversy in this appeal concerns the rights claimed by the appellants and respondents respectively under two water records purporting to be granted under the British Columbia "Land Act" of 1884, as amended by ch. 10 of the Act of 1886. The record, under which the appellant's claim, is dated the 20th of January, 1888, that under which the respondents claim, the 25th of March, 1889. Two questions are raised by the contentions of the parties which are pure questions of law and may, I think, at the outset be conveniently considered as such without reference to the facts of the case. The first of these ques-

tions is whether or not a record authorizing the diversion of water (under section 43 of the Act of 1884), for use in the cultivation of a pre-emption creates a right which is defeasible upon the cancellation or abandonment of the pre-emption.

The second question is whether or not under the Act, such a record can be validly granted to two persons jointly each of whom is the holder of a several pre-emption, authorizing the diversion of water for use indifferently in the cultivation of the land embraced within the two pre-emptions.

The statutory provisions material to the consideration of these questions may be most conveniently referred to in the consolidation of 1888, where they appear as sections 39 to 50 of chapter 66. The first and leading provision (section 43 of the Act of 1884, section 39 in the consolidation) is in these words:

39. Every person lawfully entitled to hold land under this Act, or under any former Act and *lawfully occupying and bonâ fide cultivating lands,* may record and divert so much and no more of any unrecorded and unappropriated water from the natural channel of any stream, lake or river adjacent to or passing through such land, for agricultural or other purposes, *as may be reasonably necessary for such purpose, upon obtaining the written authority of the commissioner* of the district to that effect, and a record of the same shall be made with him, after due notice, as herein mentioned, specifying the name of the applicant, the quantity sought to be diverted, the place of diversion, the object thereof, and all such other particulars as such commissioner may require. For every such record the commissioner shall charge a fee of two dollars; and no such person shall have any exclusive right to the use of such water, whether the same flow naturally through or over his land, except such record shall have been made and such fee paid.

Of this enactment it is first to be observed that it requires in express terms the application to "agricultural or other purposes" of the water which the grantee of a record acquires (under his record) the right to divert; but that it does not expressly provide

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that the water so diverted shall be used in the cultivation of any specific land. Nevertheless I think this latter requirement is plainly implied; and that the observance of it is one of the conditions of the grant. The section stipulates as a condition upon which alone the applicant may obtain a record that he shall be "lawfully occuping and *bonâ fide* cultivating lands." It provides, moreover, that he shall be entitled to

> record * * * so much and no more of any unrecorded and unappropriated water * * * for agricultural or other purposes as may be reasonably necessary for such purposes.

Unless at the time of the application the land is identified, in respect of which the water is to be used, how is the commissioner to measure the applicant's needs; how, in other words, to apply the standard prescribed by the statute? This measuring of the applicant's requirements for the purpose of determining the extent of the grant is obviously the function which above all others it is needful the commissioner should exercise wisely. The broad purpose which the legislature manifestly had before it in enacting these provisons was to secure the fair distribution of the waters of natural rivers and lakes throughout the districts in which they could be made available for the cultivation of land and in operations connected with such cultivation. Therefore the successful applicant is to obtain a record of so much as shall be reasonably necessary for his purposes, but of no more. Observe, however, that, once the question of his requirements has been passed upon by the commissioner and a record has been granted and a ditch constructed with a capacity sufficient to convey the quantity authorized by the record, that quantity is thenceforward, while the record remains in force, withdrawn from the disposi-

tion of the commissioner. The water so diverted is appropriated to the purposes nominated by the record and however improvident the grant there is no power to recall it or without the consent of the grantee to devote the water to the benefit of other parts of the district. It was, therefore, of the first importance, it is not too much to say it was vital, to the proper administration of the system that in passing upon any application the commissioner should (in order to determine the reasonable requirements of the applicant) consider his needs in relation to the supply of water available and in comparison with the needs of the locality as a whole. It is hardly necessary to observe that to reach an intelligent judgment upon these points the commissioner must know at the time of the application what was the area and the character of it, in the cultivation of which the water applied for was to be employed.

There are other sections of the statute which presuppose the designation by the applicant of some specific land but I will not enter into a particular consideration of them. It seems to me that looking at these provisions as a whole the purpose of the legislature, as I have indicated it, is manifested on the face of them with quite sufficient clearness; and that a construction of them which would authorize the grant of a right to divert water to be applied to agricultural purposes and yet to be held in gross, that is to say, unfettered by any condition requiring the use of it for the benefit of specified land, would very plainly defeat that purpose. That I think—since no difficulty arises from the words the legislature has employed—is a sufficient ground for implying the condition.

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The second observation upon the provisions in question is that the applicant obtains his record in his character of a person "lawfully occupying" land. It would, I think, be trifling with this most necessary stipulation to hold that these words are words of description merely. They import this, that the right to appropriate conferred by the record, while it is a right which is to be used for the benefit of a specific tract, is at the same time vested in the holder of the record not personally, but in his character of lawful occupant of that tract; and I think the provisions of the statute leave no room for doubt that where land is held as a pre-emption then a record granted for use in connection with that land becomes annexed to the pre-emption and where the land is held under a Crown grant the record becomes annexed to the fee. That seems to me to appear sufficiently from section 49 (which was section 1 of the Act of 1886, and is quoted in the margin) as it stands:

49. All assignments, transfers, or conveyances of any pre-emption right, where the same are or were permitted by law, and all conveyances of land in fee, whether such assignments, transfers or conveyances were or shall be made before or after the passing of this Act, shall be construed to have conveyed and transferred, and to convey and transfer, any and *all recorded water privileges in any manner attached to or used in the working of the land pre-empted or conveyed;* and any person entitled by devise or descent to any pre-emption right or land to which any recorded water privilege was attached or enjoyed by the person or persons *last possessed* or seized, shall also be entitled to such water privileges in connection with the land.

But the point is perhaps plainer when the history of that enactment is considered. So far as it touches pre-emptions the section first appeared as section 36 of the Act of 1870 in these words:

36. All assignments, transfers, or conveyances of any pre-emption right, heretofore or hereafter acquired, *shall be construed to have conveyed and transferred, and to convey and transfer, any and*

all recorded water privileges in any manner attached to or used in the working of the land pre-empted.

By the law as declared in that Act the holder of a pre-emption might after the issue of the certificate of improvements transfer his pre-emption by having the transferee entered as the holder of it, the old record being cancelled, and a fresh record being issued in the name of the transferee. In 1875, the Act of 1870 was repealed and a new Act substituted. The new Act prohibited the transfer of pre-empted land before the issue of the Crown grant. The legislature—thinking apparently that in consequence of this change section 36 had become obsolete—eliminated that section; and thus the statute stood until 1886. In August, 1885, the well-known case of *Carson* v. *Martley*(1) was argued before the full court, at Victoria; and, in consequence of the discussion which occurred in that case, the section we are now considering was passed. At the trial Begbie C.J. had expressed the opinion that a water record could not be held in gross. In the full court this opinion does not appear to have been questioned, but it seems to have been thought that a water record held by a pre-emptor who had transferred his pre-emption after the passing of the Act of 1875—that is to say, after the express repeal of section 36 (above quoted) of the "Land Act of 1870"—would not, because of the repeal of that section, pass to the transferee under such a transfer; and McCreight J., in delivering the judgment of the court(1), said:

It becomes unnecessary, therefore, to inquire into the nature of a water privilege under the "Land Acts," and whether it amounts to more than a license or personal privilege incapable of transfer.

(1) 1 B.C. Rep. 281, at p. 286.

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At the next session of the legislature, the section in question (section 1 of chapter 10 of 1886, section 49 of the consolidation) was enacted; and it bears unmistakable marks of its origin. For the most part it is declaratory and retrospective; and in so far as it is otherwise (as in dealing with the rights of persons entitled by descent or devise) it will be seen that the enactment is merely the concrete logical result of the theory upon which the legislative declarations are based. What is this theory—this view of the legislature respecting the state of the existing law? Is it not obviously that the right to divert water for use upon a specified tract of land when conferred by the grant of a record under the "Land Act" is and has always been a right appurtenant to the pre-emption when the land is held under pre-emption and appurtenant to the fee where the land is held in fee simple? In *Martley* v. *Carson*(1) the question had just been raised: Is a record a non-assignable personal right or does it pass with a transfer of the land in connection with which it is held or used? And the answer was a legislative affirmation that it did so pass and always had so passed.

The opposite view advanced by Mr. MacDonald and rejected by the court below—that the right conferred by a record may be a right in gross a right that is to say unfettered by any term requiring the application to any specified land of the water appropriated under it—is a view not only incompatible with the legislation to which I have just referred, but which, moreover, is out of harmony with the general course of legislation in British Columbia upon the subject of water rights. The legislation with which we are here particularly concerned relates to the appropriation of

(1) 1 B.C. Rep. 281.

water in natural streams to the purposes of agriculture; but the parallel legislation relating to the use of water for mining purposes (which specifically deals with the questions arising in this action) marks even more unequivocally perhaps the trend of legislative policy as touching this aspect of such rights. The "Mineral Act" at an early date declared that a record authorizing the diversion of water for use in mining should be a record appurtenant to a particular claim (or claims grouped under the special provisions of the mining law) and provided that upon the abandonment of a claim the appurtenant water record should lapse with it. Indeed the essential principle which from the beginning characterized these statutory rights whatever the purpose for which they were to be exercised is, I think, accurately embodied in the Act of 1897. That Act, while reproducing the provision of the "Mineral Act" just mentioned, applies the same principle to records held or used in connection with the pre-emptions; and declares in express terms that such records shall cease upon the cancellation or abandonment of the pre-emptions to which they are appurtenant; and this as I have already said seems to have been the principle upon which the legislation of 1870 proceeded.

It is perhaps worth while observing that while the policy of enabling persons other than riparian owners to acquire rights in the waters of natural streams was probably suggested by the example of the Pacific states yet the development of legislation in British Columbia in respect of such rights has not been at all along lines parallel to those upon which the law has proceeded in most of the states referred to. Speaking broadly, in the American states the law on the subject

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started from the principle that water in natural streams is *publici juris* and early recognized a right of appropriation by virtue of which the first comer might acquire an exclusive right to a reasonable portion of such water (so far as it should not be in use for a beneficial purpose) by the simple process of diverting it and applying it himself to any such purpose. In some states this right is recognized to the exclusion of riparian rights, in others both classes of rights exist side by side; but in all the states I think the appropriation of such water by the simple application of it to a beneficial use for purposes not directly relating to or connected with the occupation of specific land (*e.g.*, supplying the inhabitants of a town) was for a long period and in many of them still is sanctioned and protected by law; and consequently the dependency of such rights upon a specific interest in land is not in those states a characteristic of them. It appears accordingly that usually the right to divert water is not, in the states referred to, held as an easement appurtenant to land; and one even finds it held in a series of decisions in Colorado that such a right is incapable of being made appurtenant to land and that this view is professedly based upon the principles of the common law; one must here observe, however, that both the right to divert water from a stream and the right to take and carry water from and over the land of another are well-known easements which are commonly and quite validly granted at common law as appurtenant to a dominant tenement.

From the beginning on the other hand the British Columbia legislature has been at pains to declare in unmistakable language (and doubtless not without a view of emphasizing the difference between the two

systems) that the exclusive right to the use of water in natural streams and lakes could be acquired only in the statutory mode and for the statutable purposes; the statutable purposes were, prior to the year 1892 (if we except those sanctioned by certain statutes having a private or local application only), the purposes described by the words "agriculture and other purposes" and "mining and other purposes." These words taken by themselves are no doubt sufficiently comprehensive to embrace any lawful purpose; but it is quite obvious that speaking generally a grant of water rights could have no practical effect which should not authorize the interference to some extent at least with riparian rights; and when we look at the form of land grant prescribed by the "Land Act" from the earliest times we find that while it contains a reservation which constitutes a license to the Crown to create "water privileges" to the prejudice of the grantee's riparian rights we find at the same time that this license extends to such privileges only as should be used for the two purposes of mining and agriculture.

The particular effect of these provisions, therefore, was that the appropriation of the waters of natural streams by private persons under general statutory authority before 1892 was limited by the purposes (mining and agriculture) for which such waters could be diverted without regard to the rights of riparian owners; purposes involving the occupation and working of specific areas of land. And in practice before the year mentioned persons under the necessity of using such waters for other purposes in derogation of riparian rights invariably, I think, resorted to the legislature for special authority. There

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is, therefore, some danger that error may arise from reading particular legislative enactments of British Columbia touching the subject of water rights in the light of American decisions; a much safer guide to the meaning of the legislature is the general trend of provincial legislation as shewn by the enactments relating to different branches of that subject and the course of administrative practice under them.

From these views it follows that the right conferred by a record granted or used in connection with a pre-emption is defeasible on the abandonment or cancellation of the pre-emption, unless it can be maintained that such a right is annexed to the absolute allodial title vested in the Crown for the benefit of such persons as may acquire rights in it whether in succession to the pre-emptor or (after the lapse of the pre-emption) direct from the Crown. This would be to say, of course, that a record attached to an abandoned pre-emption may lie dormant for years and then suddenly spring into life and assume priority over and destroy the value of rights which had all the while been in active operation. Such a construction of these provisions if adopted would tend rather to embarrass and retard than to foster the conservation and useful application of the natural water supply which these enactments were undoubtedly intended to promote. I am disposed to think it is too late after a period of forty years to give effect to a view of them which is out of harmony with the object for which they were devised, which I do not think has ever before been suggested and would almost certainly in the case of many of the older records of hitherto unquestioned priority affect that priority with doubt and suspicion and establish a basis for adverse attacks

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which under the accepted view of the statute there could have been no ground to apprehend.

From all I have said it results that the first of the questions above stated should be answered in the affirmative; and I think the same considerations lead to the conclusion that the second question should be answered in the negative.

As I have observed, in 1870 the legislature by a declaratory enactment established the principle that water privileges attached to or used in connection with the working of pre-empted land should be deemed to have passed and to pass by any transfer of such land under the "Land Act"; in 1886, this declaratory enactment was re-enacted by the legislature with a further provision that any such record should pass to any person or persons who should become entitled to the pre-emption by descent or devise; and I have also indicated that, in my view, the Act of 1897 merely expressed the effect of the law as it stood before that Act in providing that on the cancellation or abandonment of a pre-emption any record appurtenant thereto should be deemed to be at an end. These provisions do not seem easily reconcilable with the view that a single record can be made appurtenant to two several pre-emptions held under distinct titles. That view as Drake J. pointed out in *Centre Star Mining Co.* v. *British Columbia Southern Railway Co.*(1) would, if put into practice, lead to much confusion and many inconveniences; and I do not think it correctly represents the law of British Columbia.

From these views of the law it follows I think that this appeal should be dismissed on both the grounds upon which Mr. Taylor supported the judg-

(1) 8 B.C. Rep. 214.

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ment below: 1st. that the record in question if not void *ab initio* had lapsed by reason of the cancellation or abandonment of the pre-emptions in respect of which it was originally granted; and 2ndly. that it was void *ab initio* as having been granted in respect of two several pre-emptions held by two several pre-emptors.

The facts in evidence I think establish the cancellation of the pre-emptions.

It is admitted that Vaughan and McInnes, each of whom was the separate holder of one of two adjoining pre-emptions, wished to unite these pre-emptions and hold the land in a single block. The law required that each must by himself or an agent continuously reside upon his own pre-emption, and they each should do upon this pre-emption, improvements of a value prescribed by the statute. The statute, however, contained provisions by which two persons in partnership might take up, in one area, a quantity of land equal in extent to two pre-emptions and as partners reside upon any part or improve any part for the behoof of the whole. Vaughan and McInnes wished to get the benefit of this provision and transform their separate holdings into a single partnership holding. There was, under the statute, one, and only one, way in which this could be done; and the evidence is, to my thinking, too clear to admit of dispute that the appellants took that way. They could abandon or procure the cancellation of the existing pre-emptions and take up the same land in partnership as a single pre-emption under the provisions mentioned; and this, I say, it seems to me clear they did. The undisputed facts (of the persons concerned one only, the appellant Vaughan, could be called as a witness) are that the appellants having in

view the purpose I have mentioned, went to the office of the commissioner, and that, on the 28th October, the commissioner wrote upon the existing pre-emption records "abandoned," with the date and his initials; that the appellants made the statutory affidavit required to enable them to obtain a record of the same land as a partnership pre-emption in accordance with their plan, in which they stated under oath that the land was "vacant and unoccupied," and that the record was accordingly made. The appellants obtained a Crown grant based upon this record, having occupied the lands as a partnership pre-emption.

These facts are, I think, quite sufficient to support the inference which the court below drew from them, viz., that the appellants before obtaining their partnership record had abandoned the pre-emptions held by them separately.

The oral evidence of the appellant Vaughan helps the appellants very little; but it makes clear beyond all question that, for the purpose mentioned, the appellants assented that their individual pre-emptions should be treated as abandoned and cancelled and on the faith of that assent the commissioner issued a partnership pre-emption under which they thenceforward occupied the land and upon the basis of which they obtained a grant of it from the Crown. When one considers the character of the functions performed by the commissioner under the "Land Act," it seems almost too clear for argument that it is not now open to the appellants in such circumstances to contend that notwithstanding the record of the partnership pre-emption the individual pre-emptions were in force when the application for the partnership record was made. Mr. Macdonald quite frankly

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admitted that there must have been at least a *punctum temporis* when the appellants had no right or interest in the land; and that seems to be so plain a result of the facts that I will not dwell upon the point. On what ground then can it be supposed that during this interregnum the appellants had in the lands any right of occupation which the law can recognize? The fundamental condition of the change of tenure which they sought and which they obtained was their affirmation that there had been such an abandonment of all right of occupation and of all occupation in fact as brought the lands within the category of lands subject to be taken up under section 3 of the "Land Act," that is to say, "unoccupied and unreserved" Crown lands.

It is a principle of some importance that where the legislature has confided to a special tribunal the determination of a question or a class of questions the decision of that tribunal within the scope of its duty is (in the absence of fraud or of mistake of law apparent on the face of the proceedings) conclusive. The decision of the commissioner upon an application to him for the cancellation of a pre-emption record under the "Land Act" is, I think, within the rule; from it there is, by the statute, an appeal to the Supreme Court of British Columbia, but (subject to the exceptions mentioned) it is I think final in default of such appeal. By it, moreover, the status of the land with reference to the operation of the provisions of the "Land Act" as Crown land or as occupied land is fixed. By the act of the commissioner the land in question became unoccupied Crown land within the meaning of the "Land Act"; and, if the view I have already expressed (touching the dependency of the

record upon the existing pre-emptions) be correct, any right acquired by the appellants under that record then ceased.

As to the second ground it is admitted that at the time of the grant of the record the appellants occupied their land in two several pre-emptions; but it is suggested that it was within the province of the commissioner to determine whether their interest in this land was such as to entitle them to a record in respect of it and that, this having been determined, his decision cannot now be reviewed. I do not think this quite meets the point. Speaking broadly, the decision, as I have already said, of the commissioner upon any matter within his province is (subject to the exceptions indicated) not reviewable except through the means provided by the statute; but, if the commissioner profess to do that which the statute does not authorize him to do, he could not validate his unauthorized act by putting an erroneous construction upon the statute from which his powers are derived. Now the record granted to the appellants does not on its face indicate any particular land in respect of which the water appropriated under it was to be used; and if that land could not be identified so that the record must be read as a grant in gross, then, in the view I have taken of the statute, it is obvious the record must be void as a grant not authorized by the statute. I do not think it is on this ground void because upon the undisputed facts there is no difficulty in identifying the land; but among the facts which it is necessary to take note of in order to identify the land is the fact that appellants were holding and occupying a certain area under two several pre-emptions and it is to this area that we must, in order to meet the objection just

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indicated, attribute the record. In other words (if it is to be treated as a record not invalid as a grant in gross), it is on its face a record appurtenant to two several pre-emptions held under distinct titles, or one which, in my view of the statute, the commissioner had no power to grant.

For these reasons I think the appeal fails. A good deal has been said about the hardship inflicted upon the appellants by the decision below. Hardship is not necessarily attended by injustice; the truth is, that a failure to comply with the statutory conditions of statutory rights often results as do other kinds of improvidence in individual loss; but when such lapses give rise to litigation (and they are a considerable source of the litigation arising out of the administration of the laws governing the acquisition of rights of various kinds in the public lands) judicial efforts to mitigate the seeming hardship of particular cases by departing from settled paths rarely fails to lead to general confusion and in the end I think not seldom to injustice.

Appeal allowed with costs.

Solicitor for the appellants: *D. Whiteside.*

Solicitor for the respondents: *H. C. Hannington.*

ARTHUR H. BROOK (DEFENDANT) ... APPELLANT; 1908 *Nov. 3.

AND

G. M. BOOKER AND OTHERS (PLAINTIFFS) ..... RESPONDENTS. 1909 *Feb. 12.

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

Conditional sale—Price payable before delivery—Title to goods—Rescission of sale—Action—Legal maxims—Attachment—Execution—Possession by judgment debtor—Ownership—Procedure by bailiff—Guardian to second seizure—Sale super non domino et non possedente—Adjudication upon invalid seizure.

The hull of a steamer sunk in a canal had been attached under judicial process and, while standing on the bank at a distance from which he could not see or touch the materials, a bailiff assumed to make a second seizure, gave no notice of his proceedings to those on board the hull, and appointed a guardian other than the one placed in charge of the hull at the time of the first seizure. The execution debtor, named in the second writ, had made a bargain for the purchase of the hull subject to the price being paid before delivery, but had not paid the price nor had the property been delivered into his possession. Subsequently, the bailiff adjudicated the hull to the appellant by judicial sale at auction.

Held, that there had been no valid seizure under the second writ; that the purchaser acquired no title to the property, by the adjudication, and the sale to him should be rescinded; that, under the circumstances, there could be no application of the maxim "en fait de meubles possession vaut titre" and that the maxim "main de justice ne dessaisit pas" must be taken subject to the qualification that a seizure under judicial process places the goods seized beyond the control of an execution debtor. *The Connecticut and Passumpsic Rivers Railroad Co.* v. *Morris* (14 Can. S.C.R. 319) distinguished, and the judgment appealed from (Q.R. 17 K.B. 193) affirmed.

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

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APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Montreal(2), by which the plaintiffs' action was maintained with costs.

The circumstances of the case and the questions raised upon this appeal are stated in the judgment of the Chief Justice now reported.

T. Chase-Casgrain K.C. and *Alex. Casgrain* for the appellant.

Errol Languedoc for the respondents.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Court of King's Bench for the Province of Quebec, sitting at Montreal, confirming (Bossé and Blanchet JJ. dissenting), a judgment of the Superior Court (Archibald J.) by which a sale of movables purporting to have been made under judicial process was set aside. I would dismiss the appeal with costs.

The facts out of which the suit arose are few, and, as found by the court below, offer, in my opinion, little or no difficulty in the appreciation of their legal consequences.

In July, 1906, the respondents, marine underwriters, sold to one Légaré the hull of the steamer "Sovereign," then lying partially destroyed by fire in the Lachine Canal, a condition of the sale being "cash before delivery." It appears that, in violation of his agreement, Légaré entered into possession of the hull which he proceeded to dismantle; whereupon the re-

(1) Q.R. 17 K.B. 193. (2) Q.R. 32 S.C. 142.

spondents, as unpaid vendors, took an action against him to set the sale aside, and joined to their action a conservatory attachment. While the hull was under seizure and in the custody of the guardian in that case, one Griffin, a judgment creditor of Légaré, attached, or rather assumed to attach, under a writ of execution issued long previously, the hull, which the bailiff subsequently purported to sell under the authority of this writ to the appellant; and the present action is brought to set that sale aside. The appellant relies upon arts. 668 C.P.Q. and arts. 1490, 2005 (*a*) and 2268 of the Civil Code, and says that, in the absence of an allegation of fraud and collusion in the declaration the plaintiffs, now respondents, cannot succeed. The two courts below found that fraud was proved, although not alleged in the declaration; but I prefer to maintain the judgment on the ground that no valid seizure of the hull was made in the case of *Griffin* v. *Légaré* and that, not having been taken in execution, there could be no sale of the hull "under execution," or "under authority of law," in that case, as required by the articles above referred to. I appreciate the importance of giving effect to the maxim *en fait de meubles possession vaut titre* (2268 C.C.), and of maintaining the validity of a judicial sale and I freely concede that irregularities of procedure should not invalidate the title of a purchaser in good faith of movables at a judicial sale (art. 668 C.P.Q.). But there is another principle of at least equal importance which is a necessary part of the judicial system of every British country, to this effect, that no man shall be deprived of his property except by consequence of the law of the land. The general principle of law is (art. 1487 C.C.) that the sale of a thing which does

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not belong to the seller is null; by way of exception to this general rule arts. 1490 and 2268 C.C. provide, in effect, that corporeal movables sold under authority of law cannot be reclaimed. The commentators on the articles in the Code Napoléon, which correspond with the articles of the Quebec Civil Code—there being no article in the French Code which corresponds with art. 668 C.P.Q.—say that this exception to the general rule is based upon the maxim *en fait de meubles, possession vaut titre.* Planiol, vol. 1, no. 1119. But the same author says, at no. 1124:

> *La possession vaut titre.* Il faut donc être possesseur. Ceci exclut les personnes qui n'ont pas encore la possession; *par exemple l'acheteur à qui la chose n'a pas été livrée.* Cet acheteur ne peut pas invoquer la maxime à son profit.

Here the sale was made "cash before delivery" to Légaré, the defendant in *Griffin* v. *Légaré,* and the hull of the steamer "Sovereign" was, at the time of the seizure and sale in this case, undoubtedly the property of the respondents, notwithstanding the clandestine acts of possession exercised by Légaré and, further, was then attached and *sous-main de justice,* in the case of *Booker et al.* v. *Légaré.* Admittedly, as said by Mr. Justice Bossé, in his dissenting judgment, *main de justice ne dessaisit pas;* but that legal maxim must be read according to Pothier with this qualification:

> La saisie exécution rend les meubles indisponibles et restreint, sans toutefois le supprimer, le droit qu'a le saisi d'en jouir comme propriétaire. Le saisi ne peut ni les aliéner, ni les mettre en gage, ni les prêter, ni les détruire, déplacer ou détourner d'une façon quelconque à peine de poursuite correctionnelle.

In my view of the case, this point does not require to be further elaborated. The substantial defect in the appellants' title results from the fact that there was no seizure and consequently "no

sale under execution" (art. 668 C.P.Q.), or under "authority of law," arts. 1490 and 2268 C.C. Such a sale necessarily implies that the thing sold must be placed for that purpose by legal process in the hands of justice; *placé sous main de justice,* to use the very expressive French phrase; and I agree absolutely with the two courts below that it is impossible to hold on the facts that a valid seizure was made in the case of *Griffin* v. *Légaré,* assuming the hull to have been in the possession of Légaré. Describing how a seizure is made, *La Coutume de Paris,* tome 8, nos. 2 and 3, says:

> La justice entre dans la maison du débiteur, elle prend et gage ses meubles et après l'en avoir dessaisi pour en faire un gage de justice, elle en exige la vente pour payer le saisissant.

And Judge Taschereau says, at page 94(*b*) of the case:

> Qu'est-ce qu'une saisie? Il faut, après tout, qu'il y aît un acte matériel par l'officier saisissant pour mettre la chose saisie sous la main de la justice. Si, d'une part, il n'est pas nécessaire qu'il porte la main sur les objets saisis, d'autre part il faut quelque chose de plus qu'une opération purement intellectuelle ou imaginaire. On n'a jamais prétendu qu'un huissier pouvait faire une saisie du fond de son étude.

It cannot be said that in this case the hand of justice was ever laid upon the hull of the steamer under the second seizure. Marsan, the seizing bailiff, says that he stood, when he professed to make his seizure, on the bank of the canal 500 or 600 feet distant from the hull, and his recors, Hanraty, puts the distance at 500 yards. Then Beaudoin, the new guardian in the case of *Booker et al.* v. *Légaré,* swears that, at the time the seizure is supposed to have been made, he was on or near the hull and he never saw the bailiff Marsan or his assistant, Hanraty, and, in this statement, he is corroborated by

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Rivet and Barbarie, *père*. To reverse the findings of two courts and hold that a bailiff might, under such circumstances, make a valid seizure to which he could appoint a guardian would be, in my opinion, to establish a most dangerous precedent. The seizure of movable property must be recorded by minutes made by the bailiff intrusted with the writ of execution (art. 629 C.P.Q.) and these minutes must contain a detailed description of the things seized, their number, weight, and measure, according to their nature (art. 639 C.P.Q.). How could the bailiff give these necessary details in a proper case under the conditions described by the witnesses here? To every seizure a guardian is appointed who is bound under pain of coercive imprisonment to produce at the time fixed for the sale the effects seized which were placed in his charge (arts. 657, 658 C.P.Q.). How can it be said that the guardian was ever put in possession of this hull? What sort of possession could a guardian have when he never went nearer than 600 feet to the thing seized, the waters of the canal covering the intervening space? I agree unhesitatingly with the trial judge and with the majority in appeal that no valid seizure was made and that the appellant could not acquire a title from the bailiff in the circumstances. We have been referred to the case of *The Connecticut & Passumpsic Rivers Railroad Co.* v. *Morris*(1), in which it was held that

where a number of shares of railway stock were seized and advertised to be sold in one lot, neither the defendant nor any one interested in the sale requesting the sheriff to sell the shares separately, and such shares were sold for an amount far in excess of the judgment debt for which the property was taken in execution, such sale in the absence of proof of collusion was held good and valid.

(1) 14 Can. S.C.R. 318.

I do not for one moment intend to cast any doubt upon that judgment. In that case the question of the validity of the seizure was not considered and could not have arisen. So much was this the case that in the Superior Court and in the court of appeal, art. 668 C.P.Q. (then art. 559 C.P.C.) was not even referred to (1). The effect of that article seems to have been considered in that case for the first time in this court. But the cases are clearly distinguishable. In *Connecticut & Passumpsic Rivers Railroad Co.* v. *Morris*(2), the shares were admittedly properly seized and advertised to be sold in one lot and neither the defendant nor any one interested in the sale requested the sheriff to sell the shares separately, and it did not appear that there was any intention to defraud, or that any loss had been sustained in consequence of the shares being sold in one lot, but, on the contrary, that such mode of sale was advantageous to the creditors; the sale was held good and valid, although the amount realized thereby was far in excess of the judgment debt for which the property was taken in execution.

Here I hold that the hull was never seized and cannot, therefore, be said to have been sold under execution. In *Connecticut & Passumpsic Rivers Railroad Co.* v. *Morris*(2), there is a quotation from Bioche "Dictionnaire de Procédure" which might mislead. To avoid misunderstanding I quote the whole paragraph from which the words are taken:

L'inobservation des formalités prescrites par les art. 617, 618 et 619 (V. *sup.* nos. 297 à 301), n'entraîne pas la nullité de la vente; *on ne peut dépouiller des adjudicataires de bonne foi;* mais elle soumet le saisissant et l'officier ministériel aux dommages-intérêts du saisi et des autres créanciers, si elle leur a causé un préjudice. Chauveau, 19,408; Pigeau, Com. 2,207; Demiau, 408; Biret, 2,169; Thomine, 2,132.

(1) See M.L.R. 2 Q.B. 303.

(2) 14 Can. S.C.R. 318.

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The formalities prescribed by arts. 617, 618 and 619 refer to the place of sale and the advertisement and not to the seizure or preliminary step of taking in execution.

The appeal is dismissed with costs.

GIROUARD J.—I have some doubts in this case, but they are not strong enough to induce me to dissent.

IDINGTON, MACLENNAN and DUFF JJ. concurred in the opinion stated by the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Casgrain, Mitchell & Curveyer.*

Solicitors for the respondents: *Greenshields, Greenshields & Languedoc.*

THE GAZETTE PRINTING COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

FRANK D. SHALLOW (PLAINTIFF) .. RESPONDENT.

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*Nov. 3, 4.
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*Feb. 12.

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

Libel—Privileged publications—Reports of judicial proceedings—Public policy—Pleadings filed in civil actions—Proceedings not in open court.

The publication of the statements contained in a pleading filed in the course of a civil action, merely because such statements form part of such a pleading, is not a privileged publication within the rule which throws the protection of privilege about fair reports of judicial proceedings.

The judgment appealed from (Q.R. 17 K.B. 309), reversing the judgment of the Superior Court (Q.R. 31 S.C. 338), was affirmed, Girouard J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), which reversed the judgment of the Superior Court, District of Montreal(2), Bossé J. dissenting, and maintained the plaintiff's action with costs.

The plaintiff, by his action claimed damages for libel charged against the defendants, the proprietors and publishers of a newspaper published in the City of Montreal, in the publication of certain pleadings which had been filed in the office of the Superior

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

(1) Q.R. 17 K.B. 309. (2) Q.R. 31 S.C. 338.

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Court, in a civil action, as public news, previous to any hearing or action in relation thereto by the court or any judicial officer. At the trial the action was dismissed by Mr. Justice Archibald, but his judgment was reversed and the plaintiffs' action was maintained and the damages assessed at $250, with costs, by the judgment from which the present appeal was asserted.

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

A. Geoffrion K.C. and *A. W. P. Buchanan K.C.* for the appellants.

T. Chase-Casgrain K.C. and *G. Desaulniers* for the respondent.

THE CHIEF JUSTICE agreed with the opinion stated by Duff J.

GIROUARD J. (dissenting).—We are here brought face to face with a social and political problem, the liberty of the press in Quebec.

A weekly newspaper, *Le Nationaliste,* of Montreal, brought a direct charge of blackmailing against *Le Moniteur du Commerce,* a weekly review of trade and finance also published in Montreal; and invited the latter to prosecute it in order that it might have an opportunity of proving the truth of the accusation. The *Moniteur* immediately brought an action for libel, of which we do not know the results. The *Montreal Gazette,* one of the principal daily newspapers of the country, announced the fact that the suit had been brought, and gave a summary of the declaration or

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statement of claim as fyled. This summary must have been satisfactory to the proprietor of the *Moniteur*, since he has not made any complaint on the subject though he is proved to have read it.

Some days later the *Nationaliste* served upon the plaintiff its plea of justification, containing some twelve pages of printed matter, in which it gave the names of the banks and business houses that had been made the victims of the alleged blackmailing, and caused it to be fyled in the office of the court in the usual manner. Six days later, the *Moniteur* sued the *Gazette* for libel, alleging the fact of the publication by it of an abstract of this plea, and averring that the defendant had acted with malice and with an intent to injure, without, however, claiming that the plea so published was a document of a private nature.

At the hearing before the trial court, and in appeal, as well as before this court, the question of malice does not seem to have perplexed the judges; they all agree that the *Gazette* acted in good faith, and that the summary published by it of the plea in question was fair, honest, and in the public interest.

The whole difficulty of the case is to determine whether this plea is a document of a private or of a public nature. The Court of King's Bench held, contrary to the decision of Mr. Justice Archibald, at the trial, and with Mr. Justice Bossé dissenting, that the document was of a private nature, and that it would not become public until after it had been read, or, at all events, produced in open court at the trial.

This decision is of very great importance for the whole press of the country, and it is not to be wondered at that some have protested most vigorously, while others have given vent to rather extravagant language,

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which it may be as well to tone down and correct at once. It has been claimed that the press has a right to publish everything which comes before our courts. It should not be forgotten that it is the publication of such matter only as is of public general interest that comes within the privilege of the press, in Quebec at all events. I am aware that eminent judges in England, whose names will be found in the notes of my learned brother, Mr. Justice Duff, have held that the privilege of the press to publish juridical proceedings may be traced to another order of ideas. According to them, this privilege is based upon the right which the public enjoy of being made acquainted with everything that takes place during the sittings of the courts, and as everybody cannot be present at such sittings, the press comes to the aid of those who are absent by publishing the proceedings, thereby enlarging, as it were, the sphere of usefulness of the courts of justice. According to this theory the press is a kind of good fairy conducting a continuous performance of miracles. By a wave of its wand, it is pictured to us in the act of dissolving the walls which encircle our halls of justice, and of revealing to the public gaze, not only of the country but of the universe, a tableau of everything which may be carried on within.

The British law-givers do not seem to have been greatly impressed by this idea, for all the legislation of the past twenty-five or thirty years has re-affirmed the old doctrine that the privilege of the press exists only in cases where the proceedings are of public interest, and that, when it publishes a libel, a defamatory accusation against a private individual, it cannot claim any right other than those which may be invoked in similar cases by an ordinary citizen. In

England for at least more than a century—although formerly and perhaps at the time of the cession it was not so, Petersdorff, Abr. (ed. 1029), vol. 12, p. 200—a defendant may triumph over a suit for damages by pleading and proving the truth of the libel; but, where the proceedings are brought in a court of criminal jurisdiction, the accused must, furthermore, establish that he acted in good faith in a matter of public interest.

The press is bound by the same rule. In the Province of Quebec our jurisprudence is more exacting based, as it undoubtedly is, upon the old French law, which lays down as a maxim that *la vie privée doit être murée;* it requires the two conditions of good faith and of public interest in all cases, civil as well as criminal. Nevertheless, the truth of the libel and other extenuating circumstances may be pleaded, if not as a bar to the suit, at all events in mitigation of the damages. Everything depends upon the circumstances. This is the meaning attached to the jurisprudence of Quebec during the past fifty or sixty years, and, in order to become convinced of this, it suffices to read Mignault, vol. 5, pp. 355 and following, where all the numerous precedents on the subject will be found. We hold that the public is not concerned with the private affairs of an individual or of a family, even when they come before the open courts. Unfortunately, the press has woefully trespassed upon private rights of late years, since the publication of scandals and of sensational items has become the fashion. But no question of this kind is raised in the present instance. What is in issue here is not so much the truth of the libel as the right of the press in connection with the publication of juridical proceed-

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ings. It is admitted that if the plea fyled by the *Nationaliste* had been read in open court, there would be no ground of action against the appellant.

Is the press obliged to await the day of trial before it can justifiably print or publish what is in issue, in other words, what is being done in our courts of justice?

Formerly, in England, all the proceedings in a law suit were had in open court, issue and return of writ, appearance, fyling of pleas, etc., etc. The great increase of judicial business has revolutionized the system of pleading and procedure. Blackstone (Lewis ed.), vol. 3, pp. 271 and following, and more especially 275, 279, 293. For many years a suit could not be brought here in Canada without leave of the judge, and the issues were always joined in open court. 25 Geo. III. ch. 2 (1785), secs. 1, 6, 8, 11, 13; R.S.L.C. (1845), pp. 85 and following.

If the decision of the Court of King's Bench be correct, the publication of every proceeding or pleading would have been privileged under the old law, as it had been fyled in open court; and yet not one single authority or precedent has been referred to by that court to shew that such a practice would be contrary to public order.

Nowadays, when these pleadings may be fyled in the office of the prothonotary in virtue of a law which says that they shall be deemed to have been fyled before the court, how can it be claimed that they are of a private nature? What was done under the old system should aid us in the interpretation of the new, especially as the legislature has not expressed any intention of bringing about any change in this respect.

Sir Henri Taschereau, Chief Justice, who de-

livered the judgment of the majority of the court, did not refer to article 16 of the Code of Procedure, which was cited before us, and which says that "the sittings of a court or of a judge are public," for the simple reason, probably, that this article does not lay down any new doctrine, but is the mere expression of a rule of English public law which has always been in force here since the cession of the country. Neither does the learned Chief Justice refer to article 1053 of the Civil Code for the purpose of proving that civil offences committed by the press should be judged in accordance with the principles laid down by that article. Apart from the last quoted article, there is no civil law in Quebec on the subject of libel by newspapers, however desirable it may be that legislation of some kind should be passed by the Dominion Parliament, "for the peace, order and good government of Canada." "British North America Act, 1867," sec. 91. According to his lordship, these offences should be judged according to the rules of the common law of England which recognizes that the press enjoys certain privileges that were unknown to the old French law; and, on this point, I agree with the judges of the King's Bench, who merely give expression to the jurisprudence of our province as determined since the decision of Rolland J., in 1848, in *Gugy* v. *Hincks* (1), subject, of course, to such modifications as the usages of our people have sanctioned. These privileges formed part of the public law of England which follows the British flag wherever it floats.

But I do not concur with the Court of King's Bench when it holds that according to the common

(1) See *Mousseau* v. *Dougall*, 5 R.L. 445, 446; *Trudel* v. *Cie. d'Imprimerie*, M.L.R. 5 S.C. 303.

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law of England the publication of a pleading fyled in the Superior Court is not privileged so long as it has not been produced at the trial in open court. This is doubtless the rule where the statutory law of Great Britain prevails, and, more particularly, the statute of 1888, which restricts the rights of the press to

> a fair and accurate report in any newspaper of proceedings *publicly heard* before any court exercising judicial authority.

These statutes have never been enacted in our province and have no force of law here, although Ontario, British Columbia and other provinces have adopted them at least in substance. So much is admitted by the Court of King's Bench. But, says the learned Chief Justice, these statutes are not new law; they are merely the expression of the common law; and he adds:

> The privileges must be confined to the publication of proceedings in open court, as it was in England, before the "Libel Act" came into force, and as it undoubtedly is still under that Act.

Comyn's Digest of the Laws of England, *vo.* "Libel" (5 ed.), p. 872, published in 1822, simply lays down the rule that the publication of judicial proceedings is lawful. Likewise Petersdorff's Abridgment, *vo.* "Libel," published in 1829, makes no mention of the "open court" rule. Odgers, an unquestionable authority on this subject, who has been quoted by both parties in this case says (ed. 1905), p. 307:

> The words *publicly heard* should not have been inserted.

Pollock on Torts (ed. 1908), p. 273, remarks also that this clause of the statute of 1888

> would seem to be only a not quite accurate affirmance of the common law.

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But, where is the evidence that the old common law contained any such restriction? By common law I mean the unwritten law, founded upon reason and the usages of the people, and in force in England at the time of the cession of this country. That is the only common law which should govern. Where is this common law to be found? In the decisions of the judges, as contained in the law reports? I have failed to find one single precedent on the point which now interests us, prior or even subsequent to the cession. I do find some decisions rendered about the beginning of the last century, wherein general principles are laid down, and, with all due deference, it seems to me they say quite the reverse of what the Court of King's Bench has said.

In England (says the learned Chief Justice), as far back as 1804, (*Rex* v. *Lee*) (1), and continually since (with the solitary exception of *Curry* v. *Walter*) (2) (since overruled), the publication of an *ex parte* proceeding in criminal cases was not only regarded as not privileged by law, but as an illegal act in respect of its tendency to obstruct the due course of justice.

But this is the very opposite to what really took place. *Curry* v. *Walter* (2) was approved in *Rex* v. *Wright* (3), in 1799, and more recently in *Kimber* v. *The Press Association* (4), in 1893. Lawrence J. said in *Rex* v. *Wright* (3), and I prefer his opinion on the old law, for he lived in those days:

The proceedings of courts of justice are daily published, some of which highly reflect upon individuals; but I do not know that an information was ever granted against the publishers of them. Many of these proceedings contain no point of law, and are not published under the authority or the sanction of the courts; but they are printed for the information of the public. Not many years ago, an action was brought in the Court of Common Pleas by Mr. Curry

(1) 5 Esp. 123.
(2) 1 Bos. & Pul. 525.
(3) 8 T.R. 293.
(4) [1893] 1 Q.B. 65, at p. 71.

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against Walter, proprietor of "The Times," which supposed libel consisted in merely stating a speech made by a counsel in this court on a motion for leave to file a criminal information against Mr. Curry. Lord Chief Justice Eyre, who tried the cause, ruled that *this was not a libel, not the subject of an action, it being a true account of what has passed in this court;* and in this opinion the Court of Common Pleas afterwards, on a motion for a new trial, all concurred though some of the judges doubted whether or not the defendant could avail himself of that defence on the general issue. Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings.

There is something more. Odgers says that it was not *Curry* v. *Walter*(1) which was overruled, but rather *Rex* v. *Lee*(2), and at page 292, he remarks:

There are *dicta* of eminent judges which would seem to deny any privilege to fair and accurate reports of *ex parte* proceedings, even in the Superior Courts. *Per* Maule J. in *Hoare* v. *Silverlock*, No. 2, (3), in 1850, and Abbott C.J. in *Duncan* v. *Thwaites*(4). But *Curry* v. *Walter*(1), is an express decision that such reports are privileged; a case which was at one time doubted, but is now clear law. Cockburn C.J., in *Wason* v. *Walter*(5), expressed his clear opinion that a fair and accurate report of an *ex parte* application would be privileged. And, now, the decision in *Usill* v. *Hales*(6), settles the law, and extends immunity to all *bonâ fide* and correct reports of all proceedings in a magistrate's court, whether *ex parte* or otherwise; and such cases as *R.* v. *Lee*(2), must be considered to be overruled, in so far at all events that it is unlawful to publish any report of *ex parte* proceedings.

As far as we are allowed to judge, it seems to me that the old decisions, those which were rendered at a period close to the cession, made no distinction between the report of judicial proceedings *in open court and those simply in court.*

(1) 1 Bos. & P. 525.
(2) 5 Esp. 123.
(3) 9 C.B. 20, at p. 23.
(4) 3 B. & C. 556.
(5) L.R. 4 Q.B. 73.
(6) 3 C.P.D. 319.

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The decision of the Court of Appeal in England, in *Kimber* v. *Press Association*(1), has been quoted as having been rendered under the common law against the appellants' contention. And yet it does not sustain the legal proposition of the respondent that, in order to be privileged, the pleading must have been read or produced in open court, that is to say, during term or at least at the sitting of the court. In that case, the proceedings were held in council chamber where the clerk had called the justices of the peace together for the purpose of obtaining *ex parte* the issuance of a summons against a solicitor for perjury. The public was not excluded, but was not represented, if we may except a reporter—he is everywhere—who made a report to the associated press of what had taken place. It was held that his report was privileged. The Court of Appeal decided that

> where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication, without malice, of a fair and accurate report of what takes place before that tribunal is privileged.

Lord Esher added:

> The common law, on the ground of public policy, recognises that there may be greater danger to the public in allowing judicial proceedings to be held in secret than in suffering persons for a time to rest under an unfounded charge or suggestion.

The learned judges explain that by the words "open court" must be understood not only the place where the sittings are held, but any place where the court exercises its jurisdiction, and from which the public is not excluded.

Is it essential that this jurisdiction be exercised by the same functionaries, that is to say, by the judges

(1) (1893) 1 Q.B. 65.

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who finally decide the issues? It seems to me the assertion is neither reasonable nor practicable under our juridical system.

American precedents have been cited adversely to the appellant. I admit that if they had been rendered under a Code of Procedure similar to that of the Province of Quebec where the action, the declaration, the defence, and all the pleadings before the trial are supposed to be fyled before the court, they would be of great weight; but we must decide this cause according to the rules and principles which we find in the Code of Procedure of that province.

We come now to a second question: Is the prothonotary's office an office distinct from the court? Article 76, C.P.Q., says that a suit is brought before the proper court, while, in practice, it issues from and is returned to and fyled in the prothonotary's office. See also arts. 117, 118, 151, C.P.Q. According to the Code of Civil Procedure, arts. 94 to 103, the writ commands the defendant to appear before the court, and, in the present case, the writ summons the defendant to appear before the court, while, in practice, the defendant fyles his appearance in the office of the prothonotary only. C.P.Q. art. 161. Since he is ordered to appear before the court, it would naturally follow that he should also fyle his defence before the court. C.P.Q., art. 197. It is not every one who has a right to fyle pleadings. They must be accepted by the prothonotary or his representatives in the name of the court which exercises its jurisdiction through them.

Now it seems to me that everything that takes place before the courts being, as is the case here, of a public and general interest, is public matter and the reports which the press may make thereof and which

are fair in substance, and published in good faith and without malice, are privileged.

Rules of practice have been referred to. Such rules concern only the management of the prothonotary's offices, the custody and preservation of the records and archives of the court, and can go no further. They are of no importance when it becomes necessary to decide whether the appellant had or had not the right to publish the pleading in question, for that issue must be decided according to the laws of the land, and not by the rules of practice of the Superior Court.

Furthermore, the Court of King's Bench gives to rule 36, the only one which can have any application, a much greater scope than its terms import. The rule does not say that communication of the records can be given to the interested parties only, but that these latter shall be entitled to communication thereof in the prothonotary's office. The latter cannot refuse it under any pretext. The rule says nothing about strangers to the cause, nor about the general public, whom the prothonotary may have special grounds to refuse, an order of the judge, for instance, such as is sometimes issued by the courts of other countries. Am. & Eng. Encyc. of Law, vol. 24, pp. 182, 183, par. VIII.

The judge may, it is true, prohibit the inspection of the pleadings or of the whole record, in the interest of good morals or public order, just as he may exclude the public from the sittings of the court, even in a case of public interest. C.P.Q. art. 16. As a rule, the records of courts of justice are public documents. Am. & Eng. Encyc. of Law, vol. 24, pp. 159, 160, 161, 170; Odgers, pp. 295, 296.

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If a newspaper makes a wrongful use thereof, if it gives them to the public when private interests alone are at stake, for instance, in cases of seduction, filiation, separation from bed and board (although, even in such cases, there may be exceptions where public men are concerned), if it makes public, I say, facts or private acts which are entirely of a personal nature, with which the public is not at all concerned, it does so at its risk, and peril, and cannot claim immunity.

In this case, the interest of the public cannot be put in doubt; this much is admitted. The subject matter is the honesty of a newspaper which is accused of blackmailing. The reporter of the *Gazette*, Duteau, did not surreptitiously obtain from the prothonotary's office the plea the publication whereof is made the basis of this action. He was even invited by one of the officers in charge to take cognizance of it, to take notes from it, and his notes are admitted to be correct. This is what is said by him in his testimony:

> Well, on the day previous to the publication of the article, I came to the prothonotary's office here, as I do every day, and I inquired if there was anything doing: and one of the deputy-prothonotaries told me that Mr. Asselin has fyled his defence in connection with the action that was taken against him by Mr. Shallow, whereupon I inquired if I could see the defence, and I obtained the document, and made an abstract of it, and wrote it out.

This simple story shews that in the opinion of these two officials, the pleading in question was a public document which the press and the public had a right to see, when no order to the contrary had been given.

This is all the evidence there is on the subject, and it might, and doubtless would have been made stronger if the respondent had alleged in his action, or in his answer to plea, that the records of the Superior Court before being read in open court, are private and not

public documents. Not only has the respondent not said this, but he has left the contrary to be inferred by his answer to plea.

Finally, should the court of appeal allow a plaintiff to make use of a reason which is not set out in his demand, and which he virtually thrust to one side for the purpose of bringing a charge of malice against his adversary. If the plea in question had not been read or produced at the trial and was private should he not have alleged the fact in order to take advantage of it? He charges malice only, which has not been proved. In fact, the contrary has been established. He goes even further in his answer to plea, and avers that the *Gazette* did not obtain its information from the records of the court, meaning that it was obtained out of court, being evidently under the impression that that source of information would be different, a distinction which is clearly made by the Quebec Court of King's Bench in *Archambault* v. *Great N.W. Telegraph Co.* (1). Here it was held that the publication of an abstract from the declaration is a suit entered, but before the return of the action, is not privileged. The text of the formal judgment upon the point is in these terms:

> Considérant que la défenderesse, intimée, n'a pas justifié les allégations de ses défenses, et spécialement qu'elle n'a pas prouvé que la déclaration dans la cause No. 1479 de *Dame Henrietta Sylvia Andrews* v. *Frs. Xavier Archambault*, datée le 20 de février 1883, et rapportable et rapportée en cour seulement le 14 de mars 1883, formât partie des archives de la court, fût ouverte au public, à la date de la transmission par la défenderesse du télégramme en question.

The only inference which can be drawn from this decision is that the publication of such an extract

(1) M.L.R. 4 Q.B. 122.

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after the return of the action and the fyling of the declaration in the prothonotary's office would be privileged.

The Court of King's Bench seeks to follow the common law of England. What is to be understood by that? Where is this common law to be found, the common law which was followed at the time of the cession of this country to England, one hundred and fifty years ago? Blackstone (Lewis ed.), vol. 1, par. 65, tells us that the common law is the unwritten law which takes its strength from immemorial usage, and which may be found in the reported judgments of the courts; but it strikes me that these reports must be constant and uniform in order to have force of law. Again, how can we look for uniformity when we consider that the public has repeatedly altered its customs and usages on this subject, according to varying circumstances, without waiting for any action on the part of the legislature?

Lord Coleridge said that if he had had to decide the case then before him according to the principles recognized sixty or seventy years earlier, his conclusion would have been different. Odgers (ed. 1905), p. 293. Pollock on Torts (ed. 1908), p. 259, asserts that the modern decisions of the Court of Appeal are far from agreeing with those of former days, and that we will have to wait until the House of Lords has spoken upon the subject in order to know what to hold.

Since the days of the cession journalism has made rapid strides. It has taken hold of every movement of the entire world. A newspaper written to-day as newspapers were edited fifty or sixty years ago (without going as far back as the cession) would not secure

a single subscriber. We insist, nowadays, upon news of everything, and from every point—telegraphic despatches, parliamentary reports, political, juridical, religious, municipal, financial, police, industrial, strikes, athletic news; accounts of meetings of companies and of corporations, of trade unions, of sports, of theatricals, and we must also have a personal column, and another for local news, another for social news, town topics, without mentioning caricatures, pictures and wood cut portraits. This is well known. However, the common law does not spread its protecting arms over all these. The change in the law with regard to public meetings was not made in England until 1888, nor in Canada until the Criminal Code was published in 1892. Still, without being protected by a text of law, these reports were published during many years before then. They were called for and screened by public opinion. As Lord Campbell observes in *Lewis* v. *Levy* (1):

> The law upon such a subject must bend to the approved usages of society though still resting upon the same principle, that what is hurtful and indicates malice should be punished, and that what is beneficial and *bonâ fide* should be protected.

May we not reach the conclusion, from all that has preceded, that the usages of our people have entirely changed on the subject of the press, and what one has a right to expect from it? Can we reasonably exact from the newspapers anything more than fairness, good faith, honesty and public interest, elements which are not put in doubt in this case? Such is the conclusion which has been reached by many eminent judges in England. Odgers, 293, 294, 295.

Finally, to keep to the case which is now before

(1) E.B. & E. 537, at p. 560.

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us, it seems to me that the principle laid down in art. 288 of the Criminal Code (sec. 320, ch. 146, Revised Statutes of Canada), settles the whole difficulty. This is what the article says:

> No one commits an offence by publishing any defamatory matter, in any proceeding held before or under the authority of any court exercising judicial authority.

No distinction is here drawn between term days and other days. It will not surely be contended that the Superior Court exists upon trial days only. It exists permanently in its offices, before the trial for the incidental and introductory proceedings necessary for the institution, contestation, and hearing of causes, and afterwards, for the execution of its judgments by its officers. The prothonotary, in certain cases, is supposed to represent the court or judge; and in his office he pronounces certain judgments in the name of the court. C.P.Q. arts. 33, 532, 1310.

Article 288 of the Criminal Code is not mentioned in the respondent's factum; it has, furthermore, escaped the attention of the Court of King's Bench, with the exception of Mr. Justice Bossé, who dissented. With that great judicial discernment which always distinguished him, the learned judge reasons out the question in the following manner:

> (Translation.) The principle of the liberty to publish *ex parte* proceedings is pushed much further in these countries than is necessary for the purposes of this case, where the publication was made of a contested demand and of a plea to such demand after they had been fyled in the office of the prothonotary of the court. Both were public property, the action itself which was the act of Shallow who complained of a libel that had appeared in the *Nationaliste*, and the plea, also fyled in the same office, by Asselin, giving his reasons why the action of damages by Shallow should be dismissed. A rule of practice had been cited to establish that communication to any others than the parties themselves or their representatives, should not be given of papers fyled in the office of the court. This

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rule was established for the proper administration of the office, and goes no further. It certainly could not go further, or change the law, any more than it could convert the office into a dark chamber where all judicial proceedings would be had in secret.

Further on he adds:

Where is the law which makes them secret, which enacts that law suits, before they come to trial in open court, are so very private in their nature that the public has neither an interest nor a right to know what are the contestations which take up the time of the courts, what are the claims, commercial or otherwise, which are recorded, who are insolvent, who are on the point of becoming so, why is it contended that they are so, and what reasons do they offer to shew they are not insolvent? Again, by what authority would we hold that everything in our office, suits as well as pleas, are secret procedures, which no one may disclose to the public under pain of committing a civil offence? It would certainly be pushing things very far to say that a newspaper, accused of blackmailing, which brings an action for damages by reason of such accusation, should have the right, after its action has been returned into court and become public property by the announcement made of the fact by another newspaper, to claim exemplary damages for the publication of the plea to this original action, even before proof has been made or judgment has been rendered in the first suit.

The public has a right to know what degree of importance, what reliance and what confidence it should give to a newspaper, and if such newspaper, being accused of lying and blackmailing, claims damages because of the accusation, the public has an equal right to know what defence is being made to the suit. For it must not be forgotten that Shallow is suing for damages. The fact that he thus sues, and the reasons which led him to sue, were made public by the *Gazette*. Shallow did not complain of this. He took good care not to do so; but he complains that the *Gazette* published the plea offered by Asselin to the suit for libel. He wishes that the plea alone should remain unknown, and he bases his action against the *Gazette* solely upon this one fact.

To me it is clearly evident that the facts complained of by the respondent would not warrant the prosecution of the proprietors of the *Gazette* for libel in a criminal court. This appears to be the formal enactment of the article of the Criminal Code. I cannot conceive with regard to newspapers that what is not a libel from a criminal point of view can be held

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to be a libel civilly. If a journalist has the right and is in duty bound to note everything which may interest the public within the limits prescribed by law, without being exposed to penal censure, there is still greater reason that he should be immune against any civil condemnation. Such was the opinion that Mr. Justice Johnson expressed in the case of *Trudel* v. *Le Monde*(1):

> The rights and liberties of the people of Canada completely take out of the category of wrongdoing (*culpa*), to which alone the article (1053 C.C.) relates, the performance of a public duty in a truthful and honest manner, which is the defendant's case, as they put it.

It is well worthy of remark that the Court of Appeal confirmed this view of the matter(2).

Rex v. *Wright*(3) and *Curry* v. *Walter*(4), cited above, are also authorities for the proposition that where the press has privileges, there can be neither criminal action for libel nor civil action for damages. The Supreme Court of Louisiana, a country governed by a Civil Code similar to ours in matters of civil offences, decided in 1891 that

> communications in a judicial proceeding are privileged and no person is liable civilly or criminally in any respect for anything published by him in the course of his duty in said proceedings. *Gardemal* v. *McWilliams*(5).

It is really the case to say that private interests must give way before the public weal.

Such is my interpretation of the Criminal Code, whose enactments are on this subject peculiar to our country.

(1) M.L.R. 5 S.C. 297, at p. 302.
(2) M.L.R. 5 Q.B. 510.
(3) 8 T.R. 293.
(4) 1 Bos. & P. 525.
(5) 43 La. Ann. 454.

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For all these reasons I would allow the appeal, restore the judgment of the trial court, and dismiss the plaintiff's action with costs before all the courts.

IDINGTON and MACLENNAN JJ. agreed with the opinion stated by Duff J.

DUFF J.—The question raised by this appeal is whether the publication of the statements contained in a pleading filed in the course of a civil action is (merely because such statements form part of such a pleading) a privileged publication within the rule which throws the protection of privilege about fair reports of judicial proceedings. The decision of the question is to be governed by the application of the law of the Province of Quebec; but it was conceded by counsel on both sides that under the law of that province the principles applicable to the particular question in controversy in this appeal do not differ from the principles of the common law.

The reason lying at the foundation of the privilege in question is, I think, nowhere more broadly stated than by Mr. Justice Laurence in the following passage which occurs in his judgment in *Rex* v. *Wright*(1):

> Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

The convenience of individuals is to be made subservient to the interest of the public in the administration

(1) 8 T.R. 293, at p. 298.

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of justice—which requires that full publicity shall be given to judicial proceedings—and hence the privilege. But is there any consideration touching the public administration of justice which affects generally with this desideratum of publicity the statements made in pleadings fyled by private litigants in the course of private litigation? I can conceive none. The publicity of proceedings involving the conduct of a judicial authority serves the important purposes of impressing those concerned in the administration of justice with a sense of public responsibility, and of affording every member of the community an opportunity of observing for himself the mode in which the business of the public tribunals is carried on; but no such object would appear to be generally served by applying the privilege to the publication of preliminary statements of claims and defence relating only to private transactions; formulated by the parties themselves; in respect of which no judicial action has been taken, and upon which judicial action may never be invoked. It is only when such preliminary statements or the claims or defences embodied in them form the basis or the subject of some hearing before, or some action by, a court or a judicial officer, that their contents can become the object of any real public concern as touching the public administration of justice.

It would seem, therefore, that the appellant's claim of privilege for the publication of a pleading, merely because it is a pleading, cannot be justified upon the broad ground on which the privilege itself is said by Laurence J. to rest; and still less does that claim receive any countenance from the judicial decisions in which the rule has been applied or from the

terms in which it has in later cases been judicially expounded. I have not been able to find among the reported decisions in England or in Canada a single case, except this, in which privilege has been claimed as attaching to the report of a judicial proceeding except in respect of an account of a proceeding in open court. Neither can I find any authoritative statement of the rule in which the application of the privilege is not limited either in express terms, or (when the facts under discussion are considered) by plain implication, to reports relating to such proceedings.

Thus in *Rex* v. *Wright*(1), Laurence J. is discussing the question whether the privilege is broad enough to protect the publication of reports of parliamentary debates; and while in the passage quoted he uses an equivocal phrase ("the proceedings of courts of justice") it is quite evident that he has in his eye proceedings in open court alone.

In the more recent cases the limitation is unequivocally expressed. One of the latest in which the rule is defined is *Kimber* v. *The Press Association*(2). The privilege claimed in that case was not based upon the English Act of 1888 (the defendants not being proprietors or publishers of a newspaper, and consequently not within the statute) but upon the common law principle. That principle is thus stated at p. 68 by Lord Esher:

> The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication, without malice, of a fair and accurate report of what takes place before that tribunal is privileged.

(1) 8 T.R. 293.

(2) [1893] 1 Q.B. 65.

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To the same effect is the language of Lopes L.J., at p. 73:

> The rule of law founded upon principles of public policy and convenience, is that no action for libel can be maintained in respect of a report of judicial proceedings, taken before persons acting judicially in open court, where the report is a fair and accurate report of those proceedings and published without malice.

The Court of Appeal, moreover, in that case treated as a vital point an objection that the proceedings were not in open court. At page 70, Lord Esher says:

> Therefore under that section the justices are acting judicially in a judicial proceeding in considering the application for the issue of a summons and by the law of England the proceeding must be in open court. No order to close the court was made by the justices in the present case and it is clear that the proceedings were in open court.

At page 73, Lopes L.J. says:

> I am therefore of opinion that the objection that this was a report of proceedings not taken in open court fails.

And so Fry L.J., at p. 76:

> I think therefore that the defendant must * * * shew that the matters in respect of which the report was published took place in open court.

In *Lewis* v. *Levy*(1) Lord Campbell, considering the application of the rule to the publication of an account of a preliminary investigation of a criminal charge before a magistrate, deemed it necessary to examine the question whether the court in which the magistrate sat while conducting the inquiry was "a public court of justice"; and, at page 558, this passage occurs:

> But although a magistrate upon any preliminary inquiry respecting an indictable offence may, if he thinks fit, carry on the inquiry

(1) E.B. & E. 537.

in private, and the publication of any such proceedings before him would undoubtedly be unlawful, we conceive that while he continues to sit *foribus apertis*, admitting into the room where he sits as many of the public as can be conveniently accommodated, and thinking that this course is best calculated for the investigation of truth and the satisfactory administration of justice (as in most cases it certainly will be) we think the court in which he sits is to be considered a public court of justice.

The same learned judge in *Davison* v. *Duncan*(1) at page 231, mentions (as one of the safeguards provided by the rule) the fact that "the proceedings" in respect of which reports are privileged "are under the control of the judges."

So strongly indeed have the courts emphasized the condition that the proceeding reported shall be a proceeding in open court, and so completely has that condition become incorporated in the rule as an essential element of it, that there is a considerable body of opinion of very high authority in support of the view that the rule itself is to be explained as merely intended to effect an extension of the area of the public court; and, although the passage I have quoted from Laurence J. has been accepted by eminent judges as stating truly the common ground upon which rest both the public right to be present in court and the privilege attaching to the publication of what occurs there—still it is perhaps open to doubt whether there is not a greater weight of opinion in favour of resting the privilege upon the first-mentioned or narrower ground. Thus Lord Esher in *Macdougall* v. *Knight & Son*(2), at page 639, adopts the opinion which he extracts from the judgment of Lord Campbell (speaking for the Court of Queen's Bench) in *Lewis* v. *Levy* (3) that the privilege is based upon the ground

(1) 7 E. & B. 229. (2) 17 Q.B.D. 636.
(3) E.B. & E. 537.

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that the court is open to the public but cannot hold all the people who may wish to be present and it is for the public benefit that what takes place should be made known to all.

Speaking in the same case, in the House of Lords(1), Lord Halsbury says the foundation of the privilege is

that judicial proceedings are in this country public and that the publication of what takes place * * * is allowed because such publication is merely enlarging the area of the court.

In *Stockdale* v. *Hansard*(2), Patteson J. and, in *Furniss* v. *Cambridge Daily News*(3), Gorrell Barnes J. give their adherence to the same doctrine.

There seems, therefore, to be as little foundation in authority as in principle for this view put forward by the appellants concerning the scope of the privilege; and one may perhaps venture to say that it is with some satisfaction that one arrives at this result. It is, I think, obviously undesirable that, by the simple expedient of commencing an action and filing a claim, anybody should be able to secure to himself the protection of the law in the dissemination of the most outrageous libel. The publication of statements of fact which it is in the public interest to publish and which are not untrue requires the protection of no privilege, because without any such protection such a publication entails no liability.

This view, as applicable to proceedings in the courts of Quebec, receives additional confirmation from the provision contained in rule 36, rules of practice, which seems to shew that the contents of pleadings and other papers filed in the course of litigation in the superior courts are not *publici juris*. That rule provides as follows:

(1) 14 App. Cas. 194, at p. 200. (2) 9 A. & E. 1, at p. 212.
(3) 23 Times L.R. 705.

All parties to a suit shall be entitled to communication of exhibits and other writings fyled therein;

a provision not easily to be accounted for if the public generally had in respect of such documents rights—one need not say equal—but at all analogous to the right of the public to be present at and to observe all proceedings in open court.

The American authorities cited by counsel are uniformly in accord with the opinion above expressed. I do not refer to them at length, but cannot forbear at least to mention the opinion delivered by Holmes J. speaking for the Supreme Court of Massachusetts, in *Cowley* v. *Pulsifer*(1), and that of Hayden J., speaking for the St. Louis Court of Appeal, in *Barber* v. *St. Louis Dispatch Co.*(2), each of which contains a convincing argument in favour of the rejection of the privilege now claimed based mainly upon an exhaustive examination of the English decisions.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *White & Buchanan.*

Solicitors for the respondent: *Desaulniers & Vallée.*

(1) 50 Am. Rep. 319.

(2) 3 Mo. App. 377.

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*Jan. 15.

WILLIAM NISBET PONTON (PLAINTIFF) ..... } APPELLANT;

AND

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

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

"Lawful costs"—Taxation of fees to counsel and solicitor—Construction of statute, 1 & 2 Edw. VII. c. 77 (Man.)—Contract with solicitor engaged on salary—Conflict of laws.

Section 468 of the charter of the City of Winnipeg (1 & 2 Edw. VII. ch. 77), provides that where the city solicitor is engaged at a stated salary, the city has the right, in law suits and proceedings, to recover and collect "lawful costs," in the same manner as if such solicitor were not receiving such salary. The corporation enacted a by-law appointing its solicitor at an annual salary and, in addition thereto, that he should be entitled, for his own use, to such lawful costs as the corporation might recover in actions and proceedings, except disbursements paid by the city. Upon the taxation of the costs awarded to the respondent on an appeal to the Supreme Court of Canada (41 Can. S.C.R. 18):

Held, that the statute and contracts above recited applied to costs awarded on said appeal and that, on the taxation, the usual fees to counsel and solicitor should be allowed. *Hamburg-American Packet Co.* v. *The King* (39 Can. S.C.R. 621) distinguished.

APPEAL from an order of the Registrar in Chambers, on taxation of the costs awarded to the respondent on an appeal to the Supreme Court of Canada(1).

The judgment appealed from was delivered, as follows, by

THE REGISTRAR.—Upon the taxation of the successful respondents' costs in the Supreme Court, the solici-

*PRESENT:—His Lordship Mr. Justice Maclennan, in Chambers.

(1) 41 Can. S.C.R. 18.

tors for the appellant have claimed that inasmuch as the counsel and solicitor in this court has an agreement with the City of Winnipeg whereby the city pays him a specific salary of $3,600 per annum, by which they obtain all his time and services for the corporation, that the respondents are not entitled to tax against the appellant any other costs than his disbursements.

The "Charter of the City of Winnipeg" is contained in 1 & 2 Edw. VII. ch. 77 (Man.), and section 468 provides as follows:

468. Where an attorney or solicitor is employed by the city whose remuneration is wholly or partly by salary, annual or otherwise, the city shall notwithstanding have the right to recover and collect lawful costs in all suits and proceedings in the same manner as if such attorney or solicitor were not receiving such salary, whether such costs are by the terms of his employment payable to such attorney or solicitor as part of his remuneration in addition to his salary or not.

In addition to this by-law No. 3613 (*a*) of the City of Winnipeg provides as follows:

1. Theodore Alexander Hunt, of the City of Winnipeg, solicitor, is hereby appointed solicitor to the corporation of the City of Winnipeg at a salary of three thousand six hundred dollars ($3,600.00) per annum, and that, in addition to the said salary, the said Theodore Alexander Hunt shall be entitled for his own use to such lawful costs as the said corporation of Winnipeg may recover in actions and proceedings, which costs, except disbursements which may have been paid by the said city, shall be paid to the said city solicitor as additions to the salary payable to the said solicitor.

2. The said solicitor shall devote his whole time to the duties of the office, and shall perform the duties in respect of said office prescribed by by-law No. 1596 and any amendments thereto passed or to be passed by the council.

I have already had to deal, in *Wilson* v. *Davies*, with a somewhat analogous question, where the successful respondents in this court had an agreement with an accident insurance company, whereby the insurance company undertook the payment, as be-

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tween it and the respondents, of all the costs in this court, and wherein I have reviewed all the decisions in Ontario and the English decisions, and the recent judgment of Mr. Justice Maclennan in this court in the case of *Hamburg-American Packet Co.* v. *The King* (1). In my reasons in that case, I pointed out that, in the Province of Quebec, the law as to costs is different from that in the Province of Ontario, and that, by art. 553 of the Code of Procedure in the Province of Quebec,

> every condemnation to costs involves, by the operation of law, distraction in favour of the party to whom they are awarded,

and, therefore, so far as the Supreme Court of Canada is concerned, it was open to the court to adopt the ruling as to costs in force in Quebec in preference to that in Ontario, but that Mr. Justice Maclennan had affirmed the reasoning of the courts in Ontario, and had held that costs are payable to the successful party as an indemnity, and that where the party is under no liability for costs to his solicitor, and there is nothing against which the client requires to be indemnified, such costs cannot be taxed against the unsuccessful party in this court.

I have now to determine whether the facts of this case are so different from those in *Wilson* v. *Davies* that a different conclusion should be arrived at with respect to the liability of the appellant.

An agreement such as this would appear to be perfectly valid in England under the "Attorneys and Solicitors' Act, 1870," 33 & 34 Vict. ch. 28, sec. 4 (Imp.), which reads as follows:

> 4. An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the

(1) 39 Can. S.C.R. 621.

whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor, or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained: Provided always, that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable he may require the opinion of a court or a judge to be taken thereon by motion or petition, and such court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to be cancelled and the costs, fees, charges, and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made.

This section of the statute was acted on by the courts in *Henderson* v. *Merthyr Tydfil Urban District Council*(1); and, even before the statute, it had been held in 1867 by Vice-Chancellor Page-Wood, in *Galloway* v. *Corporation of London*(2), that an arrangement of this sort between a solicitor and client was not illegal.

In Ontario, however, the Court of Appeal expressly refused to follow the judgment of the Vice-Chancellor, in *Stevenson* v. *City of Kingston*(3).

Mr. Bethune, for the respondents, contended that where the provincial legislature had expressly authorized an agreement between the solicitor and client such as is found in the present case, this validation of the agreement removed the basis for the Ontario jurisprudence, and that the Ontario cases had no application. This may be quite true so far as the costs in the

(1) [1900] 1 Q.B. 434. (2) L.R. 4 Eq. 90.
(3) 31 U.C.C.P. 333.

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provincial courts are concerned, but in my opinion it can have no application to the costs in the Supreme Court. The legislature of Manitoba cannot legislate regarding the Supreme Court of Canada, either in respect to its jurisdiction or as regards any other powers conferred upon it by the Parliament of Canada. As far back as *Clarkson* v. *Ryan*(1) the Supreme Court held that the provincial legislature of Ontario had no power to limit appeals to the Supreme Court; and quite recently, in the *Crown Grain Co.* v. *Day*(2), the Judicial Committee of the Privy Council held that the section of the Manitoba statute which provided that in a case of mechanic's lien the judgment of the Court of Appeal should be final and conclusive, was not effective to prevent an appeal to the Supreme Court, the Committee saying that this enactment was in direct conflict with the general provisions of appeal in the Dominion Act, and that if such legislation were valid it would virtually defeat the main purpose which the Parliament of Canada had in view in establishing the Supreme Court.

The "Supreme Court Act," by section 53, provides:

> The court may in its discretion order the payment of the costs of the court appealed from and also of the appeal or any part thereof, as well when the judgment appealed from is varied or reversed as when it is affirmed.

I must hold, therefore, that, so far as the Supreme Court is concerned, the judgment of Mr. Justice Maclennan in the case above cited, of *Hamburg-American Packet Co.* v. *The King*(3), has declared that in an appeal to the Supreme Court, costs are awarded to the successful party as an indemnity, and that if there is

(1) 17 Can. S.C.R. 251. (2) [1908] A.C. 504.
(3) 39 Can. S.C.R. 621.

an agreement between the client and the solicitor whereby the client will not be called upon to pay the costs of the solicitor in this court, such client, if successful, cannot tax such costs against the unsuccessful party to the appeal, and that the provision of the "Winnipeg Charter," even if applicable to costs in the provincial courts has no application to costs in this court.

C. J. Bethune for the motion by way of appeal.

F. A. Magee contra.

His Lordship delivered judgment, as follows:

MACLENNAN J.—The appellant Ponton brought an action against the City of Winnipeg to recover certain lots of land sold by the city for taxes, and bought in by the city. He was unsuccessful in the courts below, and his appeal to this court was lately dismissed with costs.

On the taxation before the registrar the appellant objected that the respondents ought not to be allowed anything but disbursements.

This objection was founded upon a statute of the Province of Manitoba, and the terms of a contract between the respondents and their solicitor, Mr. Hunt.

The statute referred to is section 468 of the "Winnipeg City Charter," and is as follows:

> Where an attorney or solicitor is employed by the city, whose remuneration is wholly or partly by salary, annual or otherwise, the city shall, notwithstanding, have the right to recover and collect lawful costs, in all suits and proceedings, in the same manner as if such attorney or solicitor were not receiving such salary, whether such costs are, by the terms of his employment, payable to such

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attorney or solicitor as part of his remuneration, in addition to his salary or not.

The contract between the city and Mr. Hunt was by a by-law in the following terms:

1. Theodore Alexander Hunt, of the City of Winnipeg, solicitor, is hereby appointed solicitor to the corporation of the City of Winnipeg at a salary of $3,600 per annum, and, in addition to the said salary the said T. A. Hunt shall be entitled for his own use to such lawful costs as the said corporation of Winnipeg may recover in actions and proceedings, which costs except disbursements which may have been paid by the city shall be paid to the said city solicitor.

2. The said solicitor shall devote his whole time to the duties of his office and shall perform the duties in respect of said office prescribed by by-law No. 1596 and any amendments thereto passed or to be passed by the council.

The learned registrar has given effect to the objection in a very full and careful opinion, which he rests mainly upon my judgment in *The Hamburg-American Packet Co.* v. *The King*(1).

This is an appeal from the decision of the learned registrar, and was very ably argued before the learned Chief Justice and myself by Mr. Bethune, for the appellant, and Mr. Magee, for the respondent.

It is to be observed that the *Hamburg-American Packet Co.'s Case*(1) was very different, and there was no statute or contract such as in the present case.

The city by-law No. 1596, referred to in the contract with Mr. Hunt, was not brought before the registrar or before us, and I assume that any additional duties on the part of Mr. Hunt, prescribed thereby, are only such as are usually performed by a solicitor.

The statute and agreement are confined to attorneys and solicitors and their duties and services, and have no relation to counsel or counsel's services.

(1) 39 Can. S.C.R. 621.

In Manitoba the offices of barrister and attorney or solicitor are distinct, although the same person may be an attorney or solicitor and also a barrister, and Mr. Hunt is both a barrister and an attorney and solicitor.

The salary provided by the agreement, therefore, does not extend to services rendered by Mr. Hunt, as counsel, and he appeared as counsel in the case both in this court and below, and there is no ground on which the usual counsel fees may not be claimed by Mr. Hunt against his clients, and recovered by the city as part of the costs awarded to them by this court.

How then does it stand with regard to charges for services as a solicitor, for the question is confined to them, the city's right to recover counsel fees whether to Hunt or any other counsel, as well as disbursements being clear and undoubted?

In considering this question it must be borne in mind that costs awarded, whether here or below, at all events under the English system, are the costs of the party, and are awarded to him and not to the solicitor. If the solicitor is acting gratuitously his client can recover no costs, as in the case of an action *in formâ pauperis,* simply because the client has incurred none, and if the solicitor by agreement with his client is to receive a fixed sum, irrespective of any particular litigation, or of its result, it cannot be said that the client has incurred any liability to him in that litigation. He has neither paid anything, nor incurred any liability to pay anything, by reason of it for services. And, if not, and if the solicitor could demand nothing for his services, in case his client was unsuccessful, it cannot be said that the client has incurred any costs, as the result of it, except disbursements.

The relation of solicitor and client is one of con-

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tract, and must be governed by the law of the province in which the contract is made, and not of the province in which the services are rendered. It follows that the solicitor's right against his client to costs incurred in this court, as well as in the lower courts, must be governed by the law of Manitoba, and that the statute and contract are applicable to the costs awarded by this court in the appeal.

The only costs in question on this appeal also are those incurred in the appeal to this court alone, the costs in the lower courts being payable by virtue of the orders made below which were merely affirmed by this court.

The only question before us, therefore, respects Mr. Hunt's services as a solicitor in this appeal. Is he now for the first time to be at liberty to make out a bill for his services, not against his client, but against Ponton, a bill for which he clearly had no claim against his client or against any one, until the moment when this court pronounced judgment in the city's favour with costs.

The question depends wholly upon the statute. What says it? It is that, in such a case, the city shall recover *lawful costs* in suits in the same manner as if the solicitor was not receiving a salary, and whether such costs are payable as part of his remuneration, or in addition to his salary or not.

The obscurity in the language is in the use of the word *costs*. The costs of a client in an action are the sums which he has paid or which he owes, to his solicitor, or his counsel, or to witnesses or others for services rendered therein. The statute says that the city, although employing a solicitor at a salary may still recover and collect lawful costs in all suits, that is, as

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I understand it, may recover and collect from the opposite party in an action sums, as above defined, which it may have lawfully paid or which it may lawfully owe for services. The sums owing, paid to counsel or for disbursements, answer the description in the statute, lawful costs. But it did not require the statute so far as those costs are concerned to enable the city to recover them, and the question is can the statute and agreement be made to apply to services which the solicitor was bound to perform in consideration of his salary and without further remuneration. He was entitled to his salary even if this action had never been brought. How then can it be said that his services in this action have cost his clients anything? He issues a writ or enters an appearance, could he claim anything for that, except disbursements? Up to the very last moment before judgment does his client owe anything but disbursements? If the judgment is against the client, or is in his favour but without costs, does the client owe anything for his services, or if the party ordered to pay is insolvent must the client pay? The answer to these questions must be in the negative. If so how can the mere fact that the action is dismissed with costs, make the city a debtor for services for which up to that time they owed nothing, and for which, if they had failed, or had succeeded, but without an award of costs, they would never have owed anything? And what the statute and agreement say is, that what he may recover is *lawful costs*.

It seems to be clear then that the costs sought to be allowed here are not in any proper sense costs, what the statute calls legal costs, that is costs of the client, and it being also clear that both counsel fees and disbursements could and might be taxed and allowed

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independently of the statute and without its aid, it follows that unless the costs in question can be allowed the statute has no effect or operation whatever, is altogether nugatory, and the sole question is whether we can give it effect or operation on the principle *ut res magis valeat quam pereat.* Can we say that the legislature *must* have intended the allowance of the costs in question by the expression lawful costs, followed by the words *in the same manner as if such attorney or solicitor were not receiving such salary.*

Upon the whole after much consideration I think that we may without violating any principle of the construction of statutes hold that the words of the enactment mean costs *which would have been lawful,* that is recoverable by the city, if the attorney or solicitor were not receiving a salary.

It is an old rule that every statute is to be expounded according to the intent of them that made it —Maxwell on Statutes (4 ed.) 427 and references— and I think we can see, although perhaps dimly, that the intention of the statute in the absence of any other effect which can be given to it, is such as I have indicated.

For these reasons I think the judgment of the learned registrar should be reversed and that the costs in question should be allowed on the taxation.

Motion allowed with costs.

BYRON N. WHITE COMPANY (DEFENDANTS) ..... APPELLANTS; 1908 *Oct. 8, 9, 12.

AND

THE STAR MINING AND MILLING COMPANY (PLAINTIFFS) ... RESPONDENTS. 1909 *Feb. 12.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mines and mining—B.C. "Mineral Act, 1891"—Apex location—Exploitation of vein—Continuity—Extralateral workings—Encroachment—Trespass—Onus of proof.

To justify an encoachment in the exercise of the right, under the British Columbia "Mineral Act, 1891" (54 Vict. ch. 25) of following and exploiting a mineral vein extralaterally beyond the vertical plane of the side-line of the location within which it has its apex, the owner of the apex must prove the identity and continuity of the vein from such apex to his extralateral workings. In the present case, as the appellants failed to discharge the onus thus resting upon them, the judgment appealed from (13 B.C. Rep. 234) was affirmed.

APPEAL from the judgment of the Supreme Court of British Columbia(1) reversing the judgment of Hunter C.J., at the trial(2), and maintaining the plaintiffs' action with costs.

The circumstances of the case are stated in the judgment of Mr. Justice Davies, now reported.

Bodwell K.C. and *Lennie* for the appellants.

S. S. Taylor K.C. for the respondents.

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

(1) 13 B.C. Rep. 234. (2) 12 B.C. Rep. 162.

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THE CHIEF JUSTICE.—I would dismiss the appeal for the reasons given, in the court below, by Mr. Justice Irving.

GIROUARD J. agreed in the dismissal of the appeal with costs.

DAVIES J.—This was an action of trespass brought by the respondents against the appellants for mining within the vertical plane of the west end line of their mining location called the "Heber Fraction."

The defendants did not dispute the fact of their having mined within this location of plaintiffs, but justified it on the ground that they were only following the dip of their own "Slocan Star" vein from its apex within their own location, and contended that they could follow such dip of the vein across and beyond the side lines of their locations indefinitely as it descends and so long as they proved continuity in the walls and ore of the vein, and kept within the extent of their side lines.

The claim of the defendants to this extralateral right was based upon section 31, chapter 25, of the statutes of British Columbia (1891), the first part of which was practically copied from section 2322 of Title XXXII., ch. 6 of the United States Revised Statutes and reads as follows:

> The lawful holder of a mineral claim shall have the exclusive right and possession of all the surface included within the lines of his location, and of all veins or lodes, throughout their entire depth, the top or apex of which lies inside of such surface lines extending downward vertically, although such veins or lodes may so far depart from a perpendicular in their course downwards as to extend outside the vertical side-lines of such surface location; but his right of possession to such outside parts of such veins or lodes shall be confined to such portions thereof as lie between vertical planes

drawn downwards, as above described through the end lines of his location so continued in their own direction that such planes will intersect such exterior parts of such veins or lodes; and nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

The latter part of this British Columbia section (not copied here), had reference to certain relative bearings of the location and the vein or lode which traversed it in which case, the section provided, the side lines of the location became the end lines thereof for the purpose of defining the rights of the owners. An important legal contention was submitted by the respondents' counsel in the course of his argument on the effect of this latter part of the section upon the appellants' rights even if upon the facts with regard to the continuity of their "Slocan Star" vein the finding should be in the appellants' favour.

He contended that under the proved facts of this case the appellants' side lines of their "Silversmith" location became their end lines for the purpose of defining their rights and that as a consequence they could not under any circumstances have the right to mine on the disputed territory or justify the trespass complained of. I merely mention the point in passing because in the view I take of the facts it does not become necessary to determine it.

In order to make the dispute and contentions of the respective parties intelligible, it is necessary to have before one's eye some sort of sketch of the mining locations of the respective parties shewing the relative situations they bear to each other and also the course of the level or drift the mining of which constituted the trespass complained of and the course of the alleged apex of the vein by virtue of which through

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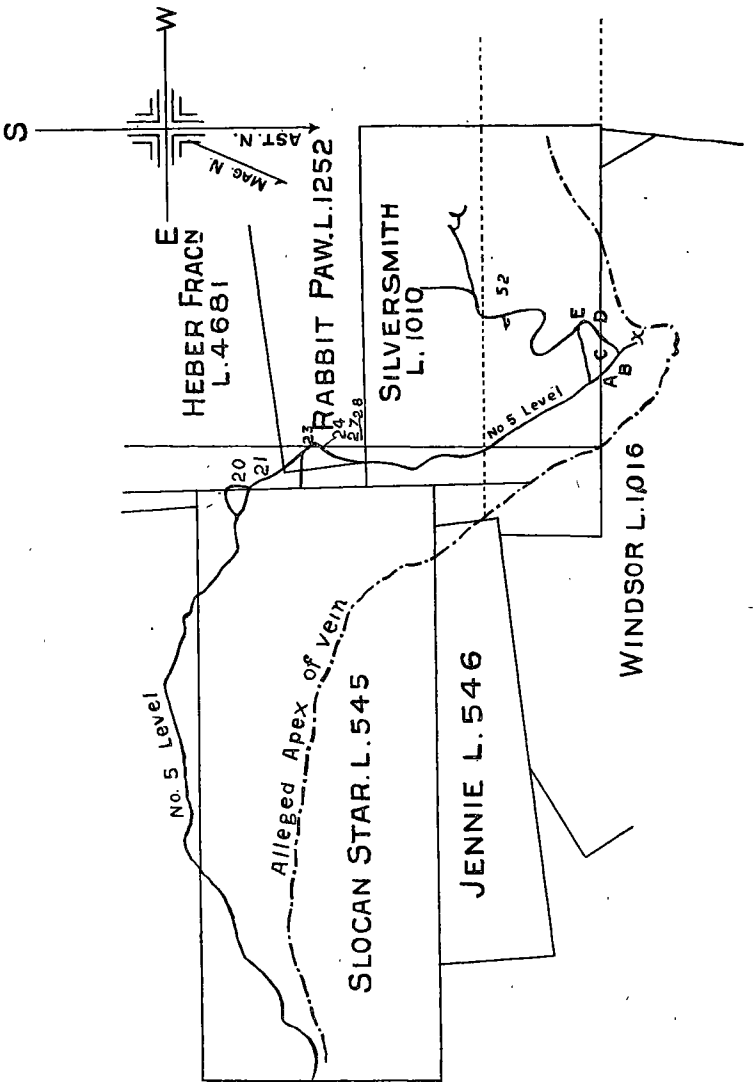
the "Silversmith" location of the appellants they claimed the right to mine within the vertical planes drawn downwards of the respondents' "Heber Fraction" location.

Such a sketch or outline of the location I here insert.



The contention of the appellants shortly was that the "Slocan Star" vein after running through the "Slocan Star" location from east to west suddenly turned to the north as and after it had entered the "Heber Fraction" and continued generally on that northerly course through the "Heber Fraction," the "Rabbit's Paw" and the "Silversmith" until it reached Point B in the "Windsor" location when it turned to the west and ran in the southwesterly though somewhat tortuous course through the "Silversmith," that an apex of that vein was in the "Silversmith" location from the point where it left the "Jennie" till it reached the "Windsor," and that this apex entitled them as owners of the location to follow the vein down its entire depth to No. 5 level and so on such level southerly to and embracing the alleged trespass on the "Heber Fraction."

The respondents, on the other hand, contended, in accordance with the findings of the appeal court of British Columbia, that the "Slocan Star" vein ended at the bend to the south on its entering the "Heber Fraction"; that in fact it was there broken and cut off by a fault fissure, called throughout the trial the "Black Fissure" that this "Black Fissure" was a non-mineralized fissure or vein and continued away to the north from the bend or turn where the "Slocan Star" vein ran up against it, and again at point B where appellants alleged the vein turned towards the west continued on in a northerly direction and did not turn at all; that the apex claimed to justify the trespass is not on the other or faulted end of the "Star" vein, but is the apex of the fault or "Black Fissure" itself; and that the "Silversmith" vein away to the west does not connect with this "Black Fissure" at all.

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It was plain from these several contentions that the main fight between the parties must concentrate around the facts as they are found to exist at the two great bends of the No. 5 level drift, though the character of the intervening and other parts of the vein or drift is important as determining identity and continuity.

The appellants contended that a quantity of ore in place had been found from the bend at or about station 21 along the drift for a distance of about 280 feet, and that this fact was absolutely inconsistent with the theory of a separate and independent vein or fissure running in a northerly and southerly direction and cutting off or faulting the "Slocan Star" vein, and shewed that in fact the "Black Fissure" was a myth and had no existence, the vein or lode or fissure, as it was variously called, being really and truly a continuation of the "Slocan Star" vein turning to the north, and again at the north point B to the southwest. They further contended that the evidences of the vein so turning alike at the south at station 21 and again at the north point B were apparent and could be seen by any one making an examination as they had been seen by their workmen and experts.

The respondents submitted that there were no evidences of any turn in the "Slocan Star" vein at or about station 21, and that what were alleged as such evidences were inconclusive and most unsatisfactory and that as regard the ore found in the drifts for a distance of 280 feet from the bend or turn it was easily accounted for, and as one of the experts, Fowler, said, its presence was, on the assumption that the respondents' theories were correct, not to be excused but expected. In the first place they say that from the

turn at the shaft going northerly from station 21 there was 80 feet shewing ore which was the cut off end of the original "Slocan Star" vein by the "Black Fissure"; then came a gap of thirty feet shewing no ore; then for 15 feet more evidence of ore in place shewing, as they contended, evidence of another vein running up against and into the "Black Fissure" and beyond that point for the remainder of the 280 feet the ore found was not ore in place, but drag ore from this independent vein subsequently called vein No. 2.

At the extreme northern end the appellants contended that the vein turned at B and ran southwesterly to E and then tortuously to station 52, where ore was again found, while the respondents' contention was that all the drifting and tunnelling done between B and station 52 was through country rock and not along any vein or lode at all, and that as a fact from station 27 to station 52 the level or drift was absolutely without ore and non-mineralized. They further contend that the "Black Fissure" was a separate independent fissure not in any way part of the "Slocan Star" vein or the "Silversmith" vein and which continued on to the south at one end and to the north at the other away past the alleged bends or turns in dispute and that these two veins, the "Slocan Star" and the "Silversmith," were in no way now connected whatever plausible grounds might exist for contending that at some distant period they may have formed one vein or lode.

The trial took place before the Chief Justice who, at one period, ordered some additional work to be done for the purpose of testing the truth of the rival theories respecting the continuity or discontinuity of the "Slocan Star" vein. The appointee being unable

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from sickness to carry out the work ordered the Chief Justice determined to make a personal inspection of the work. He did so, accompanied by the chief expert on each side, and, between points B and C, ordered some further work to be done which he also inspected.

The conclusion he reached was that the "Black Fissure" theory was a myth; that the whole of the No. 5 drift was along and part of the "Slocan Star" vein, as evidenced by what he concluded was alike continuity of walls and vein and ore found in the drift for a distance of 280 feet from the turn at the south, and that the theory of the respondents' experts as to the "Black Fissure" being a separate and independent fissure cutting off the "Star" vein or lode and of an independent vein running eastwardly from station 22, and thus accounting for the ore found in the No. 5 drift at that station and north of that was a theory "born of despair."

He was pressed several times to order some work in the nature of cross-cutting to be done at or near station 21 and north of the alleged bend which would either prove or disprove the theory of an independent fissure cutting off the "Slocan Star" vein and continuing in its southerly course past where it crossed such vein at station 21, and also some other work at the most northerly end of the drift past where it turned at point B which would prove or disprove its continuance on to the northward as contended, and also some work at station 22 which would prove the existence or non-existence of the separate independent vein contended for by respondents' experts.

The Chief Justice, however, feeling confident in the conclusions he had reached as the result of his inspection declined to make the order asked for,

whereupon counsel for the respondents decided it would only be a waste of time to argue the case on the evidence then before the trial judge and in the absence of the evidence the work they asked to have done would supply. The Chief Justice accordingly formulated the conclusions he had reached and gave judgment for the present appellants.

On appeal to the full court from that judgment the application for an order to have the three pieces of work above referred to done was renewed and granted.

Indeed it is hard to see how it could be refused or on what reasonable ground it could be opposed. It may well be that on the evidence the Chief Justice had before him coupled with the personal inspection he made in the presence and with the assistance of the experts on both sides his decision would not in the absence of this further work and the disclosure it resulted in have been interfered with.

What we have to deal with is not the Chief Justice's decision on the partial evidence he had before him coupled with his own inspection, but the judgment of the full court of British Columbia after the work which they had ordered had been done and the great mass of testimony taken before them had been given respecting the actual works done and the results they disclosed. The original experts were fully re-examined and their theories tested in the light of the actual facts disclosed and several new experts were brought forward and examined.

No question was raised before us as to the power of the court to make the order it did or to receive the evidence it heard. Before the trial judge the contentions of each side rested largely upon theories. They were no doubt ably supported by skilled and experi-

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enced mining engineers and the Chief Justice, after personal examination of the mine, accepted that of the defendants. But it does appear to me that the test asked for by the plaintiffs of the correctness of the theory they put forward as to the separate independent character of the so-called "Black Fissure" and its prolongation past each of the disputed bends, south as well as north, as also as to the existence of the separate and independent vein or lode at point C, was a most reasonable one and could hardly fail of being a decisive one. If the result had shewn either that the "Black Fissure" so called was not prolonged north and south beyond the disputed bends, or if no independent vein had been found at station 22, then it seems to me the theories of Mr. Sizer, Mr. Fowler and the other experts of the respondents would have been so weakened as might have justified at least acquiescence in, if not full acceptance of, the conclusions reached by the Chief Justice.

At the hearing of the appeal in this court we had the advantage of having the contentions on both sides very fully and ably submitted by counsel with the assistance of elaborate plans and models without which their arguments would have been difficult if not impossible to follow intelligently. Since then I have read and re-read the carefully compiled factums of both sides, as also a large part of the evidence, and as a result I have reached the conclusion that the contentions of the plaintiffs have been sustained and that the onus which rested upon the defendants has not been discharged.

In my judgment when the owner of a mining location seeks to exercise his statutory right and follow downwards and outside of and beyond the vertical

plane of the side limits of his location a vein or lode an apex of which is found within and upon or near the surface of his location he is bound, in case he claims to mine and work within the vertical plane limits of another miner's location, to shew by evidence so clear and cogent as to be irresistible that such mining as he claims to justify is on the same vein or lode as has its apex within his location. If such vein or lode has been faulted and severed and he claims to follow the severed part I think the rule laid down in the United States cases, on a similar statute, that he must prove by preponderating evidence identity and continuity alike a reasonable one. It is, as Lindley says in his book on mines, section 615, impossible to prescribe any definite rule as to what degree of continuity or identity, in a legal sense, the miner must establish when he invades property adjoining the location containing the apex of the vein. Each case necessarily presents its own peculiar features. But that there must be alike identity and continuity shewn is I think clear.

The continuity may it is true be interrupted even to a closure of the fissure without destruction of the identity provided the extent of the interruptions or closure does not prevent the tracing of the lode or vein through the fissure to be identical in its parts as a geological fact.

Butte & Boston Mining Co. v. *Société Anonyme des Mines de Lexington*(1), cited with approval in Lindley on Mines, section 615.

I do not gather, however, that there is very much difference between the parties as to the law governing this question of the necessity of shewing identity and continuity of the lode or vein.

(1) 23 Mont. 177.

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The great dispute is as to the facts to which the law is to be applied.

I do not propose to write an analysis of the great mass of evidence taken in the case. Any such analysis would be unsatisfactory without the presence of models and maps to illustrate it. I am satisfied with the analysis and general reasoning of Irving J. which, with the aid of the maps in evidence, can easily be followed.

I think the work done under the direction of the full court of British Columbia established beyond reasonable doubt: First, that the "Black Fissure" was not a myth, but was an independent fault fissure of entirely different material from that of the "Star" vein, being of broken polished country slates, and that it had been formed later than the vein fissure and had no mineralization; that it faulted and cut off the "Slocan Star" vein at the southern turn near station 21, and after so cutting it off continued on away to the south. Secondly, that the presence of the ore found within the first 280 feet of the "Black Fissure" from the shaft at the southern bend was reasonably accounted for in the manner I have before stated, namely, by the "brooming up" against this fissure, to use the expression of the Chief Justice at the trial, of the "Slocan Star" vein and of the No. 2 vein disclosed by the C drift where the fissure faulted and cut off these veins and by the drag ore from each of the veins caused by the great earth movement which the experts speak of. The explanations of the presence of this ore for the distance mentioned along this fissure which I accept are quite consistent with the existence of the "Black Fissure" as a separate independent fault fissure. Thirdly, that the existence of

the vein No. 2 at station 22, as an independent separate vein, was established by the running of the C drift and accounted for much of the ore formed in the first 280 feet of the fissure. Fourthly, that the "Black Fissure" (so called) did not turn in a southwesterly direction at point B as appellants contended the vein did at that point, but was shewn, by the work done at X, to have continued on away to the north, thus adding an additional proof of its independent and separate character.

I think it was proved beyond reasonable doubt that from station 27 or 280 feet north from the place where the fissure faults the "Star" vein, and where the drag ore ceased all the way round to station 52, where the "Silversmith" vein containing ore was first reached on this No. 5 drift, a distance of 1203 feet, the drift was absolutely sterile of ore and non-mineralized.

I also reached the conclusion from the evidence that there was no ore vein turning off westwardly from the "Black Fissure" either at point B or at station 41, and that all the tunnelling and drifting done by the appellants at these several places were simply driftings through the country rock.

The drift had first been driven northerly to "*x*" along the "Black Fissure" drift, but as that drift was not leading in a direction to connect with the "Silversmith" vein it was abandoned and the entrance to it so blocked up and disguised or hidden by the workmen of the defendants as to conceal the existence of the drift running north from B in that direction. The drift as far as it had been driven to "*x*" from B had been timbered all the way, work which would have been unnecessary if it was country rock they were drifting through. These drifts from 41 to 43 and from

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B to 43 were no doubt made with the hope and object of establishing connection and continuity between the two ore-bearing veins, the "Slocan Star" and the "Silversmith." It is well, however, to bear in mind that they were all run after this litigation began, as, indeed, was the whole of No. 5 level from station 22 in the south.

These facts, as I have found them, are destructive of the case set up by the appellants and negative any continuity between the "Slocan Star" vein and the "Silversmith" vein.

I would, therefore, dismiss the appeal and confirm the judgment of the court below.

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

It seems to me, as Mr. Justice Martin puts it, that the appellants have not satisfied that onus of proof resting on them.

I agree with the exhaustive analysis of the evidence that Mr. Justice Irving has given us the benefit of and the general conclusions he has arrived at without being quite sure as to how far I should agree in the extent or degree of discredit which he attaches to one of the leading witnesses for appellants.

MACLENNAN J.—I agree in the opinion stated by Davies J.

Appeal dismissed with costs.

Solicitors for the appellants: *Lennie & Wragge.*
Solicitors for the respondents: *Taylor & O'Shea.*

THÉODULE LARAMÉE ET UXOR (CONTESTANTS) ..... } APPELLANTS; 1908 *Nov. 6.

AND

JOSEPH FERRON (PETITIONER) ..... RESPONDENT. 1909 *Feb. 12

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

Will—Testamentary capacity—Captation—Suggestion—Undue influence—Interdiction—Evidence—Onus of proof.

The existence of circumstances which might raise suspicion that the execution of a will was procured by captation, improper suggestions or undue influence on the part of those promoting it is not a sufficient ground to justify an appellate court in interfering with the concurrent findings of the courts below as to the validity of the will.

Judgment appealed from (Q.R. 17 K.B. 215) affirmed, Girouard and Maclennan JJ. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Richelieu (Charbonneau J.), dismissing, with costs, the appellants' contestation of the petition of the respondent for leave to take up the instance (*requête en reprise d'instance*), in a suit pending, in the Superior Court, District of Richelieu.

The petition was an incident in an action taken by the late Aurélie Quintin, *dite* Dubois, assisted by her judicial adviser, against the appellants, to set aside a

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

(1) Q.R. 17 K.B. 215.

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deed of sale as being a donation in contemplation of death. While the suit was pending, the plaintiff died and the respondent, as *chef de communauté,* petitioned to be allowed to take up the suit in lieu of the deceased plaintiff, his wife being plaintiff's universal legatee under a notarial will made on the 21st day of June, 1905. The appellant contested the petition, alleging that the will in question was invalid, having been made by the testatrix when she was not in possession of her mental faculties, and inspired by suggestion and undue influence on the part of the respondent and his wife.

The contestation was dismissed with costs by the Superior Court and that decision was affirmed by the judgment now appealed from. The circumstances in relation to the issues on the appeal are stated in the judgments now reported.

S. Beaudin K.C. and *Belcourt K.C.* for the appellants.

T. Chase-Casgrain K.C. for the respondent.

THE CHIEF JUSTICE.—The only question in issue on this appeal is one of fact and I wish to express my absolute concurrence in the conclusion reached by the distinguished judges who spoke for the majority of the Court of Appeal. Their opinions are to be found in the report of the case in the court below(1).

The testatrix was interdicted on the ground of insanity at the request of the appellant, on the 19th of February, 1905, but, apparently, against the opinion of

(1) Q.R. 17 K.B. 215.

the relatives summoned to form part of the family council. She was relieved of this interdiction on the 29th of May following, and, on revision, this last judgment was confirmed on the 15th of June, and the will impugned in these proceedings was made on the 21st of the same month. The question is: Was the testatrix of sound and disposing mind on that date?

The interdiction was removed on the advice of a family council composed of eleven of the nearest relatives of the testatrix, the majority of whom formed part of the first family council; and their finding that the testatrix was then of sound and disposing mind may be said to be equivalent to the verdict of a jury. On an application to review their finding it was confirmed by the judge. No change is proved to have taken place in the mental condition of the deceased between the 15th and the 21st of June. Subsequently, the same issue was tried in these proceedings by the judge who removed the interdiction and he again found in favour of the sanity of the testatrix and his judgment was confirmed in appeal.

Under these circumstances we are asked to reverse. This is, in my opinion, one of the cases in which we should apply the rule that has been laid down on more than one occasion in this court, that we should not reverse the concurrent findings of two courts on questions of fact unless clearly erroneous.

An interesting question was raised in the Court of appeal below and at the argument here as to whether or not the judgment relieving, on the advice of the family council, the testatrix of the interdiction was *res judicata* as between the parties in this case. It is not necessary to decide that question now, but I would refer to Lacoste, "Chose Jugée" (2 ed.), page 8, *n.* 1:

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La règle qui accord aux décisions judiciaires autorité immédiate de chose jugée a été appliquée par la cour de cassation de Belgique au jugement qui prononce la mainlevée d'une interdiction, et la cour de Gand l'a appliquée en outre au jugement qui prononce l'interdiction; Gand, 2 déc., 1899, (motifs) sous Cass. Belgique, 29 nov., 1900, précité. V., à ce sujet, notre note dans S. et P., 1902, 4, 17.

The appeal is dismissed with costs.

GIROUARD J. (différant).—J'hésiterais à renverser le jugement rendu dans cette cause par deux cours sur une question de fait, si dans l'appréciation de la preuve elles avaient tenu compte d'un principe qui, dans une cause comme celle-ci, a toujours servi de guide aux tribunaux; savoir qu'un légataire qui a fait faire un testament en sa faveur au préjudice des héritiers, soit en loi ou en vertu d'un testament antérieur, doit prouver que tout a été fait légalement par un testateur compétent et agissant librement. Il s'agit d'une demande en nullité d'un deuxième testament pour cause de démence, suggestion et captation ou influence indue. Comme toujours, la preuve est contradictoire et c'est surtout dans ces circonstances que l'application du principe ne doit pas être perdue de vue.

Nous sommes en présence de deux testaments: l'un inattaquable, véritable arrangement de famille fait par les parents, de l'assentiment de leurs enfants, qui sont les parties dans cette cause, où il faut supposer que les droits de part et d'autre furent loyalement examinés et justement traités; l'autre fait à une époque où la testatrice—son mari était mort dans l'intervalle—qui avait toujours été complètement étrangère aux affaires, était en outre malade, paralytique, souffrante et faible d'esprit et pouvait facilement subit l'influence, surtout de ses proches les plus chers, par lequel testament elle prive presqu'entièrement l'une

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des branches de sa famille, les Laramée, des avantages du premier testament pour les faire passer à l'autre, les Ferron. Sans entrer dans tous les incidents et les détails nombreux et assez compliqués qui forment le dossier (qui couvre trois cents pages imprimées), il est cependant nécessaire de s'arrêter sur quelques faits saillants.

Les parents ici, monsieur et madame Bonin, née Aurélie Quintin dit Dubois, cultivateurs de St. Marcel, comté de Richelieu, n'étaient pas les père et mère mais les parents adoptifs de deux jeunes filles sœurs et nièces de madame Bonin, dont l'une avait épousé Théodule Laramée, l'appelant, et l'autre Joseph Ferron, l'intimé. Après leur mariage, madame Laramée et son mari restèrent avec les parents adoptifs environ un an, puis allèrent aux Etats-Unis d'où, après un séjour de huit ans, ils retournèrent à St. Marcel vers 1901; et finalement en 1904, ils allèrent de nouveau habiter avec les vieux parents à la suite des arrangements de famille que voici: Le 10 février 1904, par un acte entre vifs, qu'ils qualifient "vente et donation," passé devant Cardin, jeune, N.P. de Massueville, ils passèrent à Laramée la terre paternelle, où ils vivaient, avec tout ce qui en dépendait, moyennant certaines charges et une rente viagère. Le même jour, par un autre acte entre vifs intitulé aussi "vente et donation," ils passèrent à Ferron une autre terre de moindre valeur, il est vrai, mais c'était, paraît-il, ce qui avait été convenu entre eux après mûres délibérations, comme cela se pratique invariablement dans nos campagnes, et il est remarquable que pas un seul témoin n'a été produit qui aît mis en doute l'équité de ces arrangements. Pour donner plus de force à ces dispositions entre vifs, deux testaments furent faits

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devant le même notaire et deux témoins du voisinage: l'un, celui de M. Bonin, le 11 février 1904, et l'autre, celui de Mme. Bonin, le 11 mars suivant. Ces deux testaments confirment en tous points les dites ventes et donations.

Quelques jours après, savoir le 28 mars 1904, M. Bonin s'est suicidé pour des raisons qui n'apparaissent pas et qui sont d'ailleurs étrangères au litige. Naturellement, cette mort étrange a dû être un grand choc pour sa veuve et il n'est pas surprenant d'apprendre que le 15 mai suivant elle était frappée d'une forte attaque de paralysie. Elle reçut les soins du médecin de l'endroit, le docteur Gendron, et peu de temps après elle était convalescente et comme d'ordinaire dans les cas de cette nature sans être guérie. Il est rare, en effet qu'une personne agée d'environ soixante-dix ans, frappée de paralysie comme elle le fut, en revienne complètement. Le docteur Gendron, qui revit la pauvre vieille chez les Ferron où elle était en promenade à l'automne de la même année, 1904, en compagnie du notaire Cardin, certifie qu'elle était alors "démente, un cerveau ruiné."

A trois reprises différentes durant cet automne de 1904, en septembre et en décembre, Ferron, durant la visite de madame Bonin, fit venir le notaire Cardin dans le but de lui faire faire un deuxième testament. Le notaire s'est rendu à l'appel chaque fois mais sans résultat, vu que d'après lui elle n'était capable de tester; la dernière fois, cependant, afin d'en finir avec ces courses, il demanda au docteur Gendron de l'accompagner, ce qui fut fait. Le notaire ajoute que le docteur Gendron, après examen, lui a défendu de reçevoir le testament et que s'il le faisait, il témoignerait contre lui. Le témoignage du docteur Gendron

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confirme celui du notaire à cet égard. C'est alors que M. Cardin a abandonné l'idée de reçevoir un deuxiéme testament.

Le 4 février suivant (1905), madame Bonin était interdite à Sorel pour cause de démence à la requête de Laramée, mais, en vérité, ainsi que Laramée et le notaire instrumentant, Cardin, l'avouent, à l'instigation spéciale de Ferron. M. Cardin ajoute dans son témoignage:

Monsieur Ferron a répondu: "Puisqu'on ne peut pas faire un testament et puisqu'elle est folle, on va toujours lui nommer un curateur, quelque chose, pour la représenter," et il m'a demandé de procéder à l'interdiction, là-dessus j'ai dit: "Est-ce que M. Laramée serait consentant?" Il dit: "Voyez-le donc." J'ai vu M. Laramée et on a procédé à l'interdiction à l'unanimité du conseil de famille.

Q.—C'est monsieur Laramée qui a procédé?

R.—Oui. Il m'a demandé d'aller voir M. Laramée pour voir s'il serait consentant; j'au vu les deux parties, nous avons procédé à la demande de monsieur Laramée, mais c'est à la demande de M. Ferron que l'interdiction a eu lieu.

La conséquence de cette interdiction a été de faire naître dans le cœur de madame Bonin de la haine pour Laramée. Une de ses réponses aux interrogatoires pour son interdiction dénote l'esprit qui l'animait:

Q.—Qui n'était pas raisonnable?

R.—Monsieur Laramée. Il faut voir ce qu'il est. Il est ambitieux. Où est-ce qu'on trouverait le magot. On passerait le magot. On passerait dans le champ et on ne le trouverait pas. Il a été courir à Sorel. Il est grand. Il a été à Sorel pour dire que j'étais folle. Pourquoi cela? c'était pour avoir le magot * * * mais le magot lui échappera bien.

L'insuccès de Ferron avec M. Cardin lui inspira l'idée d'aller frapper à la porte d'un autre notaire, plus complaisant, savoir Joseph Gédéon Larivière, exerçant à St. Aimé. Nous avons le témoignage de ce dernier et malgré les imperfections, réti-

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cences et hésitations, il en résulte qu'il déclare à Ferron que si l'interdiction était levée et que madame Bonin fut pourvue simplement d'un conseil judiciaire, elle pourrait faire un testament. De suite Larivière, à la demande de Ferron, prend les procédures nécessaires pour obtenir le relevé de l'interdiction. Il s'arme d'abord de l'affidavit du médecin de Ferron, le docteur Pepin, assermenté devant lui le 12 mai, où ce dernier jure que Mme. Bonin "a toujours joui de toutes ses facultés mentales" et "qu'elle est capable d'administrer ses biens et affaires" bien que plus tard, lorsqu'il fut appelé comme témoin, il avoue qu'il n'a jamais tenu de conversations avec elle et n'a fait aucun examen de son état mental. Puis, le 23 mai, Larivière donne à Laramée avis d'une assemblée de parents chez Ferron, à Massueville. Enfin le 26, au lieu et à l'heure indiqués, l'avis du conseil de famille était pris devant lui à la requête de Mme. Bonin, déclarant qu'elle jouissait de toutes ses facultés mentales et qu'elle était capable de reçevoir sa rente annuelle de $207.50 et d'administrer ses affaires. Ferron a pris part à cette délibération, mais non Laramée qui est sorti de l'assemblée en disant qu'il reviendrait avec son aviseur légal; mais on n'a pas attendu son retour et alors Laramée s'est pourvu par appel devant la cour à Sorel. Le 15 juin, 1905, après un nouvel interrogatoire de Mme. Bonin et un nouvel avis du conseil de famille, l'honorable juge Charbonneau rendit un jugement nommant un conseil judiciaire à Mme. Bonin pour les raisons suivantes:

Attendu que la majorité du conseil est d'opinion que la dite Aurélie Quintin dit Dubois soit pourvue d'un conseil judiciaire;

Qu'il appert aussi par la preuve que la dite Aurélie Quintin dit Dubois n'est pas capable de gérer et administrer ses affaires seule et sans aide.

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Laramée a pris part à cette délibération, étant d'avis qu'un conseil judiciaire était indispensable. Il ne s'inquiéta guère de la possibilité d'un deuxième testament, parce qu'il considérait sa pauvre tante comme étant absolument démente. Mais il comptait sans Mtre. Larivière.

Pendant que toutes ces procédures se développaient devant le notaire Larivière et devant la cour à Sorel, Mme. Bonin habitait définitivement le domicile des Ferron où elle était gardé à vue et où le docteur Gagné, le ou vers le 6 juin 1905, quoique envoyé exprès par le juge pour faire l'examen de madame Bonin sur son état mental, fut obligé de revenir sans la voir. Ferron remarqua qu'il ne voulait rien faire sans consulter le notaire Larivière qu'il envoya chercher et qui arriva "et encore," ajoute le docteur dans son témoignage, "on m'a refusé de me la laisser voir. On m'a dit qu'il y en avait assez qui l'avait vue." En sus les Ferron et leur notaire lui adressèrent des injures. Dans son jugement qui est conçu dans des termes généraux, contrairement à l'article 541 du code de procédure, le savant juge ne fait aucune allusion à cet incident qui, suivant moi, peint la situation. Inutile d'ajouter que Laramée qui a tenté de voir sa tante vers la même époque, n'a pas eu plus de succès.

Enfin le temps presse; il faut arriver au dénouement. Le notaire Larivière se prépare à mettre à exécution l'avis qu'il a donné à Ferron; celui de faire un deuxième testament. Le juge-en-chef Taschereau est d'avis que "c'est la testatrice elle-même qui envoie quérir le notaire Larivière." Le notaire dit cependant:

> Mme. Bonin m'a fait demander par l'intermédiaire de M. Ferron d'aller chez lui disant que Mme. Bonin voulait faire son testament. Je me suis rendu.

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A l'entendre, on dirait que c'est la première fois qu'il en est question et cependant depuis plusieurs mois lui et Ferron ne cessaient de faire pas et démarches pour arriver à ce résultat. Larivière raconte qu'il s'est rendu chez Ferron où il a reçu les instructions de Mme. Bonin en présence seulement de Ferron et de sa femme. Les Ferron, dit-il, n'ont pas donné les termes du testament, mais "des explications." Le conseil judiciaire n'a pas été invité à être présent. Larivière n'a pas reçu le testament ce jour-la, n'ayant pas de second notaire et ne voulant pas prendre des témoins sur les lieux dans la crainte d'ébruiter le testament. Il dit à Ferron qu'il fera venir le notaire Rivet d'Yamaska, situé à quelques lieues, et de cette façon tout restera dans le plus profond secret. C'est en effet ce qui eut lieu quelques jours après, durant la veillée du 21 juin, Larivière et Rivet reçoivent le testament de Mme. Bonin, Ferron et sa femme étant présents. Les notaires testifient qu'elle savait ce qu'elle faisait; quant à Ferron il est impossible de savoir ce qu'il en pensait, car il n'a pas offert son témoignage. L'exécution du testament prit peu de temps; il était court; tout était donné à la femme de Ferron. Personne ne sut rien de ce qui s'était passé jusqu' après le décès de la testatrice qui eut lieu le 15 mai 1906. Cependant, en juillet, 1905, le notaire Larivière, Ferron et le conseil judiciaire Lemieux vont demander certains effets chez Laramée. Ce dernier refusa invoquant le premier testament. Là-dessus, Larivière lui dit: "Monsieur Laramée, tout est à vous par ce testament, si c'est le dernier." Il ne lui a jamais dit qu'elle venait de faire un deuxième testament; son serment d'office s'y opposait, dit-il. Cependant il avait admis les Ferron à son exécution.

Il me semble que tous ces faits démontrent non-seulement que ce sont les manœuvres de Ferron qui ont amené l'exécution du deuxième testament à son avantage, mais établissent de fortes présomptions de captation et suggestion ou influence indue, pratiquées en fraude des droits des Laramée, présomptions que Ferron devait repousser par une preuve complète. C'est ce qu'il n'a pas fait; c'est même le contraire qui apparaît.

La cour supérieure, Charbonneau J. et la cour d'appel, Blanchet et Lavergne JJ., différants, ont maintenu le dernier testament, alléguant que les Laramée n'avaient pas prouvé leurs avancés. Mais dans les circonstances sur qui retombait la tâche de faire la preuve? Les appelants n'ont-ils pas assez prouvé pour la rejeter sur le bénéficiaire? Si nous appliquons les principes que nous avons définis dans la cause de *Mayrand* v. *Dussault*(1), il ne peut y avoir de doute selon moi que le dernier testament doit être rejeté, tant d'après le droit français que d'après le droit anglais. Nous retrouvons en effet dans la présente espèce tous les éléments de la suggestion ou de la captation posés par les auteurs, en particulier par Baudry-Lacantinerie, *Précis,* tome 2, no. 774; Laurent, vol. II., nos. 132, 134, 135; et Marcadé, tome 3, art. 901, page 407.

Qui a versé le poison de la haine dans le cœur de madame Bonin contre Laramée, ainsi qu'elle l'a manifesté dans sa réponse à l'interrogatoire citée plus haut? Peut-on raisonnablement supposer que ce soit autre que les Ferron? Même si le doute était permis à cet égard, Ferron a-t-il repoussé la présomption du

(1) 38 Can. S.C.R. 460.

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droit anglais que celui qui fait faire un testament en sa faveur au préjudice des héritiers légitimes, qu'ils le soient par la loi ou en vertu d'un testament, doit prouver hors de tout doute que le testament a été fait par une personne capable de tester, librement et même honnêtement? Nous avons déclaré dans la cause de *Mayrand* v. *Dussault*(1), que cette règle devait être suivie ici comme faisant essentiellement partie de la liberté de tester qui nous vient du droit anglais; et je dois ajouter que le Conseil Privé a refusé de reviser notre décision. Je conclus en citant l'autorité du "House of Lords" dans *Fulton* v. *Andrew*(2), comme étant la plus haute autorité sur la matière. Lord Hatherley disait:

> There is one rule which has always been laid down by the courts having to deal with wills and that is that a person who is instrumental in the framing of a will and who obtains a bounty by that will is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory and capable of comprehending it. But there is a further onus upon those who take their own benefit after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction.

Pour ces raisons, j'accorderais l'appel, maintiendrais la contestation des appelants, rejeterais la requête de l'intimé pour reprise d'instance et déclarerais le dernier testament nul et de nul effet, avec dépens devant toutes les cours.

DAVIES J.—In the case of *Renaud* v. *Lamothe*(3) this court decided that, in the Province of Quebec, the English law governs the subject of testamentary dispositions.

(1) 38 Can. S.C.R. 460. (2) L.R. 7 H.L. 448.
(3) 32 Can. S.C.R. 357.

Under that law it has been determined by the Court of Appeal in England, in *Tyrrell* v. *Painton et al.*(1), and it is now accepted as the true rule to be deduced from *Barry* v. *Butlin*(2); *Fulton* v. *Andrew* (3); and *Brown* v. *Fisher*(4);

that, whenever a will is prepared and executed under circumstances which raise the suspicion of the court, it ought not to be pronounced for unless the party propounding it produces evidence which removes such suspicion and satisfies the court that the testator knew and approved of the contents of the instrument.

In the present case two wills had been executed, the first one under circumstances which admitted of no suspicion attaching to it, and the last one, which was attacked on the grounds that it was made and executed

when the testator was not in possession of her mental faculties, but was inspired by suggestion and undue influence of the respondent and his wife.

At the argument before us, without expressly abandoning the contention of undue influence, counsel for the appellant relied chiefly upon the ground that the testator was not of sound mind when she executed the will.

At the close of the argument I entertained some doubt upon the question. Since then I have carefully considered the respective contentions in the light of the conflicting evidence, expert and otherwise, and the several judgments of the courts below, and, while my doubts have not been entirely removed, I have not been able to reach such a clear conclusion that the judgment of the majority of the Court of King's Bench is wrong as would warrant me in reversing that judgment.

(1) [1894] P. 151.
(2) 2 Moo. P.C. 480.
(3) L.R. 7 H.L. 448.
(4) 63 L.T. 465.

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The fact that neither the respondent nor his wife were called to give evidence was calculated to intensify suspicion. They were the parties in whose favour the will was made, who were seeking to maintain it, and with whom the testatrix resided for some months before her death and at the time the will was made.

They were both present in the house at the time of its execution, and Mrs. Ferron was, as I gather from the evidence, in the room when the testatrix gave her instructions to the notary for the will and when she afterwards executed the will. Mr. Casgrain, I think, very properly, under the circumstances, accepted the onus of supporting this will, and the sole question is: Has he discharged that onus?

Both courts below, the trial judge and the Court of Appeal, found that he had, and, while the fact of the evidence of Ferron and his wife having been withheld had added to the doubts which the circumstances of the case created, it has not carried me any further and to doubt merely, in such a case as this, is to confirm. The experts called with respect to the soundness of mind of the testatrix differed in their opinions.

I attach great importance to the evidence of the two notaries, one of whom took the instructions and prepared the will, and the other of whom accompanied him when it was executed. Both these notaries knew of the previous interdiction by the court of the testatrix for insanity. They also knew of her subsequent release from that interdiction, but accompanied with the appointment of a judicial adviser, and of a host of other circumstances calling for special precautions on their part, alike as to her capacity to make a will and as to her knowledge and approval of its contents.

The notary who drew the will swears that he pre-

pared a will upon notes taken at the dictation of the testatrix, that he re-drafted and re-arranged these notes at his home, and that three days afterwards he returned to the testatrix, accompanied by the notary Rivet, and that she then repeated, without suggestion or aid, what she had told him in regard to her last wishes; that the will was then read to her and that she approved of it is as being what she wished and what she had dictated, and they both state that they were fully alive to the necessity, under the peculiar facts, of taking every precaution so as to satisfy themselves with regard to her mental condition and her wishes with respect to the disposition of her property.

The learned judge who heard the case and knew all the parties and their circumstances and relations to each other and to the testatrix, and who was the judge who had removed the interdiction, found for the will, accepting the testimony of these notaries and the other witnesses who testified to the testatrix's sanity. A majority of the Court of King's Bench confirmed that judgment and, notwithstanding the many suspicious circumstances which surround the case, I am unable to reach such a clear conviction of the error of these judgments as would justify me in reversing them.

IDINGTON J.—I think this appeal should be dismissed with costs. A careful perusal of the evidence leads me to infer that the only impairment of the mind of the testatrix was the result of a paralytic stroke that rendered her incapable for a time of making a will; that she thereafter grew better and so continued to improve until she became and was at the time of making the will in question possessed of the necessary testamentary capacity therefor.

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As much stress was laid by appellant's counsel on the evidence of want of capacity displayed in answer to the interrogatories she had to answer on three different occasions I have paid particular regard to these answers.

The answers on the second occasion evince such a marked improvement over those given on the first occasion as to convince me she was, perhaps slowly, yet steadily, recovering her health and with her physical health her normal soundness of mind.

On the third occasion there appear some lapses of memory and one or two of confusion, but the ordeal she was going through, which she quite well understood was to test the soundness of her mind, was quite enough, I think, to unnerve her at times. She had also on this occasion to undergo an examination of over an hour and, making due allowance for that and its incident fatigue as compared with the previous occasions, I think my theory of her continued improvement is correct notwithstanding the mistakes I have referred to.

Certainly the simple will she had decided to make was quite within the mental grasp she seems to have reached.

She certainly had conceived against appellant some sort of repugnance. For that I think she left his house, and notwithstanding the cloud then hanging over her mind seems to have had intelligence enough to find her way to the place one would under such circumstances expect her to go to if her mind was clear but her body weak.

I infer from what occurred that she desired when she reached there to be taken to the respondent's place and he was sent for and she was taken there accordingly.

I fail to see how whilst she lived with the appellant her mind could have been so poisoned by the respondent as to create this aversion for the appellant and especially during that period of her illness when her memory was weak and unlikely to retain impressions from remarks on casual visits there by the respondent or his wife even if we assume such without evidence.

Whatever happened she clearly had received under such circumstances an abiding impression that shewed itself during her later interrogations.

If proof of anything it clearly is that she had mental capacity far beyond what some would have us believe.

It seems to me this clearly is not, whatever it may be, a case of senile dementia.

Then we have two professional gentlemen who give evidence as to the making of the will and unless we discard what they say as utterly unworthy of belief without any proper reasons for doing so I do not see how we can, especially in light of what had gone before, say that deceased was so deprived of mind, memory and understanding that she could not make a will.

They did not make it quite clear that she was, when giving instructions, taken aside beyond the hearing of the respondent and his wife.

That certainly would have been a proper course and I should have felt much more confidence in what was done if some such course had been pursued and the reasons asked of her, for her preferring one of two parties who appeared to have been equally probable subjects of her bounty.

However, I cannot lay down as a rule of law that such a course is absolutely necessary even where the

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man drawing the will has been procured to do so by the beneficiary.

I think in the absence of reasons to suppose these professional men were dishonest that the case is removed from any such difficulties as appeared for consideration in the cases of *Barry* v. *Butlin*(1), and *Fulton* v. *Andrews*(2), and such like cases.

The merely sending for or bringing some one to draw up a will is not alone enough to destroy a bequest to him or her who does so.

Each such case must be determined by its own surrounding circumstances when we are asked to attach weight to the mere fact of sending for, or engaging or even selecting, the notary to perform such a service.

The only thing that has troubled me in the case since giving it all the reading of evidence and consideration thereof I possibly can, is that the condition of mind deceased then had, though of testamentary capacity, was what might be easily imposed upon.

I see no evidence, however, on which I can rest any presumption in law or find as facts from which I can infer captation, suggestion, undue influence or any other form of fraudulent practice such as imputed to the respondent.

The learned trial judge saw the witnesses and had a better opportunity in many ways of forming a correct judgment than any one else, and he is satisfied and also the majority of the court of appeal, and it seems to me great weight must in such a case be attached to these circumstances.

The case of *Mayrand* v. *Dussault*(3), relied upon, had in it facts in abundance which we have not here

(1) 2 Moo. P.C. 480. (2) L.R. 7 H.L. 448.
(3) 38 Can. S.C.R. 460.

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of a nature to entitle us to draw the inferences that were drawn.

We must be careful not to substitute suspicion for proof. We must not by an extensive doing so render it impossible for old people to make wills of their little worldly goods. The eye may grow dim, the ear may lose its acute sense, and even the tongue may falter at names and objects it attempts to describe, yet the testamentary capacity be ample.

To deprive lightly the aged thus afflicted of the right to make a will would often be to rob them of their last protection against cruelty or wrong on the part of those surrounding them and of their only means of attracting towards them such help, comforts and tenderness as old age needs.

It seems to me pertinent to speak thus for this very case, I rather think, furnishes an illustration of what people have to suffer at the hands of those that have not been as kindly treated as they had a right to expect.

MACLENNAN J. (dissenting).—I agree with the opinion stated by my brother Girouard.

DUFF J. concurred in the dismissal of the appeal for the reasons stated in the opinion of Davies J.

Appeal dismissed with costs.

Solicitors for the appellants: *Ethier & Lefebvre.*

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

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*Feb. 16.
*March 29.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF PETERBOROUGH WEST.

JAMES ROBERT STRATTON (RESPONDENT) ..... } APPELLANT;

AND

JOHN HAMPDEN BURNHAM (PETITIONER) ..... } RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE BRITTON.

Controverted election—Service of petition—Extension of time—Substitutional service—R.S.C. [1906] *c. 7, ss.* 17 *and* 18.

The provision in sec. 18, sub-sec. 2 of the Controverted Elections Act (R.S.C. [1906] ch. 7), for substitutional service of an election petition where the respondent cannot be served personally is not exclusive and an order for such service on the ground that prompt personal service could not be effected as in the case of a writ in civil matters may be made under sec. 17.

The time for service may be extended, under the provisions of sec. 18, after the period limited by that section has expired. *Gilbert* v. *The King* (38 Can. S.C.R. 207) followed.

APPEAL from the judgment of Mr. Justice Britton dismissing a preliminary objection to the election petition.

A petition against the return of the appellant Stratton as a member of the House of Commons was filed on Nov. 21st, 1908. Sections 17 and 18 of the "Controverted Elections Act" provide for service as follows:

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

17. An election petition under this Act, and notice of the date of the presentation thereof, and a copy of the deposit receipt shall be served as nearly as possible in the manner in which a writ of summons is served in civil matters, or in such other manner as is prescribed. R.S., c. 9, s. 11.

18. Notice of the presentation of a petition under this Act, and of the security, accompanied with a copy of the petition, shall, within ten days after the day on which the petition has been presented, or within the prescribed time, or within such longer time as the court, under special circumstances of difficulty in effecting service, allows, be served on the respondent or respondents at some place within Canada.

2. If service cannot be effected on the respondent or respondents personally within the time granted by the court, then service upon such other person, or in such manner, as the court on the application of the petitioner directs, shall be deemed good and sufficient service upon the respondent or respondents. 54-55 V., c. 20, s. 8.

The time for service expired on December 1st and on the following day an application was made to Mr. Justice Britton for an order for substitutional service based on the following affidavit made by the petitioner's solicitor the heading and jurat being omitted.

"I, William Henry Moore, of the City of Peterborough in the County of Peterborough, solicitor, make oath and say:

"1. I am the solicitor for the above named complainant, and on his behalf I caused the petition herein to be presented to this honourable court by my Toronto agents in this matter, namely, Messrs. DuVernet, Raymond, Jones, Ross and Ardagh, solicitors, on the twenty-first day of November last.

"2. After filing the said petition my said agents sent it to me to be served on the respondent, whose domicile and chief place of business is at Peterborough aforesaid.

"3. The same was received by me on the twenty-fifth day of November, 1908. I made inquiry for said respondent, but could not find him at Peterborough, and was informed he would be in Toronto the next day at

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his office, whereupon I returned the said petition to my said agents to be served. They returned it to me on the twenty-sixth of November last stating that he was not in Toronto.

"4. On receipt of said petition on the morning of the twenty-seventh of November last I handed it into the sheriff's office here with instructions to proceed without delay to serve the said petition on the said James Robert Stratton.

"5. The said petition was this day returned to me by Mr. Frederick J. A. Hall, Deputy Sheriff of the said County of Peterborough, with the statement that he had made every effort to serve the said James Robert Stratton, but had failed to do so."

His Lordship granted the order in the following terms the formal parts again being omitted.

"Upon the application of the complainant upon reading the affidavits of Frederick J. A. Hall and W. H. Moore filed and the exhibits therein referred to and upon hearing what was alleged by counsel for the complainant:

"1. It is ordered that the time for service of the petition herein be and the same is hereby extended till the twelfth day of December, 1908.

"2. It further ordered that a copy of the petition and of notice of the date of presentation thereof and a copy of the deposit receipt and of the appointment of the petitioner's solicitor may be served upon the respondent by delivering such copies to Roland Glover or such other clerk as may be in charge of the respondent's office at Peterborough.

"3. And it is further ordered that the costs of this order be costs in the matter of the said petition."

The petition was served on said Roland Glover on December 3rd.

A number of preliminary objections were filed and served, but when they came up for hearing all were abandoned except one, namely, that the petition had not been properly served the order of Mr. Justice Britton being null and void, having been made on insufficient material and after the time for service had expired. The objection was dismissed and the appellant then took an appeal to the Supreme Court.

THE CHIEF JUSTICE.—The rule as to the service of an election petition is laid down in section 17 of the "Controverted Elections Act," which provides that the petition, notice of presentation, and copy of deposit receipt are to be served as nearly as possible in the manner in which a writ of summons is served in civil matters, or in the alternative in such other manner as is prescribed by the Act, which must be interpreted to mean by the Act or by the rules of court made under the Act. Section 18 fixes a delay of 10 days after the day on which the petition has been presented for service of notice of the presentation of the petition and provides that this delay of ten days may be extended if, in effecting service, special circumstances of difficulty have arisen; this section also provides for substitutional service if it is found impossible to serve the respondent personally within the time granted by the court. Section 85 of the Act gives to the judges of the court authority to make rules and orders for the effective execution of the Act and the regulation of the practice and procedure with respect to election petitions.

It has been impossible for me to ascertain what were the rules in force in Ontario when the petition

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was served, but it was not contended by counsel on the argument that any rule existed affecting the questions in dispute in the appeal.

I construe these sections to provide that service may be made in either one of three ways:

1° In the manner in which a writ of summons is served in civil matters in the provinces. (Sec. 17.)

2° In such manner as the court directs on the application of the petitioner in the special circumstances mentioned in section 18.

3° In such manner as may be provided for by the rules of Court. (Sec. 18.)

In Ontario the service of a writ of summons in civil matters is provided for by consolidated rule 146, which is:

> Where service is required the writ may be served in any county or district in Ontario and the service thereof shall be personal; but if it appears to the court or a judge on affidavit that the plaintiff is unable to effect prompt personal service, the court or judge may order substituted or other service by advertisement or otherwise.

It is not doubted that the *service* made in conformity with the order of the 2nd December, 1908, would be valid if this were a civil case, and that order is in my opinion as effective made as it was within the extended period as if made before the expiration of the 10 days allowed for service, if the judge had jurisdiction to grant the extension after the 10 days within which the service should be made had expired, of which I have no doubt. *Gilbert* v. *The King*(1) and cases there cited. We have no power or right to ignore the provisions expressly made relating to the manner of service by the 17th section of the Act and should not put a construction on the 18th section which would involve such a result. The sections pro-

(1) 38 Can. S.C.R. 207.

vide alternative modes of service, one in conformity with the service of writs of summons in the province and the other the personal and substitutional service expressly prescribed in the 18th section. But the latter method of service is not exclusive and I hold that if the service was made in the manner prescribed by the rule applicable in civil matters it is a good service. The judge who gave the order explains the facts in this way:

> The application was made *ex parte*. If for want of proper information as to the facts, the petitioner has obtained an improper order, it was at his own risk. *It did appear to me, on affidavit, that the petitioner was unable to effect prompt personal service of the petition and notices, and so in the exercise of my discretion I made the order.*
>
> The respondent being a business man of large interests, in different parts of Canada, the service upon his clerk, Roland Glover, or upon the clerk in charge of the respondent's office at Peterborough, should be as good as personal service, and therefore should be deemed personal service.
>
> Assuming that at the time I had jurisdiction to make any order allowing further time, I do not think the order bad by reason of its directing substitutional service as well, in one order. Rule 146 in my opinion applies and the petitioner had, up to that time, been unable to effect "prompt personal service."

I am of opinion that the order made by Mr. Justice Britton under these circumstances not having been set aside under the practice of the Ontario court as made improvidently or without sufficient material, stands as a good order and that the service under it was a legal one without the letter and spirit of the Act and gave the court jurisdiction over the respondent.

GIROUARD, DAVIES and DUFF JJ. concurred in dismissing the appeal with costs for the reasons given by the Chief Justice.

IDINGTON J.—If we read sections 17 and 18 of the "Controverted Elections Act" as absolutely meaning

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that there must be three stages taken in reaching substitutional service of an election petition then this appeal ought to be allowed, but not otherwise.

The three stages I refer to are first an attempt to serve personally within ten days as the Act requires, when read in light of the local practice as to service of writ of summons; secondly, an order either within or beyond that term directing an extension of time for service, which must, if the order do no more than extend the time, be personal service; and thirdly, an order for substitutional service if attempts to make personal service have after due effort failed.

I conceive there may be cases in which these several steps and that order of events might properly be exacted, but I do not think it is imperative. Many cases quite likely to arise would render such a performance slightly ridiculous.

Take the case of a member elect living abroad beyond the possiblity of being reached within the statutory limit of time for service or any reasonable extension of it, by order of court or judge, why should the second step have to be taken when doing so would be an absurdity?

I think effect can be fully given to every word of these sections (and such ought to be the endeavour in construing anything) by limiting the use of the power to extend for personal service to the cases where the "special circumstances of difficulty in effecting service" are of such a character as to justify an application for the extension and not to extend its application to the cases where the granting of the order would be farcical.

Both sections 17 and 18 substantially as at present have always existed in the Act and with transposi-

tions and slight changes have throughout been supposed to be operative each covering its own appropriate ground.

I think also both sub-sections of section 18 must be read together just as if one whole. The section stood as a whole for many years undivided into sub-sections as it now stands since the revision of 1906. I do not suppose it was intended by this severance to change its meaning yet at first blush it reads since as apparently of a different meaning. In the other way of reading literally the requirement in sub-section 2 without relation to what has gone before of "personally within *the time granted by the Court*" the second sub-section would be reduced to an absurdity for the second extension of time to provide for substitutional service would be a "time granted by the court."

I do not pretend the case is free from difficulties. I am somewhat shaken in the opinion I arrived at in former cases and now express on seeing the opinion I find of the late Chief Justice Armour and the late Mr. Justice Street in the *Haldimand Case*(1), at p. 484 *et seq.*, before the Act was amended, but in the main as it now is.

This opinion comes from authority I regard so highly I would have followed, in the absence of conflicting decisions here, if the decision of that case had turned upon it.

The opinion is at best, however, mere *obiter dicta,* though framed by as careful a man as I ever knew and adopted by another.

Taking the other view I have indicated as to the meaning of the sections the extension for mere per-

(1) 1 Ont. Elec. Cas. 480.

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Idington J.

sonal service was unnecessary before permitting substitutional service.

When I arrive at that conclusion, and hold as I do for the reasons Mr. Justice Britton has assigned in that regard that he had power to make the order after the expiration of the ten days permitted for personal service, all the rest seems to me mere matter of discretion which should not be interfered with.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Watson, Smoke & Smith.*
Solicitor for the respondent: *William H. Moore.*

THE HULL ELECTRIC COMPANY (DEFENDANTS) ..... APPELLANTS; 1909

*Feb. 16.
*March 29.

AND

PIERRE CLEMENT (PLAINTIFF) ..... RESPONDENT.

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

Appeal—Jurisdiction—Court of Review—Reduction of damages—Confirmation of Superior Court judgment—R.S.C. [1906] *c.* 139, *s.* 40.

There can be no appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench, appeal side, quashing an appeal from the Superior Court, sitting in review, for want of jurisdiction. *City of Ste. Cunégonde* v. *Gougeon* (25 Can. S.C.R. 78) followed, Idington J. dissenting.

In an action for damages where the plaintiff obtains a verdict at the trial and the Court of Review reduces the amount awarded thereon the judgment of the Superior Court is confirmed and, therefore, no appeal lies to the Court of King's Bench, but there might be an appeal from the judgment of the Court of Review to the Supreme Court of Canada. *Simpson* v. *Palliser* (29 Can. S.C.R. 6) distinguished. Idington J. dissenting.

MOTION to approve security for costs and to affirm the jurisdiction of the Supreme Court of Canada to entertain an appeal from the judgment of the Court of King's Bench, appeal side, quashing an appeal from the judgment of the Superior Court, sitting in review, at Montreal, which had varied the judgment of the Superior Court, District of Ottawa, by reducing the amount of damages assessed in favour of the plaintiff.

The action was for damages for personal injuries and, in the Superior Court, the plaintiff's action was

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maintained with costs, the damages being assessed at $6,000. The defendants appealed to the Superior Court, sitting in review, at Montreal, and by the judgment of that court, the judgment of the court of first instance was varied by the reduction of the damages to the sum of $3,500. The defendants then sought a further appeal to the Court of King's Bench, where, on motion on behalf of the plaintiff, the appeal was quashed, as incompetent, on the ground that the judgment of the Court of Review was, in effect, a confirmation of the judgment of the Superior Court on the inscription for review by the defendants and that, under articles 43 of the Code of Civil Procedure, there could be no further appeal by the party so inscribing in review.

The application was first made before the Registrar, in Chambers, and was, by him, referred for decision by the court.

Aylen K.C. for the motion.

E. B. Devlin K.C. contra.

THE CHIEF JUSTICE.—This is an appeal from a decision of the Court of King's Bench for the Province of Quebec quashing, for want of jurisdiction, an appeal by the Hull Electric Co. from a judgment of the Superior Court, sitting in review.

The plaintiff (respondent) recovered judgment against the defendants (appellants) in the Superior Court for the sum of $6,000 and from this judgment the appellants inscribed in review and that court reduced the condemnation to the sum of $3,500.

The defendants then appealed to the Court of

King's Bench and, there, the appeal was dismissed, on the ground that the judgment of the Court of Review from which the appeal was taken was merely a confirmation of the judgment of the Superior Court (article 43 C.P.Q.). It was held that, in so far as it condemned the appellant to pay the amount of the judgment of the Superior Court, to the extent of $3,500, the judgment of that court was not, in that respect, revised or reformed, but confirmed in review; and that part of the judgment of the Superior Court so confirmed could not be modified in appeal. In this conclusion I agree.

The object of the article (43) is to limit appeals, and if the appellants are allowed to go from the Court of Review to the Court of King's Bench and from that court come here merely to get relief from the judgment of the Superior Court, then there would be three appeals from the judgment of the latter court, which is the very thing the statute was intended to prevent. The appellants should have come to this court from the Court of Review direct.

We were referred to the case of *Simpson* v. *Pallisser* (1), where the damages of the plaintiff had been increased on appeal to the Court of Review and, upon that ground, it was held here that an appeal lay to the Court of King's Bench, and not here. It will be seen that *Simpson* v. *Pallisser* (1) is not an authority on the point raised here. In that case the amount of the condemnation was increased in review; the judgment of the Superior Court was, therefore, not confirmed, and the party prejudiced by that increase was entitled to appeal to the Court of Appeal. Here, as I have said,

(1) 29 Can. S.C.R. 6.

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The Chief Justice.

the appeal is taken from a judgment which does not revise or reform, but confirms *pro tanto* the judgment of the Superior Court. This judgment is in accordance with the settled jurisprudence of Quebec since *Beauchêne* v. *Labaie*(1), where it was held that there is no appeal from the Court of Review when the party appellant complains of a judgment in review which confirms in part the judgment appealed from, and by his appeal seeks to obtain redress against that part of the judgment of the Superior Court which is confirmed in review. The article of the Code of Procedure (43), formerly 1115 C.P.C., is not new. It was first enacted in 1867 and amended in 1874 by 37 Vict. ch. 6, sec. 1, and re-enacted in 1888 (R.S.Q. art. 6005), in 1891, by 54 Vict. ch. 48, par. 2, and, finally, in 1897, when the present code was promulgated. I would not disturb the construction put upon this article by the Court of King's Bench and never departed from since 1876. *Fraser* v. *Brunette*(2), is not an exception to the general rule. That case is reported also in 19 Revue Légale, at page 305, but in both places imperfectly. In *Fraser* v. *Brunette*(2) the plaintiff had obtained from the defendant a right of preemption with respect to two lots of land which in violation of this agreement the defendant afterwards disposed of; hence an action in which the plaintiff asked by his conclusions: 1st. that the defendant be condemned to give him a title to the lots in question within a fixed delay; 2ndly. by subsidiary conclusion that in default of a title the judgment of the court do avail to him as such. During the course of the proceedings the plaintiff amended his claim alleging that he had suffered damages as a result of the sale made

(1) 10 R.L. 115.

(2) M.L.R. 3 Q.B. 310.

by defendants to the extent of $1,000, and that instead of being condemned to give him a deed to the property he prayed that the defendant be condemned to pay as damages, $1,000. The Superior Court, overlooking the amended pleadings, condemned the defendants to pass a title in accordance with the conclusions of the action as originally drafted, and in default that the judgment be equivalent to a title. The defendants thereupon appealed to the Court of Review where the original judgment was confirmed as to the right of pre-emption, but reformed by condemning the defendant to pay $1,000 as liquidated damages instead of returning the property. Hence the appeal to the Queen's Bench where the appeal was heard on the ground that the judgment was reformed by substituting a condemnation to pay $1,000 for a condemnation to return the property. This is not in principle a departure from *Beauchêne* v. *Labaie*(1). In *Fraser* v. *Brunette*(2), the part of the judgment in review complained of completely reversed the judgment of the Superior Court.

I would follow *City of Ste. Cunégonde* v. *Gougeon et al.*(3), where it was held that the Court of Queen's Bench having properly declined to exercise jurisdiction, no appeal lies to this court.

Application refused with costs.

GIROUARD J. agreed with the Chief Justice.

DAVIES J.—The right to appeal to this court from the judgment of the Court of King's Bench of Quebec quashing, for want of jurisdiction, an appeal by the Hull Electric Co. from the judgment of the Superior

(1) 10 R.L. 115. (2) 3 M.L.R. K.B. 310.
(3) 25 Can. S.C.R. 78.

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Court, sitting in review, depends upon the construction to be put upon sub-section 4 of article 43 of the Code of Civil Procedure of Quebec.

The simple question is whether or not a judgment of the Court of Review reducing the damages awarded by the Superior Court from $6,000 to $3,500 can be held to be a confirmation of that judgment within the meaning of the above article of the Code of Procedure.

The question is largely one of procedure, and, as it appears to be the settled jurisprudence of Quebec, since *Beauchêne* v. *Labaie*(1), that a judgment reducing the damages only is a confirmation *pro tanto* of the judgment of the court of first instance, and so within the article referred to, I will not dissent from the judgment proposed refusing the right to appeal.

Had the question come before us untrammelled by decisions which, in questions of procedure, it is not the practice of this court to interfere with, I should have been prepared to allow the appeal on the ground that the reduction of the damages was not a confirmation of the judgment of the court of first instance within the meaning of the article of the Code of Procedure.

IDINGTON J. (dissenting).—I think the case of *Simpson* v. *Palliser*(2) ought to govern this application.

It is though, on the facts, the converse of this case, in principle identical. It simply was a case of increasing whereas the case at bar is a case of reducing the amount of the judgment.

This court held, contrary in principle to what the

(1) 10 R.L. 115.

(2) 29 Can. S.C.R. 6.

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Idington J.

Court of Queen's Bench had previously held in *Beauchêne* v. *Labaie*(1), such a thing was not a confirmation, and, hence, an appeal would lie to the Court of King's Bench. That court has, in the case at bar, notwithstanding the holding of this court, refused to exercise its jurisdiction.

I am unable to understand how increasing, for and in respect of the same cause of action, the amount of damages, instead of merely diminishing them, can be more of a confirmation of the judgment in the one case than in the other.

The case of *The City of Ste. Cunégonde* v. *Gougeon* (2) does not touch the point. In that, the question raised was whether or not there could be an appeal to the Court of Queen's Bench and this court held there could not and, there being, therefore, no possible appeal from the court of final resort in the province, no appeal could lie here.

The Chief Justice, in disposing of that case, makes clear that it formed one of the numerous class of cases where no appeal is allowed by the provincial legislation to the final court of resort in the province and no legislation existed to permit an appeal here from a lower court, as to a limited extent is permitted in some Quebec cases, there could, therefore, be no appeal either here or to the Court of Queen's Bench.

Besides the former case is the last authority of this court on the subject.

In the recent case of *The C. Beck Manufacturing Co.* v. *Valin*(3), at page 528, I had occasion to fully consider the right of appeal when it turns on the

(1) 10 R.L. 115. (2) 25 Can. S.C.R. 78.

(3) 40 Can. S.C.R. 523.

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question of a court having erroneously either asserted or refused to exercise its jurisdiction.

I concluded then and hold now that an appeal in such case is an appropriate remedy where the case is otherwise within any of the classes (and having the necessary pre-requisites) for which an appeal is provided.

The application should, I think, be granted.

DUFF J. agreed with the Chief Justice.

Motion refused with costs.

Solicitors for the appellants: *Aylen & Duclos.*

Solicitors for the respondent: *Brooke, Chauvin & Devlin.*

THE MONTREAL STREET RAILWAY COMPANY (DEFENDANTS) .. } APPELLANTS;

AND

THE CITY OF MONTREAL (PLAINTIFF) ..... } RESPONDENT.

1909

*Feb. 16.
*March 29.

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

Collection of municipal taxes—Action in Recorder's Court—Montreal city charter, 62 V. c. 58 (Que.)—Appeal—Jurisdiction—Judgment by Court of Review—Special tribunal—Court of last resort—Supreme Court Act, R.S. [1906] *c. 139, s. 41.*

Under the provisions of the Montreal City Charter, 62 Vict. ch. 58, sec. 484 (Que.), an action was brought by the city, in the Recorder's Court, to recover taxes on an assessment of the company's property in the city. Judgment was recovered for $39,691.80, and an appeal to the Superior Court, sitting in review, under the provisions of the Quebec statute, 57 Vict. ch. 49, as amended by 2 Edw. VII. ch. 42, was dismissed. On an application by the company to affirm the jurisdiction of the Supreme Court of Canada to hear an appeal from the judgment of the Court of Review,

Held, that the Superior Court, when exercising its special appellate jurisdiction in reviewing this case, was not a court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes within the meaning of section 41 of "The Supreme Court Act," R.S. [1906] ch. 139, and, consequently, there could be no jurisdiction to entertain the appeal.

MOTION to affirm the jurisdiction of the Supreme Court of Canada to entertain an appeal from the judgment of the Superior Court, sitting in review, at Mont-

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

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real, affirming a judgment of the Recorder's Court for the City of Montreal, by which the defendants were condemned to pay to the city the sum of $39,691.80, for taxes due on their property assessed within the City of Montreal.

The action was instituted in the Recorder's Court for the recovery of taxes claimed by the city. That court has jurisdiction in such cases by virtue of section 484 of the Charter of the City of Montreal, 62 Vict. ch. 58, which provides in part as follows: "The Recorder's Court has the jurisdiction of a recorder and shall hear and try summarily, 1. Any action brought in virtue of any by-law or resolution of the council for the recovery of any sum of money due to the city for any assessment," etc.

An appeal lies from the judgment of the Recorder's Court to the Superior Court, sitting in review, under 57 Vict. ch. 49, as amended by 2 Edw. VII. ch. 42, which provides in part as follows: "In all cases or proceedings when the amount in dispute relates to one or more municipal or school taxes or assessments or fines or penalties imposed by any municipal by-law, exceeding in all the sum of five hundred dollars, there shall be an appeal from the final decision of any recorder or Recorder's Court to the Superior Court, sitting in review."

The charter also, by sections 383 and 384, in part provides as follows:

"383. Any ratepayer having duly complained of any entry or omission in the said rolls, or either of them, who may think himself aggrieved by the decision of the assessors, may within eight days, appeal from said decision by petition to the Recorder's Court, which shall have jurisdiction in all such cases.

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"384. A final appeal shall lie from any decision rendered by the Recorder's Court in respect of any entry on the valuation and assessment roll or on the tax roll, to any one of the judges to the Superior Court * * * and such judgment shall be final."

In the Recorder's Court the city recovered judgment for $39,691.80, and the company appealed to the Superior Court, sitting in review, where the judgment of the Recorder's Court was affirmed. The company then sought to appeal to the Supreme Court of Canada under the provisions of section 41 of the "Supreme Court Act."

The application by the motion was made upon a reference to the court by the registrar in chambers.

Campbell K.C. appeared in support of the motion.

Atwater K.C. contra.

THE CHIEF JUSTICE.—This is an application to affirm the jurisdiction of this court, in these circumstances:—

The appellants were assessed in the years 1902-03, 1904-05 upon their property in the City of Montreal for the sum of $36,691.80, and, in 1906, an action was brought in the Recorder's Court to recover this amount and the company was condemned to pay. From this judgment an appeal was taken to the Superior Court, sitting in review, and the judgment of the Recorder's Court was confirmed. From that judgment the company wishes to appeal here, invoking section 41 of the "Supreme Court Act."

In my opinion that section has no application to the facts of this case. This action was brought in the

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Recorder's Court, which is not a superior court of original jurisdiction, but a municipal court, clothed by statute with special authority to hear cases for the recovery of any sum of money due to the city for any assessment. From the judgment of that court, in these special cases, the same statute gives an appeal to the Court of Review. It cannot be said that, when exercising this special appellate jurisdiction, the Court of Review is a court of last resort, created under provincial legislation to adjudicate concerning the assessment of property within the meaning of section 41. If the appeal was from a judgment of one of the judges of the Superior Court, to whom an appeal is given by article 384 of the Montreal City Charter from the decision of the Recorder's Court on a complaint against the decision of the assessor, under section 383 of the said charter, then section 41 of our Act might apply. It is to be observed that the Court of Review is not a court of final resort in the province.

There is no appeal from that court except in certain exceptional cases of which this is not one.

GIROUARD J. concurred in the judgment rejecting the motion with costs for the reasons given by the Chief Justice.

DAVIES J.—I concur in rejecting the motion to affirm our jurisdiction.

IDINGTON and DUFF JJ. also concurred in the rejection of the motion with costs for the reasons given by the Chief Justice.

Motion refused with costs.

THE WINNIPEG ELECTRIC RAILWAY COMPANY (DEFENDANTS) .. } APPELLANTS;

AND

BECKIE WALD (BY HER NEXT FRIEND MORRIS WALD) (PLAINTIFF) .... } RESPONDENT.

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*Feb. 17, 18.
*March 29.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

New trial—Misdirection—Questions for jury—Verdict on issues—Damages.

An order for a new trial should not be granted merely on account of error in the form of the questions submitted to the jury where no prejudice has been suffered in consequence of the manner in which the issues were presented by the charge of the judge at the trial and the jury has passed upon the questions of substance.

The judgment appealed from (18 Man. R. 134) was affirmed, the Chief Justice dissenting, and Davies J. *hesitante*, as to the quantum of the damages awarded.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) affirming the judgment entered upon the findings of the jury, by Perdue J., at the trial, in favour of the plaintiff, for $8,000 damages, with costs.

The circumstances of the case and the questions in issue on this appeal are stated in the judgments now reported.

Watson K.C. and *Laird* for the appellants.

Cohen for the respondent.

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

(1) 18 Man. R. 134.

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The Chief Justice.

THE CHIEF JUSTICE (dissenting).—I agree with Mr. Justice Duff that, in the circumstances of this case, the question as to whether a child of tender years can be held at law to be incapable of contributory negligence does not arise. The judge clearly put to the jury the question of plaintiff's contributory negligence and properly directed them as to that issue.

I am, however, of opinion that the damages are grossly excessive and on that ground I would grant a new trial.

I wish further to express my astonishment at the defence put forward by the company to the effect that they are not bound to equip their cars with such fenders and guards as are generally considered indispensable for the protection of human life. Jurors can scarcely be blamed if, in cases arising in communities where such defences are raised, they take an exaggerated view of the companies' liability when accidents occur.

GIROUARD J.—I think this appeal should be dismissed with costs for the reasons stated by Mr. Justice Duff.

DAVIES J.—I adopt the reasoning and conclusion of my brother Duff with respect to the findings of the jury on the two incompatible theories or contentions submitted to them on behalf of the respective parties, and also with respect to the alleged contributory negligence of the child. It was quite open to the jury on the evidence to have accepted the version of facts contended for by either party as the true one.

The evidence was very conflicting and was fairly submitted to them by the trial judge. They accepted

the plaintiffs' theory and contention as to the facts which caused the accident, and in so doing necessarily negatived those of the defendants. That being so, their findings of negligence with respect to the defective fender and want of care in the motorman in keeping a proper lookout cannot now be impeached.

I also agree that on such findings of the jury, which there was ample evidence to sustain, the defence of contributory negligence must fail and is in fact practically eliminated from the case.

It becomes unnecessaryto consider, under these circumstances, what is the law with respect to contributory negligence on the part of a child six years of age or whether the learned judge misdirected the jury on that point when he held it to be a question of law for him to decide, as I agree, under the findings of the jury and the evidence, the appellants could not have sustained any prejudice from the judge's ruling on the point.

I am by no means, however, satisfied on the question of the damages awarded by the jury. In my opinion, considering the age, position in life and prospects of the injured child, the damages were grossly excessive. As, however, the Court of Appeal did not think a new trial should be granted on this ground and a majority of this court concurs in the same opinion, I will not formally dissent.

IDINGTON J.—This action was brought by an infant to recover damages arising from her being, when aged five years and eleven months, knocked down and so far run over and dragged by the appellants' electric street car on the main street of Winnipeg, that I am not sur-

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prised at the amount of the verdict when founded on such negligence as shewn to have caused such results.

The case was tried before Mr. Justice Purdue with a jury, who found by their answers to his questions that this accident was caused by the negligence of the defendants, now appellants; that the negligence consisted in

> defective fender and negligence on the part of the company not having car wheels guarded and on the part of the motorman in not looking ahead and in not applying the brakes and in not using sand to stop the car; and they assessed the damages at $8,000.

The Court of Appeal for Manitoba having refused to disturb the judgment entered according to this verdict, we are asked to do so.

There was evidence that the fender failed to respond to the motorman's attempt to operate it, that the car wheels were not guarded as they might have been and as cars elsewhere had been and one car on appellants' line also was at the time, and also from which it might be inferred the motorman had not been looking or he might have seen and done more to save the girl.

The case, therefore, could not have been properly withdrawn, in regard to any one of these causes of complaint, from the jury.

They were with those of excessive speed and failure to ring the gong the questions properly raised by the pleadings and the evidence.

The additional findings are harmless surplusage and neither add to nor detract from the strength of the others and possibly are germane to the question of speed and doubtless form the answer the jury found as to the charge of high speed.

The contention that inasmuch as the city authori-

ties had not, as the contract between the appellant and the city empowers them, directed a specified fender to be used, none need be used, is so untenable, I am surprised to find it raised as an arguable point of law in this case; though for the second time such a contention has been set up in this court within the past sixteen months.

The only other question seriously raised as to the conduct of the trial arises out of the refusal of the learned trial judge to submit to the jury some sort of question as to whether or not the plaintiff could by the exercise of reasonable care have avoided the injuries; and instead of doing so telling the jury that

> this little child only six years old is not accountable for negligence like a grown person,

to which the defendant's counsel at the trial took "very strong exceptions."

Counsel, on the learned judge's explaining what he had said as to such a contention, modified his demands and put it in a more reasonable way yet inaccurate in law and asked his lordship

> to tell the jury that the child is responsible for its acts as far as it realizes what it is doing.

The jury, thereupon, were recalled by the learned judge when he removed from the case all ground for reasonable objection in putting the matter as I am about to quote from this supplementary charge.

To understand it one must appreciate the issues of fact he presented to the jury.

On the one hand the plaintiff's witnesses shewed that she had gone across the track in course of going to school and, when on the strip seven feet wide between the tracks, saw cars coming in opposite direc-

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tions and got frightened at that, hesitated, retraced her steps to return to the side whence she had come and got caught in the result by the car. The fender failed to trip, and she fell underneath instead of above it as she might have done if it had operated properly.

On the other hand the defendant's witnesses, including the motorman, pretended she never had come in front of the car, but was between the sidewalk and the track, running from a boy snowballing her; and had with her shawl over her head run against the side of the car or vestibule of the car, got knocked under it and hence her injuries.

Now the judge speaking of these conflicting presentations of the facts said as follows:

> Now if you believe that (referring to the latter one) and the other witnesses for the defence the company would not be guilty of negligence. I thought I had made that clear to you, but if you believe the defendants' account of how the accident occurred, that the child ran across in that way and struck the vestibule of the car before the motorman could stop it, and that he did take steps to stop it, then the defendants would not be guilty of negligence. Then your proper answer to the first question would be "No."

No objection was made to this as a proper disposition of counsel's objection.

It was impossible for the jury to find for the plaintiff on this charge except by first finding the story of defendants' witnesses untrue, and if that is thus eliminated no evidence remains that would have justified a finding of contributory negligence of the kind any child of five years and eleven months old can conceivably have attributed to it.

The hesitation, doubt and trepidation she evidently felt and exhibited would have been excusable in one much older.

To appreciate the legal bearing of what we have to

deal with let us see what the law, so far as developed, really is.

Though the law fixes an age limit for responsibility in some cases, none for the application of the doctrine of contributory negligence has yet been so definitely fixed as to furnish a uniform rule of law to guide us in all possible emergencies that may arise in the conduct of children.

The same sort of reasoning that led to fixed ages as lines at which responsibility may be drawn in some cases tends with the progress of changed and changing conditions to develop a fixity of law. What has so far happened in legal development as to contributory negligence also is briefly this.

Just one hundred years ago a great master of English law and language is said (in *Butterfield* v. *Forrester*(1)) to have formulated for the first time, so far as reported cases give us the law, the doctrine of contributory negligence. His comprehensive proposition, doubtless the result of earlier law, has been qualified as the exigencies of time and place and occasion seemed to furnish reason therefor.

The case of *Lynch* v. *Nurdin*(2), thirty years later, raised and settled in a large measure the necessary qualification where infants as plaintiffs were concerned. That case was one where a lad nearly, but under seven years, had with a playmate jumped into a cart, left unattended on the street by the owner's servant, who ought to have been in charge, and the horses spurred up by the playmate moved on and the plaintiff boy received in the result a broken leg.

No one claimed at the trial of that case to raise as such the question of contributory negligence as a bar

(1) 11 East 60.

(2) 1 Q.B. 29.

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to recovery; but the boy's acts and age were considered by the jury under the direction of the trial judge and the jury then and thus possessed of the whole case found a verdict for the boy.

This was moved against and the whole subject dealt with by the court when it was expressly found that whether contributory negligence or however looked at it, the child's act, was only what might be expected of a child of such tender years and hence furnished no bar to the action.

That decision leaves all that is to be found in this case well within the limits of the due allowance to be made when applying the law of contributory negligence in the case of infants suing for damage done them by reason of the negligence of another.

It has been maintained as good law down to this time. The only two expressions of doubt as to it each related to the negligence of a defendant and not that of a child's contributory negligence, and even that doubt it is said is attributed in one of these cases erroneously to Lord Esher. See page 163 (*n*), of Canadian edition of Beven. Besides it is referred to in *Engelhart* v. *Farrant*(1), at page 247, by Rigby L.J., as if law, and I find Lord Esher, one of the court, disposing of the case in which this happens.

It was accepted as law in the case of *Sangster* v. *T. Eaton Co.*(2), upheld on appeal here(3).

In *Ricketts* v. *Markdale*(4) the late Mr. Justice Ferguson, whose care and accuracy were most notable, wrote the judgment fully concurred in by the whole court, dealing with this phase of the law.

(1) (1897) 1 Q.B. 240.
(2) 21 Ont. App. R. 624; 25 O.R. 78.
(3) 24 Can. S.C.R. 708.
(4) 31 O.R. 180, 610.

He quoted approvingly American and other authorities the gist of which is that no more can in any event be required than that the child should do what might be expected of an ordinary, careful and prudent child; that everywhere a child of six or seven years is presumed to be incapable of contributory negligence; and that it is not attributable to a child of tender years.

No one now pretends to support literally the defendant's contentions at the trial, but it is claimed that a varying standard as set up for older infants in many cases, ought to extend to this child. No such rule can be found to have been laid down in English or Canadian cases as law in the case of child under seven. The cases chiefly relied upon are American. It may be hard enough to reconcile the utterances of our own high authorities without going abroad.

The learned trial judge evidently had in view, in dealing with the facts presented to him, the law as laid down by this court in the case of *Merritt* v. *Hepenstal* (1), at pages 152, when the court through the then Chief Justice, Sir Henry Strong, adopted the law as laid down in *Gardner* v. *Grace* (2), by Channell B. as follows:

> The cases shew that the doctrine of contributory negligence does not apply to an infant of tender age. To disentitle the plaintiff to recover it must be shewn that the injury was occasioned entirely by his own negligence.

I find on reference to the original record of the *Merritt Case* (1) that the child in question there was only three years of age.

Yet so far as it goes the law there laid down is binding on us and must be applied as our guide as I infer the learned trial judge tried to apply it.

(1) 25 Can. S.C.R. 150. (2) 1 F. & F. 359.

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The term "an infant of tender age" there used is that which is most widely used as to various ages up to six or seven years in the cases most carefully thought out. In *Lynch* v. *Nurdin* (1) the plaintiff was referred to as "a child of very tender age between six and seven." I incline, therefore, to hold we might well follow the proposition just quoted and that the learned judge's reason for excluding the question of contributory negligence was right.

It is not necessary to say more than this that, on his view of the facts, the proper question was to determine not as to contributory negligence, but whether or not the injury was within the above rule and occasioned entirely by the negligence of the child.

Mere refusal at the request of a defendant to submit a question relative to contributory negligence to the jury is not in itself misdirection; for the first question the judge has to solve is whether or not there is any evidence bearing on the point.

Submitting needless questions or issues for consideration, only tends to confusion and perplexity in the minds of the jury.

Here the remark addressed to the jury as to contributory negligence was absolutely harmless, and although beside the question also quite correct so far as it went.

The appellants' counsel were pressed in argument here to specify the facts in evidence on which they relied to furnish ground for a direction as to contributory negligence and resorted to the evidence for the defence which the learned judge as above set forth told the jury if true furnished a complete defence. He

(1) 1 Q.B. 29.

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chose to treat that evidence as bringing the case within the second branch of the rule quoted above. The appellant cannot surely complain of this. I would not desire to commit myself to its absolute accuracy as to its bearing on the plaintiff's case, but the course the jury were directed to pursue was exactly what would have been the case had the learned judge called what he spoke of contributory negligence instead of substituting, not in actual words but in truth, injury occasioned wholly by the child's own act. Many such cases have been passed upon already. Treating this as of that class of defence, could not, did not, mislead the jury.

The jury refused to believe appellants' side of the case and that evidence is thus put out of consideration here.

The charge was lucid and fair, and so far as it omitted, at first, anything the defendant's counsel complained of was on the recall of the jury properly supplemented so far as in law it could be.

What happened as to the nature of the objections taken and the judge's charge in *Hansen* v. *Canadian Pacific Railway Co.*(1), are so similar to this case in that regard that what we did there might if need be referred to and followed.

The doctrine of the negligence of the parents being imputed to the child was set up in argument, but I confess to being unable to apprehend its bearing on this case if we have regard only to English and Canadian authorities. The American authorities are so conflicting as to help little if at all.

I think the appeal should be dismissed with costs.

(1) 40 Can. S.C.R. 194.

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DUFF J.—It is, I think, hopeless to impeach the verdict in this case as against the weight of evidence. A question, however, which requires examination is raised by the appellants' contention that the learned trial judge improperly withdrew from the jury the defence of contributory negligence pleaded by them.

The action was the outcome of an accident in which the infant respondent (a child not quite six years old) was run down by the appellants' car and seriously injured. The mishap occurred on Main Street, Winnipeg, just opposite the entrance to a cross street known as Stella Avenue. On Main Street, which runs north and south, the appellants have a double track; and the car referred to was, when the accident took place, running south on the westerly track. The respondent with other children had just come out of Stella Avenue, which opens into Main Street at its westerly boundary, and was crossing the latter street on her way to school.

Two wholly incompatible accounts of the occurrences were presented to the jury by the respective parties. According to the case presented on her behalf at the trial, the respondent crossed the westerly track in safety, but, seeing a car on the easterly track coming from the south, she became confused, and, attempting to return across the westerly track, was knocked down just as she reached the most westerly rail.

The appellants' case was that the respondent never crossed the westerly track at all; but, playing at snowballs with one of her companions—and not observing the car—ran against the side of the vestibule and slipped under the body of the car in front of the wheel that crushed her.

These were the rival cases presented to the jury;

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and the appellants' complaint which we have to consider is that the learned trial judge (holding that in law contributory negligence could not be imputed to a child of the respondent's years) withdrew that issue from the jury.

I do not think it is necessary to decide whether under the law of England, which on this subject prevails in Manitoba, the ruling of the learned judge on this point is open to objection.

In *Merritt* v. *Hepenstal* (1) this court seems to have held that, in such a case, in order to succeed the defendant must shew that the injury was occasioned entirely by the negligence of the child; and it was upon this view that the learned trial judge acted. I should prefer, however, to reserve for future consideration the exact effect of that decision and to rest my judgment on this appeal on other grounds.

The learned trial judge instructed the jury that if they accepted the account of the accident advanced by the appellants they should dismiss the action. In face of this instruction (even assuming the question of contributory negligence to be in such a case a question of fact, depending on the views of the jury and the ruling of the learned trial judge touching the degree of care to be expected from a child of tender years to the opposite effect therefore erroneous), I am not able to discover any ground upon which it can be said that the appellants have by reason of that ruling suffered any prejudice.

The learned judge, had he submitted to the jury the defence proposed, would unquestionably have told them that there was nothing in the facts to support

(1) 25 Can. S.C.R. 150.

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that defence, if they accepted the account of the child's movements just preceding the collision which was put forward on her behalf. He might, perhaps, have told them also that, if they accepted the appellants' account, it would be a question for them whether the plaintiff's conduct had fallen below the standard of reasonable care to be expected from a child of her years; but in point of fact the learned judge put the question in a form much more favourable to the appellants. He told them that if they accepted that account the action should be dismissed. This error—which was error in form only, if error at all—could not possibly prejudice the appellants.

In truth the verdict shews that the jury rejected the appellants' view of the accident and acted upon the respondent's account; and, on the hypothesis that the latter accorded with the facts, it is not open to dispute that the defence of contributory negligence must fail.

On this ground (that assuming the learned judge misdirected the jury an examination of the charge as a whole and of the findings of the jury shews that the misdirection was innocuous) I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants: *Munson, Allan, Laird & Davis.*

Solicitors for the respondent: *Bonnar, Hartley & Thornburn.*

HUGH HENDERSON AND MATILDA HENDERSON (PLAINTIFFS) ..... } APPELLANTS;

AND

KATHARINE A. THOMPSON (DEFENDANT) ..... } RESPONDENT.

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*Feb. 23.
*March 29.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Vendor and purchaser—Agreement for sale of land—Principal and agent—Fiduciary relationship—Specific performance.

Where an intending purchaser, by disguising his intentions under the role of a disinterested friend imposed on the confidence thus established and induced the owner of land to accept an offer for the purchase of it which probably would not otherwise have been accepted without independent investigation, specific performance of an agreement for sale thus procured should not be enforced. *Fellowes* v. *Lord Gwydyr* (1 Sim. 63) discussed and distinguished.

APPEAL from the judgment of the Supreme Court of British Columbia reversing the judgment, in favour of the plaintiff, by Martin J., at the trial and dismissing the action with costs.

The plaintiff, Hugh Henderson, residing at Rossland, B.C., visited the defendant, a resident of Seattle, Wash., ascertained that she was willing to sell a house and lot which she owned in Rossland, and offered to act in a friendly way on her behalf in securing a purchaser. Upon his return to Rossland, he entered into correspondence with her in which he represented that

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

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he was the agent of undisclosed principals desiring to purchase the property. He informed her that the house was in a dilapidated condition; that a good price could not be obtained and, after some letters and telegrams had passed between them, she accepted the price he offered and advised her to accept. She, afterwards, discovered that the proposed purchasers were the plaintiff, Hugh Henderson, and his wife and refused to carry out the sale. The action was then brought to enforce specific performance of the agreement for the sale of the property.

At the trial, Mr. Justice Martin, maintained the action with costs, and said:

"After further reflection upon this matter I can only form the opinion that the plaintiffs must succeed. The representations made by Hugh Henderson as to the condition of the house were substantially correct, and though I agree that it would have been more honourable if he had frankly stated the true position of the prospective purchaser, instead of trying to convey a false impression in that respect, still he was not acting in any fiduciary capacity towards the defendant, nor was she in any way prejudiced by his misleading statements. The case in principle cannot be distinguished from *Fellowes* v. *Lord Gwydyr*, in 1826(1), and on the facts I must find for the plaintiffs. I need only add that I do not think that the letter of 12th February seeks to impose any new conditions, it simply expresses, though in not very clear and precise language, a layman's idea of the way to complete the title in the circumstances."

This judgment was reversed by the judgment now appealed from.

(1) 1 Sim. 63; 57 Eng. R. 502.

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Shepley K.C. for the appellants.

Ewart K.C. for the respondent.

THE CHIEF JUSTICE.—This appeal is dismissed with costs. I agree in the opinion stated by Mr. Justice Duff.

GIROUARD J.—I agree in the opinion stated by Mr. Justice Duff.

DAVIES J.—It is not open to doubt that if the parties to the contract sought to be enforced in this case stood towards each other in a fiduciary character, such as that of principal and agent, the court would not, under the facts so proved, lend its aid to enforce specific performance.

I have had no difficulty in reaching the conclusion on the evidence that the parties did stand towards each other in that relation. The appellant's own evidence satisfies me on the point. He admits that when he first visited the respondent in Seattle he had no intention of purchasing the property for himself and so gave her to understand and left her under the impression that he did not want to purchase, *but to procure for her a purchaser.* He disclaimed, it is true, her offer to pay him a commission for his services, but that, of course, made no difference, as he left her clearly under the impression he was to act as her agent to get her a purchaser.

When he returned to Rossland he continued the misrepresentation and led her by letters to believe that he was in treaty with some third party for the purchase, and advised her to accept that third party's offer

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Davies J.

as being the best he could get out of them. As a matter of fact it transpires that the third party was his wife and that he himself had an interest in the purchase. He, therefore, occupied a position where his interest and his duty conflicted, and the authorities are conclusive that, in such cases, where there is a non-disclosure of that which it was the plaintiff's duty to disclose no specific performance can be granted. In this case there was not only non-disclosure but misrepresentation of material facts.

The appeal should be dismissed with costs.

IDINGTON J.—Mr. Shepley for the appellant conceded that if any fiduciary relation existed between his client and the respondent there was an end to his appeal. I have no doubt that the proposition involved in this may be supplemented by the further proposition that if there was anything in the language and conduct of the appellant which might have reasonably induced the respondent to believe that the appellant was acting as her agent there was also an end to his appeal; notwithstanding his peculiar idiosyncracies which enabled him to convey this impression and at the same time find for himself his way to reconcile the plain facts with a denial of such an obvious conclusion as forces itself on the minds of other people when considering the same.

I quote hereunder from his evidence including the letter referred to and which is also copied, what I think leaves it open fairly to infer that the appellant's language and conduct led and purposely was intended to lead the respondent to the belief that he was acting as her agent, as her friend, doing her friendly service without compensation and to her implicitly trusting

him accordingly. I think he thereby gained the advantage of a few hundred dollars in the price she asked, but at the same time lost any right he could have to enforce specifically a bargain he claims to have been made to appear in writing.

Q. Who brought up the subject matter of the sale at all? A. Mrs. Thompson.

Q. You called at her house in Seattle? A. Yes, sir.

Q. Did you have the purchase by yourself in view? A. Not at the time—no.

Q. What do you mean by that? A. I had no intention of purchasing the house at the time.

Q. But you had the intention of discussing the matter of the purchase with her on that occasion? A. Well, I intended to talk about the property—yes.

Q. That is about her house here? A. Yes.

Q. You were wishing then to purchase? A. To get a purchaser.

Q. You didn't want it yourself? A. I didn't want it myself at that time.

Q. So that when you left her she was under the impression that you yourself did not want to purchase? A. Yes.

* * * * * * *

Q. So that during all these negotiations and this correspondence Mrs. Thompson thought you were acting as an independent adviser? A. No, I don't think she did.

Q. What position then was she to think that you occupied? A. As a purchaser—as getting a purchaser.

* * * * * * *

Q. That is not the question I asked you. What position would Mrs. Thompson think you occupied in connection with this sale? A. I don't know what position—I wrote an offer. * * *

* * * * * * *

Q. Were you yourself to have any interest in it? A. Well, yes. *

By Mr. MacNeill. Q. You state here, Mr. Henderson, in your letter of January 24th (Exhibit 1), that the best offer you could get was $1,250. Did you really try to get a better offer than that? A. No, I didn't try. * * *

* * * * * * *

Rossland, B.C., February 4, 1907.

Mrs. K. A. Thompson,

Dear Madam,—Your letter received and contents noted. You did not mention anything about the electric fixtures, taken from the rooms, whether you have them stored here or not. Also one of the windows that got broke by the explosion have they settled with you

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for the damages done, or have you put in a bill claiming any damages, as the property looks to a disadvantage. *I have seen the party to-day and the best I can get out of them is one hundred more, or* $1,350 *all clear.* While the price is very low I don't think I would miss a sale. If you decide to sell, wire me, as they are looking at other properties, so I told them I would have you wire at my expense, and send your deed to Macdonald & Winn, who will forward you the money when the title is got. I remain,

Yours respectfully,

H. HENDERSON.

It is to be observed that the appellant swears positively he had no intention of purchasing the house at the time, and yet was to get a purchaser. What can all this mean but what I have said?

I think this appeal should be dismissed with costs.

DUFF J.—I doubt whether the documents produced sufficiently disclose the essential elements of an agreement between the respondent and a contracting purchaser; but, as the point does not appear to have been considered in the earlier stages of the litigation, I will deal with the case upon an examination of the topics which have been fully discussed before us and in the court below.

The appellant, before entering upon the correspondence on which the action is founded, intentionally led the respondent to believe that, as a friend, he was willing to help her to procure a purchaser for her house. Having thus begun, he opened the correspondence; and, in that correspondence, he professed himself to be acting as the intermediary between her and an offering purchaser. He tells her with particularity of interviews with this intending purchaser; an offer made and an advance on that offer; implies fruitless efforts on his part to procure a further advance; exaggerates the marks of dilapidation he finds on a visit to

the property, and advises the respondent not "to miss a sale." The appellant, all the while, was negotiating on his own behalf and the respondent learned of the elaborate deception thus practised upon her only when the action was brought. In these circumstances the appellant sues for specific performance.

I think the appeal fails on this short ground. The facts either admitted or proved by the correspondence shew that the appellant, by disguising his real aims under the role of a disinterested friend and imposing on the confidence thus established, induced the respondent to act upon his advice and to accept an offer which it is probable she would not otherwise have accepted without, at all events, independent investigation. It does not require the authority of any specific decision to shew that a plaintiff who has procured a contract by such contrivances is not in a situation entitling him, on the basis of that contract, to advance a claim to equitable relief.

I will add only a word about *Fellowes* v. *Lord Gwydyr*(1). When that case comes to be examined by a court competent to review it, it may be found that, whatever is to be said about the decision itself, the reasoning on which it was based by Lord Lyndhurst as well as by the Vice-Chancellor is not quite reconcilable with principles established by more recent decisions. But there can be no doubt that, to the facts of this case, as I view them, that decision can have no application. In *Fellowes* v. *Lord Gwydyr*(1) the parties were at arms length and the Lord Chancellor, moreover, declined to draw the inference that the misleading conduct of the vendors had operated upon the mind of the

(1) 1 Sim. 63.

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purchaser to induce him to make the purchase. These circumstances alone are sufficient to deprive the decision of any relevancy to the points in controversy on this appeal.

Appeal dismissed with costs.

Solicitor for the appellants: *E. S. H. Winn.*

Solicitor for the respondent: *A. H. MacNeill.*

THE WINNIPEG FISH COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

THE WHITMAN FISH COMPANY (PLAINTIFFS) ..... RESPONDENTS.

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*Feb. 25.
*March 29.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Sale of goods by sample—Delivery—Condition f.o.b.—"Sale of Goods Act," R.S.M. (1902) *c.* 152—*Notice of rejection—Reasonable time —Breach of warranty—Damages.*

By contract made at Winnipeg, Man., plaintiffs sold to the defendants, by sample, a carload of cured fish to be shipped during the winter from their warehouse at Canso, N.S., "f.o.b. Winnipeg." The sample was sound and satisfactory. The fish arrived in Winnipeg in a frozen state and were received by the defendants and kept by them in an outhouse for several weeks before being placed in the freezer, the atmospheric conditions being such that the fish could not, in the meantime, have deteriorated by thawing. Some of the fish when sold proved unsound, were returned by customers and the whole shipment was found not up to sample and unfit for food. On inspection the health inspector condemned the whole carload and it was destroyed. About six weeks after the fish had been received by them, the defendants notified the plaintiffs of the rejection of the carload so delivered. In an action for the price at which the fish had been sold, the defendants counterclaimed for damages for breach of warranty and consequent loss in their business.

Held, reversing the judgment appealed from (17 Man. R. 620), that the sale had been made subject to delivery at Winnipeg, that any loss occasioned by deterioration in transit not necessarily incident to the course of transit should be borne by the sellers, that the loss in this case was not so incident, and that, under the circumstances, the purchasers had notified the sellers of the rejection within a reasonable time, as contemplated by the "Sale of Goods Act," R.S.M. (1902) ch. 152; that the plaintiffs could not recover and that the defendants were entitled to have damages on their counterclaim.

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

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APPEAL from the judgment of the Court of Appeal for Manitoba (1), reversing the judgment of Cameron J., at the trial, and maintaining the plaintiff's action with costs.

The plaintiffs brought their action to recover the price of 800 boxes of fish sold by them to the defendants, to be delivered at Winnipeg, the plaintiffs agreeing to re-pay to the defendants any freight payable on the carload of fish shipped from Canso, N.S., to the defendants at Winnipeg, Man. The defendants pleaded, amongst other things, that the fish had been sold to them at Winnipeg, by sample, that they did not correspond with that sample and they had rejected and refused to accept the fish, and counterclaimed alleging breaches of warranty and claiming damages. At the trial, Mr. Justice Cameron found, on the evidence, that the sale had been made by sample, that the carload of fish did not correspond with the sample when delivered either at Canso or Winnipeg, and dismissed the action. He also held that the defendants were entitled to judgment on their counterclaim and made a reference to the master to ascertain the amount of the damages. By the judgment now appealed from, the Court of Appeal for Manitoba reversed this judgment, maintained the action to the extent of $1,393.70, and dismissed the counterclaim with costs.

Newcombe K.C. for the appellants.

Ewart K.C. for the respondents.

(1) 17 Man. R. 620.

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The Chief Justice.

THE CHIEF JUSTICE.—One Connor, agent of the plaintiffs (respondents) a fish company having their principal place of business at Canso, in Nova Scotia, sold to the defendants (appellants) wholesale and retail dealers in fish at Winnipeg, two carloads of fish. The order for the first car was given on the 13th November, 1906, and the fish arrived in Winnipeg on the 18th of January, 1907. The second car ordered on the 14th of November, 1906, arrived on the 1st of February, 1907, and was taken into store on the 4th of the same month. The sale of the second carload was by sample and it is admitted that the sample produced was one of the finest. In the letter written by Connor, at Winnipeg, enclosing the order for this car to the plaintiffs at Canso, he (Connor) says that the carload was ordered "on condition you ship them the same quality haddies as sample." Before the fish arrived and was taken into store, trouble arose about the quality of the first carload and another shipment of some 400 boxes had also gone bad. The haddie was intended for sale among the appellants' customers in both their retail and wholesale trade and was bought, as I gather from the evidence, because if in accordance with the sample it would suit the taste of these customers. The preliminary precaution of effectively testing the quality of the sample by cooking and eating it was taken by respondents' managers. It is, I think, admitted that finnan haddie cannot be properly inspected when frozen. In fact, it would appear from the evidence that the only effective test is to thaw and cook the fish. Be that as it may, on the 23rd of February, the defendants' manager Wall wrote complaining of the fish and requesting the plaintiffs to

take the matter of this haddie proposition up with their agent (Connor) who had made the sale, at once, in order that same may be

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taken off your hands as we will not, as we have already said, endeavour to dispose of the goods.

A previous letter had been written on the 21st of the same month, and the defendants had also refused to accept a draft for the value of the fish. There is very little, if any, dispute or difference between the witnesses as to the quality of these fish after they reached Winnipeg. No answer was given to the letters of the 21st and 23rd February; but, on the 6th March, Connor, the selling agent, called at the defendants' store presumably to investigate the complaints made as to the quality of the fish and it was then agreed to have it examined, and one Guest was by mutual consent selected for that purpose. Guest says that some of the fish was not fit for use, and finally being pressed for details says:

> I mentioned to Mr. Wall and Mr. Connor that although the fish were not first-class there was nothing to prevent people from using them. That was my opinion of the haddies at the time.

Eliminating all the other evidence adduced by the defendants, can it be said that this finding was favourable to the plaintiffs? I think not. In the civil law, which counsel for the respondents says is applicable to this case, when a sale is made by sample, there is an implied warranty that the goods will, in all respects, be equal or conform to the sample, and any defect or inferiority, however slight, in the goods is sufficient to justify the purchaser in refusing to accept. Dalloz, 1873, 2, 100; *Durocher* v. *Leitch*(1); R.S.M. ch. 152, sec. 17.

My conclusion is that it was the intention of the parties to enter into a contract for the delivery in Win-

(1) Q.R. 3 S.C. 367.

nipeg of fish fit for the trade for which to the knowledge of the sellers it was intended and equal in all respects to the sample exhibited by the plaintiffs' selling agent when the sale was made and the subsequent delivery of the fish and the taking of it into store by the defendants does not in the circumstances imply acceptance. The defendants (purchasers) were entitled to reasonable time and opportunity for inspection (section 33, "Sale of Goods Act") to ascertain if the fish corresponded with the sample and I agree with the trial judge that there was no improper delay in discovering the defective quality of the fish nor in the offer to return it. The fish was frozen and it is admitted that effective inspection was impossible except by adopting methods which would destroy its commercial value, and the defendants (now appellants) seem to me to have shewn every anxiety to give the shipment a fair test by the only effective means, that is, by sale to their customers, although in so doing they ran the risk of serious injury to their trade. With respect to acceptance and rejection, I hold this to be one of those cases in which one should apply the principle stated by the Geneva Court of Appeal:

Sortent du cadre des vérifications usuelles auxquelles l'acheteur est tenu, celles qui ne peuvent se faire sans modifier l'état et l'apparence de la merchandise et sans diminuer sensiblement la valeur de celle-ci.

Tribunal fédéral Suisse, Journal des tribunaux, juillet, 1904.

As it was argued for the respondents that the Manitoba "Sale of Goods Act" was a mere codification of the principles of the Civil Law, I would refer in addition to 24 Laurent, No. 143, par. 2.

As to the counterclaim for damages, I find with the trial judge that there was an express agreement be-

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tween the parties at the time of the settlement for the price of the first carload of fish fully reserving the defendants' rights and that allowances for any of the unsold portion which might thereafter be found not of first quality would be made. In the Court of Appeal, the Chief Justice agrees that there was evidence to justify this finding. The case of *Beer* v. *Walker*(1) is, in my opinion, applicable in one aspect of the case. That is the case about the Ostende rabbits in which it was held that there is an implied warranty that goods sold for human consumption shall reach the buyer in condition fit for food and to continue so until the buyer can reasonably dispose of them in reasonable course of business, and it is no answer to say that they became unfit for food in the ordinary course of transit. In my view of the case it is not necessary to rely upon that authority. Here the seller contracted to deliver the goods at their destination, Winnipeg, equal to sample, and reasonable time for inspection and rejection must be allowed the buyer.

I would allow the appeal with costs and restore the judgment of the trial judge.

GIROUARD J. agreed with the Chief Justice.

DAVIES J.—This was an action brought to recover the price of two separate carloads of finnan haddies sold by the plaintiffs to the defendants at different times. The defendants carry on the fish business in a large way in Winnipeg, and the plaintiffs catch, cure and ship their fish from Canso in Nova Scotia. They had an agent, Mr. Connor, at Winnipeg, and the sale of both cars of fish were made in that city by him.

(1) 46 L.J.C.P. 677.

The trial judge found that the second carload was sold by sample and that it did not correspond with the sample when delivered either at Canso or Winnipeg. He further held that when defendants paid for the first carload of fish "there was an express agreement fully reserving the defendants' rights" to recover back for any fish in that car which they might shew were bad and unmerchantable. On his findings he dismissed plaintiffs' claim and gave judgment for defendants on their counterclaim, referring the question of the damages to which they were entitled on both cars to the master for assessment.

On appeal it was held that construing the language of the contract for the sale of the second car of fish sued for in the light of the plaintiffs' statement of claim that the goods were "to be delivered at Winnipeg" the contract must be held to have required delivery there and the property did not pass till such delivery.

The Court of Appeal also found that the defendants had the right to reject the goods in Winnipeg as not up to the contract if on inspection they were so found wanting, but after a lengthy review of the facts they determined that the defendants retained the goods for an unreasonable time after receiving them without rejecting them and after being aware of the defects in the fish, did acts in relation to them inconsistent with the ownership of the seller, and that there had, therefore, been an acceptance of the goods which became thereupon defendants' property entitling plaintiffs to a verdict for the price; that such acceptance of the fish threw upon the defendants the onus of proving their counterclaim for damages arising from the defective character of the fish; that the fish were of

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good quality and condition when delivered to the carrier at Canso, and that as defendants

had not shewn what the condition or character of the fish was when it reached Winnipeg or what caused the damage or when or where the fish spoiled whether during transit or afterwards, but kept possession of the fish until climatic conditions made the holding of them precarious, the loss must be held to have been largely caused by their own negligence.

I agree with the holding of the Court of Appeal that the contract in the case must in the circumstances under which it was made be held to have

required delivery of the fish in Winnipeg, and that the property in the fish did not pass till such delivery.

Such a determination does not necessarily follow from the use of the letters and words "f.o.b. Winnipeg" in the contract made. There is room for much contention as to their real effect and the language may be said to be ambiguous. But when we consider the circumstances surrounding the making of the contract, that the agent of the plaintiffs and of the defendants both were in Winnipeg when they made it that the fish were to be shipped from Canso, Nova Scotia, thousands of miles from Winnipeg, and delivered "f.o.b. Winnipeg," that they were to be in accordance with a sample then and there produced and that the plaintiffs in suing upon the contract expressly set forth in their claim that the goods were to be delivered in Winnipeg, I agree that the contention of the parties must fairly be determined to have been that the property in the fish should not pass until they were in Winnipeg ready for delivery to the defendants.

I also agree with the finding of the trial judge, approved, as I understand from their judgment, by the Court of Appeal, that the contract was one for sale of goods *by sample*.

The property in the fish did not, therefore, pass to the defendants until it was delivered to them in Winnipeg between the 1st and 4th February. The car seems to have reached Winnipeg on the first of February, but was not delivered over to the defendants till the 4th, and it is not shewn clearly on which day their agents, the cartage company, received the car from the railway company. It does not seem to me under the proved climatic conditions which then existed at Winnipeg a matter of any importance whether the car was delivered to the defendants' agents on the 2nd, 3rd, or 4th as the fish could not have been injured during that time they being then in a solid frozen condition.

In this condition they were delivered to the defendants on the 4th and were stored in their winter shed adjoining their freezer where the defendants store all their fish during the cold weather. In this shed they remained until the 18th March when they were transferred to their freezer.

The conclusion of fact which I have reached from a close examination of the evidence respecting the temperature which existed from day to day and from the condition of the shed where the fish were kept from the 4th February until the 18th March when they were transferred to the freezer, and from the condition of a lot of other fish of defendants kept in the shed at the same time, and from the temperature of the freezer from that date of the 18th of March till the fish were examined and condemned by the sanitary authorities and destroyed as unfit for human food, is, that the fish were kept under conditions which would not and did not allow of their thawing out, and that the bad condition in which the fish were ultimately found to be in by the sanitary authorities must, therefore, have existed

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at the time they were delivered to the defendants at Winnipeg in a solidly frozen condition.

At the time of its delivery, therefore, although not known to the defendants and not capable of being known by any inspection or examination short of one which involved thawing of each box of fish out, the fish were not merchantable or up to sample.

The questions then arise as to what were the risks of deterioration which defendants were liable for before delivery to them at Winnipeg. The Manitoba "Sales of Goods Act" says those "which were necessarily incident to the transit." Did these risks embrace deterioration caused by the freezing of the fish and their thawing and freezing again?

The trial judge held that the fish could not have been, from the condition in which they were proved to have been when thawed out, in good condition when delivered by the plaintiffs in Canso.

The appellants on the contrary hold that the evidence shews the fish to have been in good condition when so delivered in Canso and apparently fit for transit to Winnipeg, and that there was no evidence given by either side as to the treatment of the carload for the twenty-two days between delivery to the carrier and its arrival in Winnipeg, nor during the four days it was in Winnipeg before reaching defendants' warehouse.

I do not feel obliged to determine whether or not the finding of the trial judge or that of the Court of Appeal as to the condition of the fish when delivered by the plaintiffs at Canso is a proper one, because it seems to me that, even assuming the goods to have been in good condition when delivered to the carrier there, unless the unmerchantable condition in which they

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were found in March and for which they were condemned and destroyed is necessarily attributable to risks which the buyer assumed under the 33rd section of the Manitoba "Sale of Goods Act," then such condition must be held attributable to other risks for which the sellers alone would be liable.

That section reads as follows:

33. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

That section adopts the rule stated in *Bull* v. *Robison,* in 1854(1). It is limited expressly to cases where the risk would otherwise be the seller's as, under my construction of the contract, is the case before us where the goods were to be delivered in Winnipeg. The risks which, unless otherwise agreed, the buyer assumed are in the express language of the section "any risk of deterioration in the goods necessarily incident to the course of transit." All other risks the vendor assumes. As said by Alderson B., in delivering the judgment of the court, in *Bull* v. *Robison*(1):

A manufacturer who contracts to deliver a manufactured article at a distant place must indeed stand the risk of any *extraordinary or unusual deterioration,* but we think that the vendee is bound to accept the article if only deteriorated to the extent that it is necessarily subject to in course of transit from the one place to the other, or in other words that he is subject to and must bear the risk of the deterioration necessarily consequent upon the transmission.

As so expressed the rule does not seem an unreasonable one. But I cannot think that the deterioration found in these fish was "necessarily incident to the course of transit" or necessarily consequent upon such transit. It might have occurred during the tran-

(1) 10 Ex. 342.

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sit; it might not. It was not necessarily incident to it. To hold so would be to throw the entire risk in the case of perishable goods upon the purchaser who in a case like the present did not own the property till it was delivered to him in Winnipeg, and who under the contract had no right to dictate how the goods should be forwarded. The deterioration I hold in this case comes within the extraordinary or unusual deterioration exceptional or accidental for which the vendor assumes the risk as stated by Baron Alderson in the case referred to. The vendor was to deliver the fish "free on board" at Winnipeg. He was to pay the freight. He could send the fish in a refrigerator car and reduce the risk arising from changing climatic conditions to a minimum, or he could send them at a cheaper rate by ordinary car taking the risk himself, and in this case he chose to do so.

The remaining and the main question is whether or not the appellants accepted the goods within the meaning of the 35th section of the Act. That section reads:

> 35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them:

There was, of course, no intimation of acceptance and the questions remain as to acts of ownership inconsistent with ownership of seller or undue detention of the goods without notice of rejection.

These are questions of fact determinable in each case upon its own peculiar facts. Here we have a carload of fish in boxes delivered to defendants in a solid

frozen condition. No mere outward examination or inspection would afford any clue to their real condition nor would indeed the removal of the box or package enclosing them do so. The only examination which would or could be in any sense effective to determine the condition of the fish would be by thawing out the contents of the boxes. But why should defendants be compelled to resort to that mode of inspection which necessarily destroyed all the boxes tested when there remained what has been shewn to have been the customary method of selling the frozen boxes of fish to customers who would properly and effectively determine their true condition by thawing out and cooking the fish. The defendants, pursuant to this mode of testing the fish, on February 9th sent ten boxes to their retail store. The result was most unsatisfactory and was probably known to defendants to have been so within a few days afterwards. On 23rd February defendants' manager, thinking that possibly he had not given the fish as fair a test as he should have done, shipped out seven boxes more of the fish to customers, and on the 26th four boxes and on the 27th four boxes, in all fifteen boxes. On March 5th plaintiffs' agent, Connor, returned to Winnipeg, from a business visit to the West and between that date and the 6th he saw Wall, defendant's manager, and after discussing the facts connected with the receipt of the goods by defendants and their condition asked him to make another test of the goods. It was not then contended on plaintiffs' part that defendants had by any undue delay on their part accepted the goods, but the two men ultimately agreed that one Guest, as a disinterested party, should test them and a number of boxes were thawed out at defendants' freezer and examined by Guest. His opinion was that

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some of the haddies were not good; some smelt quite strong and others were all right as far as he could see.

The result of this test was to confirm Wall in his conclusion not to accept or sell the fish and he so informed Connor, but after some conversation he agreed with Connor, who was not from Guest's examination satisfied the fish were bad, to give them another test and in consequence shipped out to customers the balance of about 120 or 125 boxes. All these fish sent out after the interview between Wall and Connor were so sent at Connor's request and after these further tests had been made and the results known the defendants wrote the letter of the 19th March rejecting the fish as being in a uniformly bad condition. Mr. Newcombe contended that there had been an absolute rejection by the 5th of March when the telegram of that date was sent by defendants to plaintiffs refusing to accept plaintiffs' draft for the price of the fish and asking for "instructions as to the disposition of your fish." The telegram he contended read in the light of defendants' previous letter to plaintiffs shewed a clear rejection of the fish. The rule of law on the subject is clearly laid down on the point in *Grimoldby* v. *Wells*(1), where it was held that with regard to goods sold by sample the purchaser might reject them by giving notice to the vendor that he would not accept them and that they were at vendor's risk, but that such notice must, of course, be clear and unequivocal.

It does not appear, however, to be important to determine whether or not there was an unequivocal act of rejection on that day because within a day or so afterwards, sometime between the 6th and 9th March,

(1) L.R. 10 C.P. 391.

the interview between Wall, defendants' manager, and Connor, plaintiffs' agent, took place on the latter's return from the West, at which interview Wall at first clearly rejected the goods, though he subsequently agreed with Connor to a further test being made of them by a disinterested party, Guest, and this test not being satisfactory to both parties ultimately agreed to give them another test by further shipments to his customers. The time lost in these several tests and trials of the fish made at the express request of plaintiffs' agent cannot certainly be counted as against the defendants, while in my opinion the fact that plaintiffs' agent, so far from contending that there had been an acceptance of the fish, urged the defendants to give them further trials is important in determining whether there had or had not been a lapse of a reasonable time in the retention of the goods by defendants without intimation to the seller that they had rejected them.

The 35th section of the "Sales of Goods Act," already cited and set out, states what constitutes acceptance of goods by the buyer.

The only question which can arise under this section is whether or not there was undue detention by the buyers without notice of rejection.

This question of fact the Court of Appeal determined in the affirmative. Looking at all the circumstances of the case, the time when the goods were delivered, the then condition of these goods, frozen solid, the impossibility of testing their condition unless by the thawing out of each box or by sale to customers who would do this, the sale of the ten boxes on the 9th February and the subsequent sales of the fifteen boxes between the 25th and 27th February, the

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notice to Connor on or about the 6th March, when he returned to Winnipeg, of defendants' rejection of the goods, coupled with the subsequent agreement at the same interview between the two agents to have the fish further tested by Guest as an independent person, and the subsequent shipments by defendants to their customers at Mr. Connor's request after Guest had made his examination, the places and temperature in which the fish were kept from the time they were received by defendants till they were condemned and destroyed by the health authorities, I am satisfied that there was no such "undue detention of the goods," that the defendants never accepted them, that nothing was done by the buyer with or to the goods inconsistent with the ownership of the seller, and that they were rejected within what under the peculiar facts and circumstances was a not unreasonable time for testing and ascertaining their condition.

The subsequent discovery by the health authorities of the absolute unsoundness of the fish convinces me that no prejudice could have been caused to the plaintiffs by the delay, and the conduct of defendants' agent on or about February 6th in having first an independent test made by Guest and in afterwards inducing defendants to send out further samples to their customers to further test them, satisfies me that at that time at any rate he at least did not think the fish had been accepted.

Coupled with what I have already said of the temperature and conditions under which the fish were kept by defendants until they were condemned and destroyed I am satisfied that their condition was attributable to something which happened to them before or during transit and "not necessarily incident to the

course of transit," and that the delay of the defendants in rejecting them was not unreasonable under all the circumstances.

Summing up my conclusions I would say:

1. That I agree with the Court of Appeal that the true construction of the contract provided for delivery by the seller to the buyer in Winnipeg; that the property did not pass until that delivery and that the sale was one by sample; that the "risks of deterioration in the fish necessarily incident to the course of transit" fall under section 33 of the "Sale of Goods Act" upon the purchaser, and all other risks upon the seller, and that, assuming the goods to have been delivered to the carrier at Canso in good and suitable condition, as found by the Court of Appeal, but upon which I do not express any opinion, any damage causing deterioration to the fish arising from their having been frozen and thawed during transit not being necessarily incident to such transit must under the circumstances of this case be held to have been accidental and exceptional and so must fall on the seller; that the fish when delivered to the purchasers' agent or carters in Winnipeg was in a frozen condition and was kept in such temperature and condition by the defendants after receipt by them as precluded their being deteriorated any further than they were when received, up to the time they were condemned and destroyed; that consequently the delay in repudiating acceptance of the fish, such as it was, did not operate to the plaintiffs' prejudice and was not under the circumstances unreasonable, and that therefore the defendants having finally rejected the fish on the 23rd March as unmerchantable and not in accordance with sample no right of action existed for the price of the second carload; that the claim of the

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defendants for such damages as they may reasonably have sustained by reason of the plaintiffs' breach of contract was a good one with respect to both carloads and had been preserved as far as the first carload was concerned by express agreement when that car was settled for and that therefore the judgment of the Court of Appeal should be reversed and that of the trial judge restored.

IDINGTON J. agreed in the judgment allowing the appeal with costs.

DUFF J. agreed with Davies J.

Appeal allowed with costs.

Solicitors for the appellants: *Aikins, Robson & Co.*

Solicitors for the respondents: *Tupper, Galt, Tupper, Minty & McTavish.*

GERTIE E. J. PORTER (DEFENDANT) . APPELLANT; 1909

AND *March 2. *April 5.

DANIEL J. PURDY (PLAINTIFF) . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Lessor and lessee—Lease for years—Covenant to renew—Option of lessor—Ejectment—Equitable plea.

A lease for years provided that on its termination the lessor, at his option, could renew or pay for improvements. When it expired the lessor notified the lessee that he would not renew and that he had appointed a valuator of the improvements requesting her to do the same, which she did. The valuation was made and the amount thereof tendered to the lessee which she refused on the ground that valuable improvements had not been appraised, and refusing to give up possession when demanded the lessor brought ejectment. By her plea to the action the lessee set up the invalid appraisement and claimed that as the lessor's option could not be exercised until a valid appraisement had been made he was not entitled to possession. By a plea on equitable grounds she again set up the invalid appraisement and asked that it be set aside and the lessor ordered to specifically perform the condition in the lease for renewal and for other and further relief.

Held, affirming the judgment appealed against (38 N.B. Rep. 465), Idington J. dissenting, that though the appraisement was a nullity that fact did not defeat the action of ejectment; that the acts of the lessor in giving notice of intention not to renew, demanding possession and bringing ejectment, constituted a valid exercise of his option under the lease, and that the lessor was entitled to possession.

Held, also, Idington J. dissenting, that sec. 289 of the "Supreme Court Act of New Brunswick" did not authorize that court to grant relief to the lessee under her equitable plea; that such a plea to an action of ejectment must state facts which would entitle the defendant to retain possession, which the plea in this did not do.

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

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APPEAL from a decision of the Supreme Court of New Brunswick(1), maintaining the verdict at the trial in favour of the plaintiff.

The material facts are stated in the above headnote.

Ewart K.C. and *W. B. Wallace K.C.* for the appellant.

McKeown K.C. for respondent.

THE CHIEF JUSTICE agreed with Duff J.

DAVIES J.—I concur with the opinions of Duff J. and Anglin J. dismissing this appeal.

IDINGTON J. (dissenting).—The appellant is the lessee of property described in a renewable lease which originally began to run in 1840 and of which the last renewal expired in May, 1907. This is an action of ejectment brought by the lessor since the expiration of the term to recover possession from the lessee whose only answer seems to be rested by the statement of defence upon the equity she claims to have arisen under the following agreement in the lease:

> And it is agreed by and between the parties to these presents, that *at the end of the said term,* the buildings or improvements heretofore erected, or which may hereafter be erected or made by the said Anne Cunard, her executors, administrators or assigns, on the demised premises, shall be valued *by two indifferent persons,* one to be chosen by each party, which two parties, in case of disagreement, shall choose a third, the appraisement of whom, or any two of whom, *shall be conclusive,* as to the value of such buildings and improvements; *at which time it shall be in the option* of the said Charles William K.

(1) 38 N.B. Rep. 465.

Cunard, his heirs and assigns, *to pay to the said Anne Cunard,* her executors, administrators and assigns, *such appraised value, or to continue the lease of the said premises to the said Anne Cunard,* her executors, administrators and assigns, for a further term of twenty-one years, at the same yearly rent, under the like covenants in all respects as herein contained and expressed.

I construe this as containing mutual covenants by the parties that there shall be "at the end of the term" a valuation in the manner prescribed of buildings and improvements and then and not before the lessor shall declare his election and at least until he has after such finding so declared the lessee is bound to hold herself ready to renew.

I think there is clearly an implied agreement that the lessee shall remain in possession pending the bringing about of what is expressly provided for as the basis of the further execution of what has been partly in express terms and partly by implication agreed to be done.

If ever there was a contract where the considerations "of the terms of the contract in a reasonable and business manner" as expressed in the very apposite words of Lord Esher in *Hamlyn & Co.* v. *Wood & Co.* (1), gave rise and vitality to an implication, when due regard is had to what the surrounding circumstances and the evident purposes of the parties were, this is that contract.

The English cases of analogous import seem to be generally of a converse character giving the lessee the option, and hence in part the difficulty of finding authority.

But we have the American cases of *VanRensse-*

(1) (1891) 2 Q.B. 488.

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laer's Heirs v. *Penniman*(1), followed in *Holsman* v. *Abrams*(2), which seem very much in point, though I cannot assent to what is suggested there as to a tenancy from year to year resulting unless supplemented by payment of rent in the way which usually implies that. *Nudell* v. *Williams*(3) is in the same direction.

The observations by eminent judges in *Hamlyn & Co.* v. *Wood & Co.*(4) to the effect that cases upon other contracts are of little service stand good, yet the authorities largely got together in the argument of that case, and on the same subject of necessary implication under review from a different point of view in the case of *Butterfly Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*(5), in the current volume, exhibit the maintenance of numerous implications much less obvious than what I find here.

Having regard to the express covenants and necessary implications here, just as clear to my mind, I think a court of equity could in such a case restrain the lessor from proceeding in violation of his obligations in the premises. In view of the nullity of the award as made; of the ambiguous character of the lessor's election; of the possibility that there is no power to compel the appraisers to act and rectify their omission or the lessor to nominate another, or in any way do what obviously must be done to enable the lessee to obtain what by the findings of the learned trial judge is her right, I think it needless to elaborate how or why a court of equity could and should holding my view of the agreement find its way to restrain the respondent. Without extending the equit-

(1) 6 Wend. 571.
(2) 2 Duer. 435, at p. 446.
(3) 15 U.C.C.P. 348.
(4) (1891) 2 Q.B. 488.
(5) 99 L.T. 818.

able jurisdiction given by the statute further than was in the somewhat analogous legislation of the "Common Law Procedure Act" done as applied to other cases than ejectment suits when the test was whether restraint could properly be applied unconditionally to the claim set up I think such an equity exists here.

Whether in the case of a full explicit repudiation of all his obligations by the lessor which would clearly entitle the lessee to an action for damages the court, seeing he is a man of substance, might or not leave her to her action may not be clear, but he has created a most embarrassing situation I need not dwell on merely to make more so.

But in the case presented and holding the view I do of the nature of the obligations binding the parties and possible want of other remedy there should be no doubt of what course to adopt.

The defence, however, is maintainable at law and the pleading is amendable and we are bound to amend if need be to do justice. The respondent's right to eject could only arise when the lessee's holding became wrongful by virtue of the lessor's express election and demand of possession after a valid award. I see, however, no necessary implication that the appellant should be entitled to hold longer than until the lessee's election after such an award. To hold for an ulterior purpose of securing payment seems an extension of the term not fairly within the reasonable implications of the agreement.

I would declare award void, allow the appeal with costs and dismiss the action.

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DUFF J.—The respondent is the owner of the reversion in certain premises in the City of St. John which, by a lease dated the 1st of May, 1886, were demised for a term of twenty-one years from that date to the appellant's predecessor in title. The lease contained a provision in the following words:

> And it is agreed by and between the parties to these presents that at the end of the said term the buildings or improvements heretofore erected, or which may hereafter be erected or made by the said Anne Cunard, her executors, administrators or assigns on the demised premises, shall be valued by two indifferent persons, one to be chosen by each party, which two parties, in case of disagreement, shall choose a third, the appraisement of whom, or any two of them, shall be conclusive as to the value of such buildings and improvements; at which time it shall be in the option of the said Charles William K. Cunard, his heirs and assigns, to pay to the said Anne Cunard, her executors, administrators and assigns, such appraised value, or to continue the lease of the said premises to the said Anne Cunard, her executors, administrators and assigns, for a further term of twenty-one years, at the same yearly rent, under the like covenants in all respects as herein contained and expressed.

Upon the expiry of the term valuators were appointed who professed to make an appraisement pursuant to this provision. The respondent then notified the appellant that he would pay to her the sum found by the appraisement as the value of the improvements, and at the same time tendered that sum. This tender the appellant refused to accept; and the appellant having further refused to give up possession, in compliance with the respondent's subsequent demand, the action out of which this appeal arises was brought. On the argument before us the respondent's claim to recover possession was put upon two grounds: 1st, that the term vested in the appellant having expired, she was left without any right of possession; and 2ndly, that assuming some right of possession to have remained vested in her after the expiry of the term and

pending the exercise by the respondent of the option conferred by the clause quoted above, that right has lapsed because the respondent has pursuant to that clause elected to pay the value of the improvements and to resume the premises demised.

The question raised by the first of these contentions need not in my view of the case be considered. To come to the second—the plaintiff, upon the expiry of the term became entitled to elect whether he would "continue the lease" for a further term of twenty-one years, or pay the lessee for her improvements. It is not perfectly plain on the face of this clause at what point of time or in what manner the election is to be exercised. The clause is susceptible of several constructions; and of these both parties seem to have accepted the view according to which the lessor was bound only to make his election within a reasonable time after the expiry of the term, and might do so by any unequivocal expression of his intention.

Has the lessor then exercised his election to pay for the improvements? In form he has admittedly done so. He has tendered the amount found by the valuators to be the value of the improvements; has expressly declared his intention not to renew the lease; has demanded possession; has brought ejectment. It is argued, however, that this *ex facie* valid exercise of his option to determine the possession of the lessee is vitiated by the circumstance that everything so done was done on the footing that there had been a valid appraisement of the improvements. It is not and cannot be seriously disputed that the valuators in making the appraisement left out of account improvements for which they ought to have allowed; or that this omission had the effect of invalidating the ap-

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praisement. Does this circumstance—the invalidity of the appraisement—affect the validity of the respondent's election?

The alternatives between which he was to decide, be it observed, were, in the words of the clause, on the one hand, "to pay * * * such appraised value" and on the other hand "to continue the lease * * * for a further term of twenty-one years." His election might be effected either by evincing an intention "to pay" or by evincing an intention not "to continue the lease." If we limit ourselves to evidence positively manifesting an intention to pay there is something to be said in support of the view that the respondent's acts indicated an intention to pay only the specific sum awarded by the valuators—rather than the true value of the improvements as determined by a proper proceeding under the provisions of the lease. But, whatever may be said upon that point, the notice of the 22nd of June, 1907, was in explicit terms a communication of the respondent's intention not to renew the lease. In the light of that communication the effect of the respondent's conduct appears to have been simply this; that he had decided to resume possession and that he was proffering a sum of money which was as much as he admitted he was liable to pay as the value of the improvements. That, subject to the effect of any mistaken belief under which he may appear to have acted, was an irrevocable election to pay whatever the appellant might be entitled to.

Did the respondent then proceed under any mistake which can be held to have deprived his acts of their normal legal effect? Had it appeared that both parties were proceeding under the belief that the valuators had made a complete valuation within the mean-

ing of the lease, and that the respondent had exercised his option under that belief, when in truth the exercise of the option exposed him to a liability to pay a very much larger sum than that awarded by the valuators, it may be that (no equity intervening to prevent it, and the appellant insisting upon a valuation pursuant to the lease), the respondent would have been entitled to revoke his election. It would, nevertheless, even in that case, be revocable only at his option. I do not know upon what principle the appellant could insist on treating it as void so long as the respondent should be willing to stand by it. Here, however, evidence is wanting to support the contention that it was open to the respondent—at all events at any time after the commencement of the action—to recall his election. It is quite impossible I think to escape the inference that, at least as early as the time when the appellant refused the respondent's tender, the respondent became aware that she disputed the validity of the valuation. In these circumstances whatever might have been his rights up to that time, he must be taken by bringing ejectment to have concluded himself from setting up his mistake as a ground for withdrawing from the position he had assumed.

The appellant's defence consequently fails. But an important question arises respecting the cross relief claimed by the defendant. The facts do, I think, establish her contention as I have already intimated that the the appraisement so called was wholly invalid; and it is, moreover, I think, sufficiently calculated to becloud her rights in regard to compensation and to embarrass her in the prosecution of her claim to give her a title to relief in a court of equity. The difficulty in the defendant's way is one which arises

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solely out of rules of procedure. The Supreme Court of New Brunswick has held that under the "Supreme Court Act" it is not within the power of the court to grant the appellant any relief in this action. One cannot help feeling that in the circumstances of this case it is regrettable that such relief cannot be given at once; but I cannot bring myself to entertain any doubt that this court would not be justified in reversing the decision of the court below on that point. The question is, as I have said, a question of procedure—whether the Supreme Court of New Brunswick on its common law side has power in this action to grant the relief claimed or whether on the other hand substantive proceedings must be instituted in the equity branch of the court. The course of this court—and if I may say so the rule seems to me to be a wise one—is that we do not interfere with the deliberate decisions of provincial courts upon matters which are matters of procedure only unless the determination impeached involve something like a departure from the requirements of substantial justice. It is impossible to say that there is any such departure in this case. I venture, moreover, to say that I have just as little doubt that on the merits of the question the decision of the Supreme Court of New Brunswick is right. The statutory provisions material for consideration to the point are these:

Section 134. For the purpose of carrying into effect the objects of the two last preceding sections and of the provisions of this chapter relating to ejectment, respecting equitable defences, and for causing complete and final justice to be done in all matters in question in any action on the common law side of the court, the court or a judge thereof, according to the circumstances of the case, may at the trial or at any other stage of the action or other proceeding, pronounce such judgment or make such order as the equitable rights of the parties respectively require, and may make such rule or order as to

adding third parties, or treating parties named plaintiffs as defendants, or parties named defendants as plaintiffs and as to costs and may direct such inquiries to be made and accounts to be taken as seems reasonable and just and may as fully dispose of the rights and matters in question as a court of equity could.

Section 287. In case the defendant, or any other person not named in the writ who has obtained leave to appear and defend, has a defence to the action on equitable grounds, he may in addition to the notice denying the plaintiff's title, and asserting title in himself, state by way of defence the facts which entitle him on equitable grounds to retain possession; and such statement shall begin with the words, "For a defence on equitable grounds."

Section 289. The defendant may in such statement, as in a bill in equity or in answer asking gross relief, attack the title of the plaintiff on any ground whatever, and in all such cases he may pray and ask for relief against the plaintiff; and it shall be competent for the court on the hearing or trial of the cause in all such cases to grant or withhold the relief prayed for as law and justice shall demand, and generally to do justice and to determine all questions between the parties arising in the action according to law.

Section 289 is the enactment mainly relied upon. The relief which the courts thereby authorized to grant the defendant in an action of ejectment would seem to be relief which is based upon a state of facts affording a ground for impeaching the plaintiff's title to which the court can give effect and does give effect as a defence to the action. In other words before the power conferred upon the court by this section can come into operation you must have facts sufficient to support an attack on the plaintiff's title and thereby constituting a defence to the action; then and then only, if on that state of facts the defendant would in a substantive proceeding be entitled to claim affirmative relief against the plaintiff the statute empowers the court (in order to give complete effect to the rights arising out of that state of facts), to grant that relief at once, without the necessity of further proceedings. My view of the section may be exemplified by supposing the case of a plaintiff in ejectment who bases his

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rights to possession upon a conveyance by the defendant which the latter alleges was obtained by undue influence. Under the "Common Law Procedure Act" that circumstance could not have been set up by the defendant as a defence in an action of ejectment. Chitty's Archbold (12 ed.) 1038. In an action in the King's Bench Division for the recovery of possession of land the defence might be set up and if established the deed treated as set aside for the purposes of the action only; but no order directing the cancellation of the instrument could be granted. To use the language of Brett J. in *Mostyn* v. *West Mostyn Coal Co.*(1), at page 150, the deed could not be "set aside with regard to its effect in the future." The provisions in question here go a step further. Not only is the court authorized to give effect to the defence for the purposes of the action but any affirmative relief to which the defendant would be entitled in substantive proceedings in equity may be given in the ejectment action. It is a vastly different thing, however, to say that the court is empowered to grant such relief upon a state of facts which it has held to be wholly irrelevant to the plaintiff's claim. Such a case is, I think, plainly outside the purview of the section. And this is such a case; for here it has been held both in the court below and in this court that the invalidity of the so-called appraisement has no relevancy whatever to the respondent's claim for the recovery of the land.

I concur in the declaration proposed by my brother Anglin and subject to that would dismiss the appeal with costs.

(1) 1 C.P.D. 145.

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ANGLIN J.—The appellant (tenant) appeals from the judgment of the Supreme Court of New Brunswick awarding to the respondent (landlord) possession of certain wharf property on the River St. John in the City of St. John. The lease under which the appellant held this property expired on the 1st May, 1907. It contains the following provision:

> And it is agreed by and between the parties to these presents, that, at the end of the said term, the buildings or improvements heretofore erected or which may hereafter be erected or made by the said Anne Cunard, her executors, administrators or assigns on the demised premises shall be valued by two indifferent persons, one to be chosen by each party, which two parties in case of disagreement shall choose a third, the appraisement of whom or any two of whom shall be conclusive as to the value of such buildings and improvements, at which time it shall be in the option of the said Charles William K. Cunard, his heirs or assigns to pay to the said Anne Cunard, her executors, administrators and assigns such appraised value or to continue the lease of the said premises to the said Anne Cunard, her executors, administrators and assigns for a further term of twenty-one years at the same yearly rent, under the like covenants in all respects, as herein contained and expressed.

On the 2nd May, 1907, the landlord notified the tenant that, under this covenant, he had chosen and appointed one Holder as his appraiser and that he required the tenant to appoint her appraiser. On the 21st May the tenant formally notified the landlord that she had appointed as her appraiser one Belyea. The two appraisers so appointed met and, being unable to agree, chose, as third appraiser, one Edgett.

In the course of the trial some exception appears to have been taken by counsel for the tenant to the right of the two appraisers, named by the parties, themselves to select the third appraiser. The trial judge overruled this objection and it was not renewed on appeal to the Supreme Court of New Brunswick, nor has it been raised in this court.

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The appraisers proceeded to make a valuation, and eventually two of them—Holder and Edgett—concurred in an appraisement, dated the 15th of June, 1907, in which they valued the tenant's improvements at $2,550. There was some conflict of evidence as to whether proper steps had been taken to render the appraisement sufficient and binding without the concurrence of the appraiser named by the tenant. No objection, however, on this ground appears to have been urged in the Supreme Court of New Brunswick, and the point is not raised in this court. But the appraisers, as found by the trial judge—this finding being affirmed in the Supreme Court of New Brunswick—omitted to include in the improvements for which they made allowance, a portion of the wharf property which had been constructed of crib work and filled in, and which appears to be of substantial value. The courts below have expressed the opinion that upon this ground the appraisement is invalid. On the 22nd June the landlord notified the tenant that he had "decided not to renew the lease" and that he would pay "the amount of said award and terminate the said lease." The tenant did not relinquish possession, and on the 23rd July the landlord served upon her a formal notice to quit. The notice of the 22nd June was accompanied by a tender of the amount of the award, and a similar tender was made to the tenant at or about the time when the notice of the 23rd July was given. The tenant still continuing in possession, the landlord brought the present action of ejectment.

The Supreme Court of New Brunswick, affirming Hanington J., has held that there is no agreement, express or implied, in the lease entitling the tenant to retain possession of the demised premises after the

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expiration of the term of the lease, and that the landlord upon his demand was entitled to possession thereof before exercising his option to take the property over and pay for the improvements. The tenant, appealing to this court, contends that it is a necessary implication from the provision of the lease as to renewal that she should have the right to retain possession until the landlord has exercised, in a manner binding upon him, his option, not to renew but to pay for improvements.

The tenant alleges that the landlord, in giving the notice of the 22nd June that he had decided not to renew the lease, proceeded upon the assumption that the award of the appraisers was valid, and that, in giving the notice of the 23rd July, he proceeded upon the like assumption; that, under the terms of the provision above quoted from the lease, the landlord is not bound to elect until there has been a valid appraisement of improvements; and that his election, in the mistaken belief that there had been such an appraisement, is not binding upon him. Therefore, the tenant claims, the landlord has not yet irrevocably elected not to renew and until he has so elected she insists upon her right to retain possession.

Counsel for the landlord supported the judgment in appeal upon two grounds: (1) that under the terms of the lease the landlord is entitled to possession although he has not exercised his option against renewal; and (2) that he is entitled to possession, whatever the proper construction of the lease, because he has in fact irrevocably elected against renewal; and he took the position that his client has exercised his option against renewal in a manner binding upon him, and that he is prepared to abide by the consequences

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of having so exercised such option, including the chance of there being a larger appraisement of the value of improvements for which the tenant is entitled to compensation, should the award already made be set aside and a new appraisement had.

By her pleadings and at bar in the courts below, as well as in this court, the tenant has asked that, in any event, upon the finding that the appraisement is invalid, she should be given judgment for consequential relief in the form of an order setting aside the award and directing a re-appraisement.

If, upon its proper construction, the provision above quoted from the lease allows the landlord to postpone the exercise of his option until an appraisement or valuation of the improvements has been duly made, that is a term inserted for his benefit and, upon the maxim *quisque potest renunciare juri pro se introducto,* he may waive his right to await the appraisement of the valuators and may exercise his option immediately upon the expiration of the lease. If, doing so, he elects not to renew, he takes his chances as to the outcome of the appraisement of improvements. I see no reason why, when the landlord asks that the decision in his favour be upheld because he has elected not to renew and declares that he has so exercised his option under the lease, he should not be taken at his word, and given judgment upon that ground. *Gandy* v. *Gandy*(1), at pp. 81 *et seq.*

It seems to me unnecessary to determine the somewhat nice question whether, if he had not exercised his option, the landlord would be entitled to recover possession of the demised premises. If he should be so entitled, it would follow that, pending the appraise-

(1) 30 Ch.D. 57.

ment, he could eject his tenant, thereby seriously injuring, if not destroying, the business carried on by her on the premises, and yet, after the lapse of whatever time should be consumed in the making of a proper appraisement, he might notify the tenant that he elected to renew, when she would be confronted with the alternative of incurring the expense of moving back into the premises, and paying rent for the period during which she had been deprived of possession, or of forfeiting her right to compensation for her improvements. This not improbable situation affords a plausible argument against a construction which would give to the landlord the right to eject the tenant before he had irrevocably elected not to renew and also affords some support to the contention that the words "at which time" in the provision of the lease conferring his option upon the landlord were intended to relate not to the date at which the appraisement of the value of buildings and improvements should be completed, but to the date at which the term of the lease should expire.

But, inasmuch as the tenant's right eventually to recover the duly appraised value of her improvements will be protected by the estoppel of a judgment based upon a declaration, to which the landlord is willing to submit, that he has already made a binding election not to renew, I think that, varied by the insertion of such a declaration, the judgment for possession in favour of the respondent should be affirmed.

The respondent has also been awarded the sum of $250 for mesne profits since the termination of the lease. Of this the appellant complains. In view of the disposition of the main appeal, this portion of the judgment cannot well be interfered with.

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The right of the tenant to the cross relief which she asks, in the nature of an order setting aside the appraisement and remitting the matter of valuation of the appraisers for further consideration, depends upon the provisions of the statute law of New Brunswick applicable to actions of ejectment.

The Supreme Court Act (C.S.N.B. [1903], ch. III.) contains provisions with regard to equitable pleas similar to those of the "Common Law Procedure Act" (C.S. U.C. [1859], ch. 52), held not to apply to actions of ejectment (*Neave* v. *Avery et al.*(1)) and the "Administration of Justice Act" (Ont. 36 Vict. ch. 8). Amongst the latter are found, in sections 287 to 289, the provisions permitting defences upon equitable grounds in actions of ejectment. By section 287 the defendant is permitted to

> state by way of defence the facts which entitle him on equitable grounds to retain possession.

By section 289 he is permitted to

> attack the title of the plaintiff on any ground whatever and in all such cases he may pray and ask for relief against a plaintiff.

As pointed out by Barker C.J. section 289 can "only have reference to matters which would amount to a defence to the action, or which, in the language of section 287, would entitle the defendant to retain possession." The landlord having elected against renewal, it is obvious that the equitable plea of the tenant alleging the invalidity of the appraisement cannot constitute a defence to the action on equitable grounds. Neither does it amount to an attack upon the title of the plaintiff and, although by section 289 the court is empowered

(1) 16 C.B. 328.

to grant or withhold the relief prayed for as law and justice shall demand and generally to do justice and to determine all questions between the parties arising in the action according to law,

this jurisdiction is conferred only in "such cases," that is, in cases where the defendant puts upon the record by way of equitable defence a plea alleging matters which constitute a defence to the plaintiff's claim for possession—which entitle the defendant on equitable grounds to retain possession. If, upon such a plea, the defendant is entitled to relief, the court is empowered to give it to him. But the foundation of the jurisdiction is a plea by the defendant stating facts which entitle him on equitable grounds to retain possession. The plea in the present instance does not fall within this description. It alleges matter wholly irrelevant to the plaintiff's claim for possession based upon his having elected against renewal and it does not, therefore, present a case in which the court is empowered to exercise the jurisdiction conferred by section 289.

Counsel for the appellant directed attention to sections 133 and 134 of the "Supreme Court Act." These sections embody provisions of the "Administration of Justice Act." (See 36 Vict. (Ont.) ch. 8, secs. 3 and 8.) Section 134 enables the court to

pronounce such judgment or make such order as the equitable rights of the parties respectively require,

and

for the purpose of carrying into effect the objects of the two last preceding sections and the provisions of this chapter relating to ejectment, respecting equitable defences and for causing complete and final justice to be done in all matters in question in any action on the common law side of the court, * * * as fully dispose of the rights and matters in question as a court of equity could.

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This section, so far as it relates to an action for ejectment, for which a separate and distinct code is provided by secs. 275 to 385 of the "Supreme Court Act," appears to be limited in its purpose by the words above quoted. It is only for the purpose of carrying into effect the object of the provisions of sections 287-8 and 9 that the jurisdiction conferred by section 134 may be exercised in actions of ejectment. These provisions, as already indicated, do not extend to the pleading of equitable matters or equitable rights otherwise than by way of defence to the plaintiff's claim and it is only where they are properly so pleaded that relief can be given to the defendant in respect to them.

Having regard to these statutory provisions the proper conclusion seems to be that the appellant cannot in this action obtain the cross relief which she seeks in respect to the appraisement and which was refused her by the Supreme Court of New Brunswick.

For these reasons, with the variation in the judgment above indicated, I would dismiss this appeal with costs.

Appeal dismissed with costs.

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

Solicitor for the respondent: *Joseph J. Porter.*

THE EQUITY FIRE INSURANCE COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

J. C. THOMPSON AND THE UNION BANK OF CANADA (PLAINTIFFS) } RESPONDENTS.

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*Mar. 17, 18.
*April 5.

THE STANDARD MUTUAL FIRE INSURANCE COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

J. C. THOMPSON AND THE UNION BANK OF CANADA (PLAINTIFFS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance against fire—Statutory condition—R.S.O. [1897] *c.* 203, *s.* 168, *s.-s.* 10(*f*)—*Construction of statute—Gasoline "stored or kept."*

One of the conditions of the contract of insurance against fire imposed by the Ontario Insurance Act (R.S.O. [1897] ch. 203, sec. 168, sub-sec. 10(*f*), is that an insurance company is not liable for a loss occurring while gasoline, *inter alia*, is "stored or kept in the building insured * * * unless permission is given in writing by the company."

T. effected insurance on a building used as a drug and furniture shop having in his employ a qualified chemist who occupied rooms in the upper part as tenant. This clerk had a gasoline stove which he used occasionally for domestic purposes and later on he brought it down to the shop and used it in making syrups, and while doing so the building took fire and was totally destroyed.

Held, that this was a "keeping" of gasoline on the insured premises within the meaning of the statutory condition, and the insurance

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

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company were not liable for the loss. *Mitchell* v. *City of London Assur. Co.* (15 Ont. App. R. 262) distinguished.

Judgment appealed from (17 Ont. L.R. 214) reversed, Idington and Anglin JJ. dissenting.

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

The only question reserved for consideration on this appeal was whether or not gasoline was "stored or kept" on the insured premises in breach of the statutory condition imposed by R.S.O. [1897] ch. 203, sec. 168, sub-sec. 10(*f*). The facts relied on to support the defence of so "keeping" gasoline are sufficiently stated in the above head-note. All the other questions dealt with by the courts below were disposed of at the argument in respondent's favour.

Raney K.C. for the appellants. "Stored" and "kept" are not synonymous terms and effect must be given to each. "Kept" is the more comprehensive word and its meaning cannot be cut down by the more narrow term preceding it. See *Anderson* v. *Anderson* (2) as to the principle of construction in such case.

Mitchell v. *City of London Assur. Co.* (3) can easily be distinguished. It was decided there that lubricating oil was, to the knowledge of the company, a necessity for the operation of the insured property and its use was, therefore, an implied term of the contract. *Boyer* v. *Grand Rapids Fire Ins. Co.* (4), was decided according to our contention in this case.

As to the condition being reasonable see *Bastian* v.

(1) 17 Ont. L.R. 214.
(2) [1895] 1 K.B. 749.
(3) 15 Ont. App. R. 262.
(4) 124 Mich. 455.

British American Assur. Co.(1); *Johnston* v. *Dominion of Canada Guarantee Co.*(2), at pp. 479 and 482.

Gamble K.C. for the respondent Thompson. Words collocated in a manner similar to "stored or kept" in this condition have frequently been held to mean the same thing. For example, "have or keep" in *Biggs* v. *Mitchell*(3); "case or canister," *Foster* v. *Diphwys Casson Slate Co.*(4). In *Krug* v. *German Fire Ins. Co.*(5) a condition against using premises otherwise than for storage was not violated by a temporary use for other purposes. And the Ontario courts held the same in *Mitchell* v. *City of London Assur. Co.*(6).

Hellmuth K.C. for the respondent The Union Bank, referred to Strand's Jud. Dict. word "kept": *Farmer & Mechanics Ins. Co.* v. *Simmons*(7).

THE CHIEF JUSTICE.—As I read the evidence it establishes these facts:

That the plaintiff's manager, Post, some time before the fire, brought upon the insured premises half a gallon of gasoline to be used in a gasoline stove with which he cooked his meals in a room over the store, where he lodged with his wife. While the gasoline was being kept upstairs where it had been used for several days by Post for cooking purposes an emergency arose in connection with the preparation of syrups in the store and the stove with what was left of the gasoline (about a pint) was brought down to a room at the rear of the store to prepare the syrups, and during the

(1) 143 Cal. 287.
(2) 17 Ont. L.R. 462.
(3) 2 B. & S. 523.
(4) 18 Q.B.D. 428.
(5) 147 Pa. St. 272.
(6) 15 Ont. App. R. 262.
(7) 30 Pa. St. 299.

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time that it was thus in use for this purpose the fire occurred. The question to be decided on these facts is: Was gasoline stored or kept on the premises insured in violation of the condition of the policy set out at length by Sir Louis Davies?

This is a mixed question of law and fact which, in my opinion, must, in the circumstances of this case, be answered in the affirmative. I hold that there was a breach of this positive condition and that the plaintiff cannot recover.

The object of this statutory condition, which is part of the consideration of the policy, is to decrease the risk of destruction by fire of the thing insured, and, by limiting the peril insured against, to proportionately lessen the obligation of the insurer to indemnify the insured; and to that end it prohibits the storing or keeping on the premises of the very inflammable substances enumerated, *i.e.*, gasoline, etc. Can it be said that the insured did not violate this condition of the contract which he entered into with the company when he brought upon the premises gasoline, one of the prohibited articles, and which he kept there for several days and used in a gasoline stove for cooking purposes? I cannot find anything in the record to shew that there was any limitation of the time during which it was intended to use the stove for which the gasoline was required. It is said to have been discarded; but as a fact it was available for use at any time, as evidenced by the fact that the fire was caused by the use of the gasoline stove and its contents.

I do not think it is necessary to either extend or restrict the meaning to be given to the words "stored or kept." They are to be read along with the context and the whole section *must have a reasonable interpre-*

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tation, such as was probably contemplated by the parties at the time the contract was entered into. For a dealer to store or keep for commercial traffic during a protracted period the excluded substances on the insured premises under proper conditions of safety would, it is admitted, be a breach of the condition; but it is argued that to keep them for occasional daily domestic use during months under such conditions as common sense suggests are most likely to bring about the destruction of the premises is not a violation of such a condition. With proper deference and fully sensible of the weight to be attached to the opinions of the distinguished judges below, I am obliged to say that I cannot accept such a conclusion which necessarily involves the inference drawn by Mr. Hellmuth that the destruction of the property as a result of the use of gasoline in a gasoline stove kept on the premises is one of the perils *insured* against whereas the destruction of the property while gasoline is stored or kept under proper conditions as regards safety would not be a risk insured against.

Let me repeat again to avoid possible misunderstanding: This is not a case of bringing upon the insured property an excluded article for a temporary purpose or for a purpose which might reasonably be contemplated or be assumed to be in the minds of both the insurer and the insured in view of the subject matter of the insurance, such as arose in the *Mitchell Case*(1), but was the keeping on the premises of an excluded article in a manner and for a purpose in direct violation of the condition of the policy. The distinction between the case where the excluded article is brought upon the premises for a temporary pur-

(1) 15 Ont. App. R. 262.

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pose, and one in which it was kept there in direct violation of the condition, is well exemplified in the cases of *McCurdy* v. *Orient Insurance Co.*(1), in 1906, and *Boyer* v. *Grand Rapids Fire Ins. Co.* (2), in 1900. In the latter case the court said, in referring to a previous decision of *Smith* v. *German Ins. Co.*(3):

> In the last named case the gasoline was in the building for the purpose of being used by the painters, when they were making ordinary and usual repairs to the building by painting it where it needed painting. The court discussed the questions involved at length, citing many authorities, and held, in substance, that the making of ordinary repairs, in a reasonable way, even though it increased the risk while the work was going on, and even though an article was used in the work the use of which in the business carried on in the building was prohibited by the policy, would not avoid the policy; that if the use of naphtha at the time and in the manner in which it was used was reasonable and proper in the repair of the building, having reference to the danger from fire, as well as to other considerations, it would not render the policy void, but the question was a proper one for the jury.
>
> The case proceeded upon the theory that it was in the contemplation of the parties that the insured building should be kept in repair, and that what it was reasonably necessary to do to accomplish that purpose would not avoid the policy. But there can be no such claim here. It is a well-known fact that gasoline is a dangerous article to have in and about a building. The parties had a right to contract that it should not be allowed upon the premises without the written consent of the company. They made such a contract. Gasoline was brought upon the premises, not for the purpose of being used in a reasonable way for necessary repairs, but, according to the version of the plaintiff, for the purpose of using it in a gasoline stove in an upstairs room, having no direct connection with the store, but reached from an outside stairway. Would it be claimed that a gasoline stove could be used without the consent of the company, and that its use would not invalidate the policy? If not, could the keeping of gasoline be allowed on the premises for the purpose of using it in a stove without the consent of the company, and the policy remain good? If so, how much might be kept? And for how long? It seems to me to ask these questions is to answer them against the claim of the plaintiff.

(1) 30 Penn. S.C. 77. (2) 124 Mich. 455.
(3) 107 Mich. 270.

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Davies J.

I agree with Sir Louis Davies. The appeal should be allowed with costs.

DAVIES J.—These were actions brought to recover moneys claimed to be due under policies of insurance taken out by respondent Thompson in the appellant companies. More than one defence was set up to the actions by the companies and argued upon this appeal besides that with which I will deal presently. These defences related to prior and subsequent insurances upon the property in question as to which it was alleged no notice as required by the policies had been given to the companies. They were all, however, disposed of at the argument adversely to the appellants, the only question reserved for consideration being that of the proper construction of the statutory condition R.S.O. ch. 203, sec. 168, sub-sec. 10(*f*), which reads as follows:

> This company *is not liable for the losses* following, that is to say:
> (*f*) For loss or damage occurring while petroleum, or rock-earth or coal oil, camphene, gasoline, burning fluid, benzine, naphtha or any liquid products thereof, or any of their constituent parts (refined coal oil for lighting purposes only, not exceeding five gallons in quantity, or lubricating oil not being crude petroleum nor oil of less specific gravity than required by law for illuminating purposes, not exceeding five gallons in quantity, excepted), or more than twenty-five pounds weight of gunpowder is or are stored or kept in the building insured or containing the property insured, unless permission is given in writing by the company.

There was no dispute as to the facts relating to the fire which destroyed the insured premises or to the presence upon the premises at the time the fire occurred of a small quantity of gasoline, or to the circumstances under which it had been bought and remained upon the premises.

The respondent Thompson being the proprietor of

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a drug store, not being himself a licensed druggist, employed one Post who was so licensed as manager of his store. This manager was in charge at and prior to the effecting of the insurance and also at the time the fire occurred. He was also tenant of the respondent of the rooms above the drug store which he occupied with his family, all of which formed part of the insured premises.

Some weeks before the fire Post purchased and brought to his rooms above the drug store half a gallon of gasoline which he used in a gasoline stove for cooking purposes for three or four days and then ceased to use it further for cooking purposes and left the stove with the unused portion of the gasoline in it in one of his upstair rooms.

On the day of the fire he carried the stove and its gasoline contents down to a room in the rear of the drug store and there lighted the gasoline in the stove and began to boil some syrups. The stove had been burning some ten minutes or more when the syrup boiled over and the fire took place.

The fact that the fire took place as a consequence of the use at the time of the gasoline stove does not in itself affect the question of the plaintiff's right to recover. The sole question is: Did the loss occur while gasoline was "stored or kept" on the premises within the meaning of those words in the statutory condition?

The learned trial judge in a considered judgment after reviewing the cases upon the point came to the conclusion that to bring a case within the condition

> there must be something in the nature of dealing in such articles or having a storehouse therefor;

and that

> no court could give to the words a meaning wide enough to cover the present case.

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In the Court of Appeal the learned Chief Justice who delivered the judgment of the court after dealing with the facts went on to say that

what is to be ascertained is the meaning to be attached to the condition as a whole.

To that I fully subscribe and inasmuch as the language of the condition is that of the legislature and not that of the company the court is not justified in construing the words for any reason against either insurer or insured. Effect must be given to the plain simple meaning of the words if that can be ascertained. The Chief Justice goes on to say:

Is there any reason for separating the words "stored or kept" even though they were expressed in the disjunctive? If the intention was to exclude gasoline and the other substances mentioned in condition 10 (*f*) and the word "kept" has a wider and more extensive meaning than "stored" why use the latter at all. It must be taken to have been used in the ordinary sense and for some reason and as not unnecessarily inserted. And "kept" should also be read as not intended to nullify the meaning of the word with which it is associated. In other words they should be read together. Read together they indicate the *continuous habitual storage or keeping of an article.*

I have italicized what I understand to be his conclusion which in another sense he puts as follows: "It would do no violence to either words to read them in this condition as they were by Hagarty C.J.O. in *Mitchell* v. *City of London Ass. Co.* (1) as

pointing to a dealing in such articles or having a storehouse therefor.

But Chief Justice Hagarty in the paragraph from which the above words are taken seems rather to rest his judgment upon the ground that the words "stored or kept" were not applicable

to a lubricating oil necessarily used for machinery where machinery or a boat propelled thereby was the subject matter of the insurance

as was the case then before him.

(1) 15 Ont. App. R. 262, at p. 268.

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As I understand the ratio of the judgment of the Court of Appeal in that case it was that the presence of the oil there in question on board of the tug was not within the condition of the policy, but was within what was held by them to be *an implied exception,* out of that condition. The Chief Justice so reasoned from the fact that the oil was as he said on board the tug "for the necessary purposes of lubricating the engine" and with the knowledge of the insurance company as he says

> the court must assume a universal knowledge that lubricating oil must be so used.

It was this combined necessity and knowledge which induced his conclusion that the condition did not cover this oil, but that on the contrary it was within the implied exception which permitted it. Chief Justice Hagarty goes on to say:

> No person insuring a steam vessel against fire would think of obtaining express permission to keep enough oil to lubricate the machinery nor would, except after taking legal counsel, construe this clause in the statutory condition as prohibiting its use.

Osler J.A. in the same case at page 278 while stating he was not prepared to differ from the Chief Justice rested his judgment upon the ground

> that the statutory condition is qualified by the application which is a part of and is incorporated with the policy and which prohibits only the storing of *camphene, coal oil or burning fluid* without the special permission of the company saying nothing of petroleum or rock-earth oil.

Patterson J.A. concurred with both Hagarty C.J.O. and Osler J.A., while Burton J.A. dissented from the judgment, but upon a ground having no relation to the one we are discussing.

This case cannot be said to be an authority one

way or the other applicable to the appeal now before us. I am not able to accept the construction of Chief Justice Moss that the words of the condition "stored or kept" must be read as indicating a "continuous habitual storage of an article." There may be authority for such a conclusion in some of the cases cited from the state courts of the United States on the language of the policies before those courts, but I cannot accept it with regard to this statutory class nor can I accept the alternative construction he suggests and which was adopted by the trial judge based evidently upon a casual observation made by Chief Justice Hagarty in the case of *Mitchell* v. *London Assurance Co.* (1) that they may "relate only to something in the nature of dealing in such articles or having a storehouse therefor." I venture to think that both readings involve the importing into the section of a limitation never intended by the legislature and which the words used will not justify. I think there is reason to be found in the use of the disjunctive separating the words stored or kept, the latter being a word of broader and larger meaning than the former. If the word "stored" was alone used it might be held to import some commercial or business meaning only, and such as would be applicable to and understood in the world of trade and commerce. But I cannot see how such a limited meaning can be put upon the word "kept." It has no special reference to dealing in an article as one of trade and commerce, and to so limit it must be to fritter away the language of the legislature. It must be taken as being used in its ordinary sense and as it would be understood by ordinary

(1) 15 Ont. App. R. 262, at p. 268.

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people and as inserted for some good reason and not unnecessarily or without meaning. It might be a reasonable limitation to say that the prohibition is not applicable to such very small quantities of the forbidden article, say a few ounces for medicinal or cleansing purposes as are not unusually found in ordinary households. A court might well determine without doing violence to the language of the clause that it did not prohibit and never was intended to prohibit such very small quantities, and obviously it must be a question in each case whether the quantities kept are within that limitation. But could such a limitation be extended to the pint, the remains of the half gallon, which was the unfortunate cause of the fire here? I feel compelled to say no. It is said that at the time of the fire there was only about a pint. But that was quite sufficient for the purpose of boiling his syrups by the chemist. Though the fact that this quantity of gasoline actually caused the fire may have nothing to do with the defendant's liability for the damage it would be almost ludicrous for the court to hold that it existed in a quantity so insignificant as to be innocuous or ignored.

There remains the ingenious suggestion of Mr. Hellmuth, which at the time impressed me somewhat, that under the condition the fire must have occurred while the gasoline was being "kept" on the premises and that this fire occurred not while it was being kept, but while it was being actually used for fuel. But if the conclusion is once reached that it was so being kept while it was being used for three or four days as fuel upstairs and for the period when it was abandoned as a fuel and simply remained in the gasoline stove, it is difficult to see when it ceased to be kept

simply because it was brought down stairs in the stove where it had been for some weeks and then ignited for the purpose of boiling syrups for the chemist's business. It seems to me to come back to the primary question: Was it not being "kept" when and while it remained in quantity a pint or more in the rooms upstairs after it ceased to be used for the three or four days as a fuel and did it not continue to be kept while it was being carried down and used in the room downstairs behind the drug store for the purpose connected with the business of boiling syrups?

The criminal cases called to our attention assist very little if any in the construction of this clause, and I am bound to say that after reading the different American cases cited I did not find them, owing to the different language used in the clauses of the policies discussed, and to the fact that they were conditions of policies prepared by the companies and so for special reasons construed must strongly against the party preparing them, of any great assistance in this case where we are construing the language of the legislature.

Two things in the condition in question are of importance with respect to its construction, one that with regard to certain of the prohibited articles several have a specified minimum quantity excepted or allowed; five gallons in the case of certain oils, and in that of gunpowder twenty-five pounds; and the other is that apart from such specific exceptions or permissions general words are used at the end of the clause qualifying the absolute prohibition, namely, "unless permission is given in writing by the company." These latter words seem intended to meet the suggested cases where the arbitrary and absolute lan-

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guage of the prohibition might work intolerable hardship while the adoption of the suggested construction excluding such trivial quantities as a few ounces for cleansing clothes from stains or spots or for medicinal purposes in households from the operation of the prohibition relieves the clause from a construction contended to be obviously absurd and not within the intention of the legislature.

The appeals should be allowed with costs and the actions dismissed.

IDINGTON J. (dissenting).—The only question raised herein and now left for decision turns upon the construction of the statutory condition No. 10, subsection (*f*), which as set forth in section 168 of "The Ontario Insurance Act" was indorsed as required by that section on the policy sued on.

The purport of it is that the company is not responsible for loss or damage that occurs "while petroleum" or other things specified

> is or are stored or kept in the building insured or containing the property insured

without written permission. The question to be resolved is the meaning of the words "stored or kept" as used in said condition.

The statutory conditions framed by a commission of judges were first imposed in 1876. The one now in question stood as first enacted until 1887, when possibly anticipating the decennial revision of the Ontario statutes, due to be done that year, the "Ontario Insurance Act, 1887," was passed and this condition was modified in the way I will presently refer to.

Meantime the case of *Mitchell* v. *City of London*

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Fire Ins. Co.(1), which required for its decision that the condition, as it stood then must be interpreted in order to decide the rights of the parties arose out of an insurance on a tug. The tug insured had carried about two gallons of a lubricating oil which was a product of one of the forms of articles thus prohibited.

In deciding in 1886 that issue in that case the late Mr. Justice Armour of this court then sitting in the Queen's Bench Division of the High Court of Justice for Ontario after giving his reasons at p. 744 for doing so held as follows:

> In my opinion the words "stored or kept," as used in this condition, are too indicative of duration and permanence to cover a user such as was had of this black oil on this tug.

The late Mr. Justice O'Connor, though doubting if a tug was a building expressly agreed in this holding and thus the majority of that court maintained the plaintiff's case.

An appeal was taken to the Court of Appeal for Ontario(1) where the late Chief Justice Hagarty, who had been of the commission which framed the conditions held, for reasons that appear on pp. 267 and 268, that the oil in question was not "stored or kept." He says:

> It is not "stored or kept," in the apparent meaning of the words which seem to point to a different matter such as the dealing in such articles, or having a storehouse therefor.

This was concurred in by Mr. Justice Patterson, afterwards a judge of this court, and accepted by Mr. Justice Osler who, however, preferred to rest his judgment of that case on the express terms of the contract as evidenced in the application as he read it.

(1) 12 O.R. 706. (2) 15 Ont. App. R. 262.

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He was also one of the judges who concurred in the judgment of the Court of Appeal now in question.

At first blush I was led by what is or appears, on closer reading, only mere illustration in Chief Justice Hagarty's opinion judgment to suppose he had proceeded on an implication to be found in the contract from the nature of the subject matter of the insurance. Clearly that is not his meaning, but a means of arriving at the same meaning of the phrase as Mr. Justice Armour had.

And just as he finds everybody knew of the use of lubricating oil being in necessary use, so everybody knows of each of the other things.

He never intended to say this kind of lubricating oil was a necessity. He had lived too long in this world with an acute sense of what was going on not to know that lubricating oils of other kinds had universally been in use up to about twenty years before the making of the contract he was dealing with to imply any such thing.

I have no doubt he did imply that under such a condition of things as existed the legislature could never have intended to put the meaning on "stored and kept" he was then asked to put and we are now asked to put.

I cannot distinguish that case in principle from this one. It was put clear beyond doubt that the judicial interpretation of the words "stored and kept" as used in this condition did not cover the case of a casual having of any of the prohibited articles in a building whilst burnt down.

What happened the condition, about a year later than the decision in the Queen's Bench, was that it was as already referred to amended by the "Ontario Insur-

ance Act, 1887," inserting gasoline which had not previously been so amongst the things forbidden "to be stored or kept."

It was further amended by inserting the following words in the excepting parenthesis of the condition:

or lubricating oil not being crude petroleum nor oil of less specific gravity than required by law for illuminating purposes, not exceeding five gallons in quantity.

The judicial interpretation had evidently thus got legislative sanction in 1887 which has never been questioned since.

The general use of petroleum began about 1861 and increasing general use of its many products had also by 1887 become such as to enable those concerned to frame a more appropriate condition than had been done twelve years before. Gasoline is then for the first time expressly enumerated amongst the articles dealt with. And the term lubricating oil is used for the first time and then in the parenthesis, and distinguished from crude petroleum, and required to be of a certain specific gravity.

In no way does this indicate anything in the amending Act to shew that the legislature did not mean to use the words "stored or kept" in the sense attributed to them by the court.

In this amended Act I think the presumption is that the legislature did use them in the sense attributed to them by the court. See the cases cited, Hardcastle (3 ed.), p. 183 *et seq.*.

The amendment of the "Interpretation Act," by 60 Vict. ch. 2, sec. 11, now section 9, sub-section 59, of the "Interpretation Act of 1907," R.S.O., whatever it may mean is not retroactive or of such nature as to touch herein this case now cited.

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The use of gasoline has gone on increasing and become so general that probably half the existing fire insurance in Ontario is for the moment practically worthless if we find as asked to do here that a pint of gasoline being in a building when fire takes place destroys the right to recover.

Whatever may be said of the true meaning of the phrase in question especially in light of the curiously framed excepting parenthesis in the middle of the condition, I think that the meaning indicated expressly by judicial authority, sanctioned by legislative use immediately after such indication, and then upheld by such a mass of judicial opinion in the Court of Appeal immediately after that must be taken (when unquestioned ever since amid so vast a number of cases as undoubtedly have given opportunity to demand such interpretation as now sought by appellant), to have come to be regarded by all concerned as the meaning by which they were bound in their dealings in regard to insurance for the past twenty years.

The meaning adopted so long ago and followed by the Court of Appeal in the judgment now under consideration is in harmony with the meaning given amongst many others to the word "keep" by the Century Dictionary "to have habitually in stock or for sale."

I respectfully submit we should always hesitate to adopt in the interpretation of either statute or contract a meaning that is likely to run athwart the common understanding of men in the ordinary conduct of their affairs, lest thereby the ends of justice be frustrated.

The adoption of the plain ordinary sense of the language used is daily and properly pressed upon us.

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The basis of the rule is to give to words and phrases that meaning, whether etymologically accurate or not, which passes current amongst men in relation to the business in hand.

These words in question here have come to have and be accepted as having in the relation now in question the meaning the Court of Appeal has applied.

I think the appeal ought, therefore, to be dismissed with costs.

DUFF J.—I agree in the opinion stated by the Chief Justice and Mr. Justice Davies.

ANGLIN J. (dissenting).—In the course of the argument the court intimated that, except upon one point common to both cases, the appeal of the insurance companies is hopeless. That point, reserved for consideration, is, whether, at the time the plaintiff's premises were destroyed by fire, gasoline was "stored or kept" upon them, within the meaning of statutory condition 10(*f*), prescribed by the "Ontario Insurance Act," R.S.O. (1897) ch. 203.

The facts are fully set forth in the judgments of the learned trial judge and the Chief Justice of Ontario(1), and in that of Mr. Justice Davies in this court.

Statutory condition 10 (*f*) exempts the insurers from liability

> for loss or damage occurring while * * * gasoline * * * is stored or kept in the building insured * * * unless permission is given in writing by the company.

This condition, when originally introduced in Ontario, as No. 10 (*g*), by the statute 39 Vict. ch. 24, did

(1) 17 Ont. L.R. 214.

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not apply to gasoline; but, by the Act 50 Vict. ch. 36, gasoline was included in the list of prohibited articles.

In *Mitchell* v. *City of London Assurance Co.*(1), in 1886, and(2) in 1888, the Ontario courts were called upon to interpret this statutory condition. A fire had occurred on a tug while there was upon it a small quantity (about a gallon in two small cans) of oil—assumed to be "rock, earth or coal oil"—used for lubricating the machinery. Lubricating oil was not then, as it is now, excepted from the condition to the extent of five gallons. (See 39 Vict. ch. 24.) In the Divisional Court it was held by Armour and O'Connor JJ. (Wilson C.J. dissenting), that crude or earth oils, kept for lubricating purposes in such a quantity as was on the tug, could not be said to be "stored or kept" within the meaning of the statutory condition.

> Storing or keeping an article seems to me to convey the notion of conservation, a keeping inconsistent with the destruction of continual or occasional use,

per O'Connor J., at p. 748.

In the course of his judgment in the Ontario Court of Appeal, Hagarty C.J.O., at p. 268, said that the oil was

> not "stored or kept" in the apparent meaning of the words, which seem to point to a different matter such as the dealing in such articles, or having a storehouse therefor.

Patterson J.A. concurred with Hagarty C.J.O. Osler J.A. preferred to rest his concurring judgment upon another ground. Burton, J.A., who dissented on another point, expressed no opinion upon the construction of the words "stored or kept."

So construed in the Ontario courts twenty years

(1) 12 O.R. 706. (2) 15 Ont. App. R. 262.

ago, this statutory condition has since been used in many thousands of insurance contracts, and we find it unqualified in the policies now sued upon. Before its adoption in Ontario in 1876 it had received a like construction in the NewYork Courts, *Williams* v. *Fireman's Fund Insurance Co.*(1), in 1874, and I respectfully agree in the statement of the Chief Justice of Ontario in the present case that

> the trend of decision in the courts of the United States is in the same direction.
>
> It is a wholesome rule that has often been laid down that when a well-known document has been in constant use for a number of years, the court, in construing it, should not break away from previous decisions, even if, in the first instance, they would have taken a different view, because all the documents made after the meaning of one has been judicially determined are taken to have been made on the faith of the rule so laid down.

Dunlop & Sons v. *Balfour, Williamson & Co.*(2), in 1892.

In *Bourne & Tant* v. *Salmon & Gluckstein, Limited* (3), the Court of Appeal when asked to overrule the Divisional Court decision in *Direct Spanish Telegraph Co.* v. *Shepherd*(4), in 1884, refused to do so. Cozens-Hardy M.R. said:

> Mr. Macorran has frankly and fairly asked us to overrule that decision and to say that it is no longer law. I am not prepared to do so. I think it is a very serious matter in dealing with rates and questions of this kind lightly to depart from an interpretation which must have governed and guided the rights of parties in innumerable cases of a similar kind ever since.

And Sir Gorrel Barnes said:

> I think it is extremely important where a decision has been in existence for some 20 or 25 years, which is practically on all fours with the case before the court, that the court should be very reluctant to entertain a fresh view of that old decision which might disorganize

(1) 54 N.Y. 569.
(2) [1892] 1 Q.B. 507, at p. 518.
(3) [1907] 1 Ch. 616.
(4) 13 Q.B.D. 202.

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the state of things which had existed as a result of that old decision for that length of time.

A similar view was expressed by Vaughan-Williams L.J., in *Southwark Union* v. *City of London Union* (1). For other instances of the application of the rule reference may be made to *Re Wallis; Ex parte Lickorish* (2); *Pandorf* v. *Hamilton* (3); *Philipps* v. *Rees* (4); *Palmer* v. *Johnson* (5); *Smith* v. *Keal* (6); *Pugh* v. *Golden Valley Railway Co.* (7).

The same rule is applicable to old and accepted dicta of eminent judges which are likely to have affected divers and numerous contracts. *In re Rosher* (8); *Quilter* v. *Heatly* (9); *Ex parte Willey* (10).

The views expressed in *Mitchell* v. *City of London Assurance Company* (11), are certainly not "manifestly erroneous and mischievous" (*Pugh* v. *Golden Valley Railway Company*) (7); on the contrary unless the meaning of "kept" is restricted in some degree by collocation with "stored"—*noscitur a sociis*—the latter word is practically expunged; neither are these views "contrary to principles of the general law" (*Smith* v. *Keal*) (6); nor have they been questioned in later cases (*Labouchere* v. *Dawson*) (12). We are dealing with a "contract in daily use" (*Philipps* v. *Rees*) (4), and with a decision which

> is not binding upon us, but in view of its character and practical results is one of a class of decisions which acquire a weight and effect beyond that which attaches to the relative position of the court from which they proceed" (*Pugh* v. *Golden Valley Railway Co.*) (7).

(1) [1906] 2 K.B. 112.
(2) 25 Q.B.D. 176, at p. 180.
(3) 17 Q.B.D. 670, at p. 674.
(4) 24 Q.B.D. 17, at p. 21.
(5) 13 Q.B.D. 351, at pp. 354-7-8.
(6) 9 Q.B.D. 340, at pp. 351-2.
(7) 15 Ch.D. 330, at p. 334.
(8) 26 Ch.D. 801, at p. 821.
(9) 23 Ch. D. 42, at p. 49.
(10) 23 Ch.D. 118, at pp. 127-8.
(11) 12 O.R. 706.
(12) L.R. 13 Eq. 322.

"One of those decisions which * * * it would be mischievous to overrule" (*Andrews* v. *Gas Meter Company*) (1).

To put upon the language of paragraph (*f*) of the 10th condition a construction different from that placed upon it 20 years ago by such eminent judges as Hagarty C.J.O. and Armour J., which, so far as I can find, has not since then been questioned in Ontario, and which, it is entirely proper to assume has been acted upon by insurers and insured during the intervening period, and now to hold that it is a breach of this condition to have upon the insured premises a small quantity of gasoline for domestic purposes, would, I think, be unfair and unjust, and could produce nothing but mischief and uncertainty in the mercantile world. On this ground alone I would affirm the judgment in appeal.

I fully recognize that in the *Mitchell Case*(2) the article in question was something which both insurer and insured must have contemplated should be used, having regard to the subject of the insurance; and therefore a case of implied exception was made out. But the decisions in *Williams* v. *Fireman's Fund Ins. Co.*(3); *Putnam* v. *Commonwealth Ins. Co.*(4); *Mayor of New York* v. *Hamilton Fire Ins. Co.*(5); *Hynds* v. *Schenectady County Mut. Ins. Co.*(6); *Springfield Fire and Marine Ins. Co.* v. *Wade*(7), and other American cases are not susceptible of this explanation. Moreover, I rely not upon the actual decision in the *Mitchell Case*(2), but rather upon the

(1) [1897] 1 Ch. 361, 371.
(2) 15 Ont. App. R. 262.
(3) 54 N.Y. 569.
(4) 4 Fed. Rep. 753.
(5) 10 Bosw. 537.
(6) 11 N.Y. 554.
(7) 95 Tex. 598.

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views as to the meaning of the phrase "stored or kept," which the distinguished Ontario judges, whom I have named, expressed as a ground of their judgment.

I was also impressed by the contention of counsel for the respondents that, whether or not the gasoline should be regarded as having been "stored or kept" while it lay in the disused stove upstairs, it certainly was not being "stored or kept" when it had been brought down stairs in the stove for actual and immediate use and consumption. At the time of the fire the conditions were the same as if the gasoline had been brought upon the premises only when the stove was carried downstairs. Gasoline thus in actual use and in course of consumption cannot be said to be "stored or kept." *Dobson* v. *Sotheby* (1); *Maryland Fire Ins. Co.* v. *Whiteford* (2); *Phœnix Ins. Co.* v. *Lawrence* (3); *Mears* v. *Humboldt Ins. Co.* (4); *Krug* v. *German Fire Ins. Co.* (5); *Fraim* v. *National Fire Ins. Co.* (6). The fact that it had been previously "stored or kept" would be quite immaterial; *Putnam* v. *Commonwealth Ins. Co.* (7); as is also the fact that the use of the gasoline actually caused the fire; *Turnbull* v. *Home Fire Ins. Co.* (8); the excepted risk being confined to fire occurring while the prohibited article is actually "stored or kept" in the insured building.

I find myself with great respect unable to agree in the judgment of the majority in this court. The appeal in my opinion fails and should be dismissed.

(1) Moo. & Mal. 90.
(2) 31 Md. 219.
(3) 4 Met. (Ken.) 9.
(4) 92 Pa. St. 15.
(5) 147 Pa. St. 272.
(6) 170 Pa. St. 151.
(7) 18 Blatch. 368.
(8) 34 Atl. Rep. 875.

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Appeal allowed with costs.

Solicitors for the appellants Equity Fire Ins. Co.: *Mills, Raney, Hales & Colquhoun.*

Solicitors for the appellants Standard Mutual Fire Ins. Co.: *Curry, Eyre, O'Connor, Wallace & Macdonald.*

Solicitors for the respondents: *Hartman & Smiley.*

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*Mar. 16, 17.
*April 5.

JANE JACQUES STUART (PLAINTIFF) ..... APPELLANT;

AND

THE BANK OF MONTREAL AND JOHN STUART (DEFENDANTS) .. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Husband and wife—Contract—Separate estate—Security for husband's debt—Independent advice—Stare decisis.

The confidential relations between husband and wife are such that where the latter conveys or encumbers her separate property for her husband's benefit she is entitled to the protection of independent advice; without that her action does not bind her. *Cox* v. *Adams* (35 Can. S.C.R. 393) followed, Idington J. dissenting.

Only in very exceptional circumstances should the Supreme Court refuse to follow its own decisions.

Judgment of the Court of Appeal (17 Ont. L.R. 436) reversed.

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming, by an equal division of opinion, the judgment at the trial which dismissed the plaintiff's action.

The action was brought by appellant for rescission of conveyances and other documents which she executed to secure the bank for a large liability of her husband, the respondent, John Stuart. Mr. Justice Mabee, in giving judgment at the trial, states the facts as follows:

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

(1) 17 Ont. L.R. 436.

"Mr. John Stuart, the plaintiff's husband, had for many years prior to 1896 occupied a very prominent position in financial and mercantile matters in Hamilton. He was the head of a large wholesale house, the president of the Bank of Hamilton and connected with other corporations.

"Prior to 1896 he had made large investments in the Maritime Sulphite Fibre Co. owning a pulp and paper mill at Chatham, N.B. He was the president of the company, his only living son was the general manager. Almost the whole of his available resources were invested in that company. The defendants were carrying the account and more money was urgently required if there was to be any likelihood of the company being made a success. On Feb. 6th, 1896, Mr. Stuart in a letter to the defendant says: "He (Mr. Lee, a fellow director) however knows that the $50,000 mentioned in the guarantee will not be sufficient to carry us through. * * * I shall find a surety to take his place. I explained to him, as to you, the pressing necessity for relief in money matters in Chatham during the next few days * * * Mr. Lee will either sign the guarantee in a day or two, or agree with me for a substitute; in the latter case my wife will join me in the guarantee and I now submit her name to you for that purpose, as I told you her means are ample enough to secure payment for a much larger sum than we contemplate requiring now or in the future. Pending the carrying out of these arrangements I trust you will authorize your Chatham branch to pay the company's cheques for funds required as follows: (Then follows a statement amounting to $7,500.) I would prefer as you will readily believe not to ask this favour lest it should meet the fate of similar previous ones,

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but it is based upon the proposals above recited and I trust you will have no doubt that my promise to complete one or other during the coming week will be kept."

"On February 7th the general manager of the bank wrote saying the bank would advance $4,250 of the $7,500 asked and stating the balance could stand until the guarantee was completed and the following is a postscript: 'I think it only reasonable to ask, that if you offer Mrs. Stuart's guarantee, you should provide us with a statement of her means and ability to make it good.'

"The information was furnished shewing Mrs. Stuart to be possessed in her own right of real estate, stocks and mortgages to the value of about $250,000.

"On February 24th, 1896, Mr. Stuart completed the proposed transaction, or rather the guarantee being that date was completed shortly afterwards, and the plaintiff signed a document guaranteeing advances to the Sulphite Co. up to $100,000.

"On February 14th, 1896, she assigned in trust for the bank mortgages amounting to about $27,000 and on 11th April, 1898, she gave another guarantee to the bank for the Sulphite Co. advances up to $125,000. This latter was inclusive of the $100,000 guarantee, so her total liability was not to exceed $125,000.

"Advances were made by the bank upon these guarantees and in 1903 the company went into liquidation and on October 2nd, 1903, the plaintiff and her husband gave the bank a mortgage upon all the real estate owned by them. On July 20th, 1904, a lengthy agreement was entered into between the bank and the plaintiff and her husband, the result of which was that the plaintiff gave up to the bank all her estate, both real

and personal, in settlement of her guarantee. The plaintiff's husband at this time was liable to the bank upon a note $196,052 and a guarantee of $50,000 and he was discharged from this debt by the bank. Many stocks that the plaintiff owned, but which stood in the name of the husband, were pledged by him for advances from other banks, and the equity of redemption only in these was turned over by the settlement of July. There was nothing in the transaction to shew the defendants that these stocks belonged to the plaintiff and I have every reason to believe the officers of the bank treated upon the basis of these stocks belonging to the husband.

"On Jan. 6th, 1903, Mr. John Stuart resigned his position of director and president of the Bank of Hamilton and received from them an agreement to pay him the sum of $5,000 per year as long as he lives, the payments to be made monthly in advance. Of course by releasing him from the indebtedness to the bank in consideration of both the husband and wife agreeing to make the transfers provided for in the settlement of July 20th the defendants put it out of their power to proceed for the recovery of the $5,000 per year payable by the Bank of Hamilton. Mr. Stuart said he had understood that was not available for creditors, but it is quite apparent that the defendants could have obtained judgment against Mr. Stuart and obtained a receiving order and swept away from him the monthly payments from the Bank of Hamilton. Many deeds were executed as provided for by the settlement of July, 1904. The properties turned over to the bank, stocks sold, some of the real estate, if not all, it was said in argument had been sold and the position of the defendants entirely changed.

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"In 1903, during the liquidation of the Sulphite Co., the defendants were in litigation with the liquidators and on October 6th, 1903, Mrs. Stuart joined in an agreement authorizing the settlement of that litigation upon the strength of which the defendants made compromises and otherwise changed their position and made a cash payment to the liquidator of $15,000.

"On February 24th, 1896, five shareholders and their representatives transferred to the plaintiff 134 preference and 100 ordinary shares (in all $23,400) "in consideration of Mrs. Jane J. Stuart giving a guarantee to the Bank of Montreal for advances made and to be made to the company to the extent of $100,000." Mrs. Stuart signed acceptances of the transfer of these shares upon the books of the company and from time to time gave proxies for them to be voted upon. In a letter written by Mr. Stuart to Mr. Bruce (who was a shareholder and guarantor to the bank) of February 12th, 1896, he says: 'The question at once presents itself what inducement can we offer to any one to assume the responsibilty of guaranteeing the necessary advances ($100,000 referred to in the letter) and how can the matter be arranged. * * * I believe I can procure the guarantor required by the bank for the new advances, on the security of a lien on material to the bank, and the postponement by Mr. Lee and myself of our claims for cash advances, together with a reasonable bonus in the way of stock which may under existing circumstances be considered of only nominal value. It is, of course, most vital to me to save this property in which my all is invested, and it is of no small consequence to all concerned, for all have not merely an interest in the value that is expected to be given to the stock, but also, perhaps, a more serious

responsibility contingent on the unpaid debt due to the Bank of Montreal.'

"Of course Mrs. Stuart was the guarantor referred to in the letter and in addition to the stock bonus which was given to her the postponement of the debt for cash advances was also executed by Messrs. Stuart and Lee. On February 26th, or thereabouts, and when the $100,000 guarantee was given by the plaintiff the advances already made and for which the plaintiff was becoming liable were about $20,000, but whether this sum included the $7,500 which Mr. Stuart was asking in his letter of February 6th, 1896, the bank to advance upon the strength of the guarantee being given does not clearly appear, but it is altogether likely it does include that sum as on February 20th the debt upon this head was only some $11,000. In any event the guarantee was not given for an entire past due liability to the bank; at least the sum of $80,000 was advanced upon the strength of the first guarantee and an additional sum of $25,000 upon the second guarantee being given.

"Mrs. Stuart is a lady of intelligence and refinement. She was the sole executrix and devisee under her father's will and obtained in land and securities about $250,000 from that source upon his death in 1886. Her husband had had the entire management of her estate and in 1896 it stood at something like $240,000.

"Prior to becoming liable to the defendants in February, 1896, she had indorsed for her husband a note discounted and then held by the Bank of Hamilton for $125,000; that note was afterwards paid out of the proceeds of her securities, which with the transfers made by her to the defendants in 1904, entirely wiped out her fortune.

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"She says she had no experience in business matters, that she signed at her husband's wish, that she knew something of his business matters, and thought he had independent means, that she knew of his connection with the Sulphite Co. long before 1896, and that she also knew Messrs. Lee, Bruce, Brown and Leys were connected with it, that her son had been connected with it for many years and was the manager and that she and her husband were both hoping the company would offer to him an opportunity for a successful business career. She also says she knew there was nothing her husband was more engrossed in than the success of the company and that she knew he had a large amount invested in it, that upon that account and her son being manager she was also interested in its success. She says she consulted no one about the wisdom of her entering upon the guarantee, that she would have scorned to consult any one about the transaction and regarded it solely as a matter between herself and her husband, that she knew the bank would advance a large amount of money to the company that her husband and son were interested in upon the strength of the guarantee and that she intended the bank to act upon the guarantee and advance the money; that she was in no way under the control or influence of her husband, but exercised her own free will, and that she was sanguine about the success of the company if the bank would advance the money. She says that if her husband had said to her not to enter into the guarantee without asking some one else she would have refused to consult any person else, that she knew there was no sham about the guarantee and that she was becoming legally bound, that her husband did not make the slightest misrepresentation to her

and she repudiates the suggestion that she was in any way deceived or misled. Then when giving the second guarantee she says she knew the company wanted more money and that that was the reason she was asked to give the additional guarantee. She did not remember getting stock in the company, but at once frankly recognized her signature in the company's books and to the proxies, although she had also forgotten about the latter. Then, speaking of the settlement made in 1904 when she gave up everything, she says she knew all the facts connected with the matter and had learned nothing additional to what she knew at that time; she knew of the arrangement the Bank of Hamilton had made to pay her husband an annuity of $5,000 per year and that the bank was releasing him from all liability. She knew she was conveying everything to the bank, that they could not keep up Inglewood (the Hamilton residence which also belonged to her) on $5,000 a year and that she intended the bank to get it.

"Mr. Stuart says that no misrepresentations of any kind were made to induce her to sign any of the documents and that he told her "she was to get shares in the Fibre Co. as a sort of acknowledgment of her goodness in doing this."

The learned judge held that as the transaction was *bonâ fide* and there was no fraud on deception *Cox* v. *Adams* (1) did not apply his interpretation of the decision in that case being that there was not a majority of the court in favour of the principle that a married woman is entitled to the protection of independent advice. He therefore dismissed the action and on

(1) 35 Can. S.C.R. 393.

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appeal from his judgment the Court of Appeal was equally divided and it was sustained. The plaintiff then appealed to the Supreme Court of Canada.

Hellmuth K.C. and *W. J. Elliott* for the appellant. *Cox* v. *Adams*(1) is a binding authority for the proposition that the relation between husband and wife, as regards the necessity for independent advice, is the same as that between father and child or guardian and ward.

And this is clearly the law in England as exemplified by *Bank of Africa* v. *Cohen*(2), decided in 1908. See also *Bischoff's Trustee* v. *Frank*(3).

Shepley K.C. for the respondents. All the cases in which a married woman has succeeded in setting aside a transaction into which she had entered are those in which there was fraud or deception. This was so in *Cox* v. *Adams*(1), and the majority of the court in that case did not proceed on the view that the wife was in the protected class.

In *Turnbull* v. *Duval*(4) also the decision was based on the ground of pressure, and concealment of material facts by the husband and the question of independent advice had not to be determined. The same can be said of all the cases relied on by the appellants.

THE CHIEF JUSTICE.—I agree that this appeal should be allowed with costs for the reasons stated by Mr. Justice Duff.

DAVIES J.—The only question argued before us on this appeal was whether conveyances or securities

(1) 35 Can. S.C.R. 393.
(2) 25 Times L.R. 285.
(3) 89 L.T. 188.
(4) [1902] A.C. 429.

given by a married woman of or upon her separate property to or for the benefit of her husband can be upheld as against her in the absence of independent advice before executing the documents, the beneficial assignee having knowledge at the time of her marital relationship. Or, put it in another way, whether under English authorities the wife stands towards her husband within those confidential relationships which, in cases where conveyances or securities are made or given by one to or for the benefit of the other, the law, on grounds of public policy, requires shall have the protection of independent advice in order to be upheld.

In the case of *Cox* v. *Adams*(1) this court had to consider the question very fully. A majority of the court, of which I was one, was, after full consideration of the authorities, of the opinion that the wife was within those confidential relationships and gave judgment accordingly. Mr. Justice Sedgewick, while expressly concurring in the opinions delivered by Mr. Justice Girouard and myself, held also that the securities in question in that case were avoided as against the wife by fraud, and, because of this, an attempt has been made in the courts below to distinguish *Cox* v. *Adams*(1) from the case now before us, where no fraud is charged. But that additional ground adopted by Mr. Justice Sedgewick for the conclusion he reached cannot, in my judgment, weaken the authority of that case or make it less binding upon us than it, otherwise, would be. The learned justice fully agreed with the ground on which Mr. Justice Girouard and I, myself, rested our judgments, that the wife was within those confidential relationships.

(1) 35 Can. S.C.R. 393.

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Davies J.

As I am of the opinion that the decision of this court in *Cox* v. *Adams*(1) is binding on us, I would allow this appeal with costs and dispose of the case in the manner proposed by Chief Justice Moss in the Court of Appeal.

IDINGTON J. (dissenting).—It is contended that the appellant, being a married woman living with her husband to the knowledge of the respondent when she signed, without independent advice, documents guaranteeing the respondent for advances made by it to a corporation in which her husband was deeply interested, could not thereby bind her separate estate, though the facts surrounding and leading to these contracts are such that, if she had before signing, gone through the form of hearing some such independent advice and had discarded it, the contracts would have bound her and her estate.

I observed the difficulty her counsel had in defining this new doctrine as presumption of law or of fact and the qualification, in the latter case at all events, that might be some sort of consolation to some of those in Ontario concerned in some of the thousands of contracts entered into in that province, without observing the form demanded on the faith of the law not imposing such conditions.

It is attempted to rest the appeal on the case of *Cox* v. *Adams*(1).

I admit there are expressions in some of the opinion judgments in that case, reversing by a bare majority the unanimous judgment of the Court of Appeal for Ontario, going a long way, but I submit these opinions

(1) 35 Can. S.C.R. 393.

were not necessary in the view taken of the facts by two of that majority to the determination of the case, and, in short, do not form the *ratio decidendi* of their judgments.

It is one thing, in dealing with a case of fraud or undue influence, to remark upon the absence of independent advice, and quite another to hold that alone sufficient because of presumption arising therefrom.

Unless there be in a case the concurrent opinion of at least the majority of a court as to the application of a principle of law on a point to be decided which, of necessity, has led to the determination of the suitors' rights found dependent thereon, its decision binds no one in a later case.

I might well adopt and apply the language used in relation to a more extended view of the nature of authority by Sir William Markby, in his book on "Elements of Law," par. 99:

> The nature of the process of reasoning which has to be performed in order to extract a rule of law from a number of decided cases by elimination of all the qualifying circumstances, is a very peculiar and difficult one. The opinion of the judge, apart from the decision, though not exactly disregarded, is considered as extra-judicial, and its *authority* may be got rid of, by any suggestion which can separate it from the actual result. Unless, therefore, a proposition of law is absolutely necessary to a decision, however emphatically it may have been stated, it passes from the province of *auctoritas* into that of mere *literatura*. Curiously enough it is not the opinion of the judge, but the result to the suitor, which makes the law.

I might also refer to the remark of the late Sir George Jessel M.R., in *Re Hallett's Estate*(1), at p. 712, that

> the only use of authorities, or decided cases, is the establishment of some principle which the judge can follow out in deciding the case before him.

(1) 13 Ch. D. 696.

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Another illustration of the nature of authority derived from decided cases is that of *The "Vera Cruz"* (1), in which, on appeal, the court held a previous decision arrived at in appeal by an equal division had not the effect of constituting such decision authority in a later case in appeal.

Let us see what those of the learned judges who composed the majority deciding *Cox* v. *Adams*(2) did say.

Mr. Justice Sedgewick says, at page 396:

> 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. * * *

And at page 397 speaks of it as

> a deliberate attempt on the part of both to defraud them.

And he expressly says, in light thereof, that

> the equitable principles regarding undue influence need not be resorted to.

And at page 398 Mr. Justice Girouard says:

> 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? etc., etc.

And, at page 414, he says:

> 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); *Bridgman* v. *Green*(4); *Huguenin* v. *Baseley*(5), and *Smith* v. *Kay*(6), 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 pos-

(1) 9 P.D. 96.
(2) 35 Can. S.C.R. 393.
(3) (1902) A.C. 429.
(4) 2 Ves. Sr. 627.
(5) 14 Ves. 273.
(6) 7 H.L. Cas. 750.

sible, under the circumstances, not to consider as a reward to Cox for betraying the persons who were entitled to his protection.

If these learned judges intended to lay down the proposition it is now contended they did as the *ratio decidendi* of the case, I would not have expected this examination of the evidence for there was never any pretence of these ladies having taken independent advice.

Hence, I cannot feel assured from reading his judgment that the late Mr. Justice Sedgewick deliberately intended to concur in the view of his colleague Mr. Justice Davies as to the law when considered in relation to the wife as governing his decision.

In short, in the view taken of the facts both by him and Mr. Justice Girouard, there was no need to rely upon any such proposition of law so far as the wife was concerned. Comprehensive undiscriminating phrases of agreement sometimes mislead. Nor do I think when such widespread consequences depend upon the decision which could only be weighed by those since concerned in its interpretation by reference to the report of the case we should look elsewhere for assurances of its meaning; especially when we find three out of five judges able to distinguish it from this case.

And I find Mr. Justice Sedgewick avowedly did not consider it necessary to come to any such conclusion of law, and, hence, proceeded on the facts as he viewed them to reach the result by the application of legal principles in no way affected by the proposition now in question.

If we are not bound by the decision of this court in *Cox* v. *Adams* (1), to hold otherwise, as I think we are

(1) 35 Can. S.C.R. 393.

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not, there can, in light of the findings of the learned trial judge, be nothing clearer. I think, then, that this appeal is not maintainable.

To illustrate and apprehend the true position of the law of Ontario on the subject, let us observe its growth and remember that, at common law, the marriage gave certain limited and certain more extended, but conditional, rights to the husband in and over his wife's real estate and to possess her chattels real and to possess absolutely her specific personal chattels and, as to her choses in action, to reduce them into his possession.

I am not called upon here to go into the details of this brief outline of the husband's right or of the qualifications thereof nor to observe the distinct rights she might have arising from settled estates or other property held for her separate use. All I am concerned with is to recall the condition of things before the changes made in the law by modern legislation in the province whose law is now in question in order that we can understand how little it was possible under such a state of things to have arisen therein for the application to the dealings between husband and wife of the exact principles of law governing the relation between parent and child or similar relations.

In such cases the child's property was his or her own and the weak were protected against the strong by the application of well-known principles to preserve to the child or other weak person his or her rights of or in property.

But when the husband requesting the wife to part with such property as Mrs. Stuart gave up here was only asking, apparently, what the law had so recently

given to him, what field was there for such a principle to operate upon?

When the enfranchisement of married women began and their power over their separate real estate was recognized, the husband's common law rights therein were, for a time, also recognized. She could not convey her real estate without him. And she was so protected by law that she could not convey it, even with him, save upon condition of a separate examination and judicial certificate that she was found, as a result thereof, to be acting free from the restraint of her husband.

I need not dwell upon the details of this legislation or how, bit by bit, the husband's rights and her protection, in this mode or by such means, were at last obliterated.

The lesson to be drawn from this history is that, when the legislature was conferring thus upon the wife a dominion over her real estate and also her personal property it was, tentatively as it were, for a long time expressly protecting her against her husband as regards her real estate, but never applied that protection or seems to have dreamt of applying similar protection for the wife as to her personal property; much less to her power of contracting, which I am about to advert to.

In all this growth of legislation, the wife was gradually acquiring dominion over that which had, speaking broadly, been theretofore the husband's property or possible property. The enfranchisement had gone a long way and was something entirely inconsistent in principle with putting restraint upon the married woman.

Those, I submit with respect, arguing for the main-

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tenance of safeguards seem to me to have entirely misapprehended the starting point of the married woman's emancipation, the condition of things in which that took place, and the process that has gone on which finally, for the present, ends in 60 Vict. ch. 22, now set forth in R.S.O. [1897], ch. 163, and section 4 thereof, as to the meaning of the contracting power, as if a *feme sole,* previously conferred and appearing in section 3 of the last named chapter 163; both being now in question.

If the legislature in this long course of legislation and judicial discussion, I had almost said struggle, extending over nearly forty years, had ever intended in taking from the husband that which once was his, to prohibit him from merely requesting and receiving assistance unless through the channel of some independent advice, I think it would have said so.

When protection as against her husband's influence so long guarded against in regard to her real estate until the injury and absolute futility of it was recognized and removed by the legislature, why should we partially re-establish it? Why, especially when the principle had never been adopted by courts in relation to the dealings of husband and wife?

We have been referred to many authorities quite beside what the history of this legislation tells was intended and this enactment expressly provides.

What right have we to cut down the express power so given? Moreover, it is not in the case of a contract with the husband we are asked to do so, but in a contract with others knowing only the married relation existed and husband's partial interest. In this case his proportion of interest is large, but in many other cases it might well be his interest would be merely

fractional with that of others, or of and with others, including the wife herself. Where can such a principle end?

It is not as if the legislation had invaded the common law rights of married women or some protecting right they had enjoyed at common law or protection by virtue of a long, well understood course of jurisprudence which required a wife, before contracting, to have and take the privilege of independent advice in order to enjoy the rights which this legislation has provided and suffer the burthens consequent thereon.

The relationship exists which will induce the courts to scrutinize closely the conduct of either party upon being charged with exercising undue influence.

But, notwithstanding expressions used in *Cox* v. *Adams* (1) and other cases, I submit with confidence no court has yet held that, from that relationship alone, there arises, upon mere request for either party to do or abstain from doing something which may enure to the other's benefit, any kind of presumption of undue influence. The court will, doubtless, require that the nature of the instrument signed be understood. This one seems to have been explained by a trustworthy solicitor, who, though solicitor for the bank, was not disqualified from doing that much, went no further and refrained from giving advice either way.

The act of signing such an instrument involved risk. So does every case of going surety and it would be much more sensible to prohibit married women, or for that part, unmarried women also, from ever going surety, than imposing an idle and possibly mischievous form. The legislative tendencies, how-

(1) 35 Can. S.C.R. 393.

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ever, are entirely and perhaps wisely directed in an opposite direction.

The facts having been found as they were by the learned trial judge, and such findings not being quarrelled with by the Court of Appeal, and, taking the view I do of the legal result of *Cox* v. *Adams*(1), I think that the appeal should be dismissed with costs.

DUFF J.—In the determination of this appeal we are, I think, concluded by *Cox* v. *Adams*(1). In that case, at page 415, Davies J. says:

> 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 burthen 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 shewing that the makers had independent advice.

The principle thus enunciated formed the basis of the judgment of Girouard J.; and, notwithstanding the acute critical examination to which the observation of Sedgewick J. has been subjected, I cannot bring myself to doubt that, upon the same ground, that learned judge also proceeded. It is true that the judgment of Sedgewick J. and, perhaps, also that of Girouard J., rested upon another ground as well; but "it is," said Lord Macnaghten, in *New South Wales Taxation Commissioners* v. *Palmer*(2), at page 184:

> impossible to treat a proposition which the court declares to be a distinct and sufficient ground for its decision as a mere dictum because there is another ground upon which, standing alone, the case might have been determined.

(1) 35 Can. S.C.R. 393. (2) [1907] A.C. 179.

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Duff J.

Some question is raised, whether or not we are entitled to disregard a previous decision of this court laying down a substantive rule of law. This court is, of course, not a court of final resort in the sense in which the House of Lords is because our decisions are reviewable by the Privy Council; but only in very exceptional circumstances would the Court of Exchequer Chamber or the Lords Justices, sitting in appeal, (from which courts there was an appeal as of right to the House of Lords), have felt themselves at liberty to depart from one of their own previous decisions. That is also the principle upon which the Court of Appeal now acts: *Pledge* v. *Carr* (1); and the Court of Appeal, in any province where the basis of the law is the common law of England, would act upon the same view. Quite apart from this, there are, I think, considerations of public convenience too obvious to require statement which make it our duty to apply this principle to the decisions of this court. What exceptional circumstances would justify a departure from the general rule, we need not consider; because there was, in the circumstances in which *Cox* v. *Adams*(2) was decided, nothing in the least degree exceptional. Mr. Shepley, with his usual candour, admitted frankly, what indeed is indisputable, that under the rule laid down in the passage quoted above from the judgment of Davies J. the appellant must succeed.

I would allow the appeal with costs; the action should be disposed of in the manner proposed by Moss C.J.O.

(1) [1895] 1 Ch. 51.

(2) 35 Can. S.C.R. 393.

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ANGLIN J.—The appellant seeks to be relieved from liability upon a guarantee given by her to the Bank of Montreal.

The evidence establishes the following material facts.

The bank did not, in any sense, seek to have the plaintiff brought into its transactions with her husband. Its manager, however, knew that it was his wife whom John Stuart procured to become his guarantor and that Mrs. Stuart assumed liability in reality for the benefit of and as surety for her husband and without any personal gain or advantage to herself. She knew that the purpose of the guarantee was to render her, to the extent of her separate estate, personally liable for a large sum of money which the bank proposed to advance to the sulphite company, in which her husband was interested, and she intended that the bank should act upon her guarantee and advance the money. She was in nowise under the control of or influenced by her husband in the transaction, but exercised her own free will. She says that if her husband had suggested her taking independent advice she would have refused to consult any other person; and she repudiates the idea of any misrepresentation or deceit. She was not misled in any way and fully understood the nature of the transaction. On the other hand, notwithstanding Mr. Shepley's contention to the contrary, the only possible conclusion upon the evidence is that she had not, in fact, independent advice. The circumstances do not support the plea of laches urged by the respondent. The question, therefore, is squarely presented for decision, whether the mere fact that she acted without independent advice, notwithstanding the absence of fraud and un-

due influence and of any misunderstanding on her part, enables the appellant successfully to repudiate her liability to the bank.

This question, which the Judicial Committee, in *Turnbull* v. *Duval*(1), at page 434, treated as not settled and expressly left open, was, it is contended by the appellant, definitely decided in her favour by this court in *Cox* v. *Adams*(2) in 1904. If it was, and if this court is bound to follow its own previous decision, this appeal must succeed. The respondent contests both propositions.

I entertain no doubt whatever that the judges who composed the majority of this court in *Cox* v. *Adams* (2), intended to formulate, and did, in fact, formulate, as the basis of their judgments, the propositions that the relation of husband and wife is one of those confidential relations in which, on grounds of public safety, the law presumes that an obligation, contracted by the person assumed to repose confidence for the benefit of the person in whom confidence is assumed to be reposed, has been procured by the undue influence of the latter and that he, or any person claiming the benefit of the transaction with notice of the relationship, can rebut that presumption only by proving that the obligor had, in fact, independent advice.

Davies J., at page 415, in the report of *Cox* v. *Adams*(2), expressly states that he rests his decision upon this ground, and he adds 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.

He thus excludes the idea that the fraud and misrepresentation of the husband and his agency for the

(1) [1902] A.C. 429. (2) 35 Can. S.C.R. 393.

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creditor, which Sedgewick J. expressly found (pp. 396-7), and which Girouard J. was also inclined to think established (p. 414), at all influenced or affected his judgment.

Girouard J., after quoting the passage of Lord Lindley's judgment in *Turnbull* v. *Duval*(1) in which he leaves open the question whether or not, if impeached upon the sole ground of lack of independent advice, the security given by Mrs. Duval should be set aside, adds:

> In the present case, the point of law must, I conceive, be determined. (p. 412.)

Again he says:

> I cannot see that a material distinction can be made between the case of the mother and that of the daughter. * * * I have come to the conclusion that the rule which governs the case of Miss Cox applies also to that of Mrs. Cox.

These passages leave no doubt as to the *ratio* of Mr. Justice Girouard's judgment.

Sedgewick J. commences his opinion by stating:

> I entirely agree with the conclusion at which my brother Girouard has arrived in his very able and exhaustive judgment.

And he concludes by stating that as to

> the equitable principles regarding undue influence * * * I can usefully add nothing to what my brother Girouard and my brother Davies have said.

In the course of his opinion he expresses very strongly his own view that the fraudulent and deceitful—he calls it criminal—conduct of the husband must invalidate the security in the hands of the creditor and that it is, therefore, unnecessary to resort to the proposition of law upon which Girouard J. rested his

(1) [1902] A.C. 429.

opinion. But I entertain no doubt that he intended to express, and did in fact express, as a distinct ground of his decision, his concurrence in the conclusions of Girouard and Davies JJ. that the equitable doctrine invoked by them was applicable to the case of Mrs. Cox.

In *New South Wales Taxation Commissioners* v. *Palmer*(1), Lord Macnaghten, delivering the judgment of the Privy Council, says, at page 184:

> It is impossible to treat a proposition which the court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground stated upon which, standing alone, the case might have been determined.

In *Membery* v. *The Great Western Railway Co.*(2), at page 187, Lord Bramwell said:

> Of course it is in a sense not necessary that I should express an opinion on this as the ground I have first mentioned, in my opinion, disposes of the case. But if, instead of mentioning that ground first, I had mentioned the one I am now dealing with, it would, on the same reasoning, be unnecessary to mention that. What I am saying is not obiter, not a needless expression of opinion on a matter not relevant to the decision. There are two answers to the plaintiff; and I decide against him on both; on one as much as on the other.

Reference may also be made to the remarks of Rose J. in *Landreville* v. *Gouin*(3), at page 464.

Being satisfied that all three judges who composed the majority in *Cox* v. *Adams*(4) (and only their opinions need be considered in determining what was the principle of the decision: *Suffell* v. *Bank of England* (5), at page 560) concurred in assigning as a ground of judgment the applicability of the rule above stated to the relation of husband and wife, we must regard

(1) [1907] A.C. 179.
(2) 14 App. Cas. 179.
(3) 6 O.R. 455.
(4) 35 Can. S.C.R. 393.
(5) 9 Q.B.D. 555.

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this conclusion not as a mere dictum, but as the *ratio decidendi* of the case, and, therefore, binding, unless members of this court are at liberty to reconsider and review its former deliberate and explicit decision upon a question of law, merely because they would, if the matter were *res integra,* reach a different conclusion.

Cox v. *Adams*(1) was decided in the year 1904. The rule against interference with a decision which has stood unchallenged and has been acted upon in transactions of daily life throughout the country for many years, especially if titles to property depend upon it. has no application in this instance. On the other hand, *Cox* v. *Adams*(1) has not itself been questioned nor has the principle upon which it proceeded been controverted in this court, or in any tribunal of co-ordinate or quasi-co-ordinate jurisdiction, since it was decided.

The case of *Chaplin & Co.* v. *Brammall,* in the English Court of Appeal(2), proceeded upon the fact that the true nature of the guarantee given by the wife was not understood by her when she signed it, and is, therefore, distinguishable from the present case. The proposition involved here was not passed upon by the court. This is the only case at all similar to the present which has received consideration from a court of appeal, either in England or in this country since *Cox* v. *Adams*(1) was decided.

Bischoff's Trustee v. *Frank*(3), though decided before *Cox* v. *Adams*(1), does not appear to have been adverted to by counsel or by the court. But, in that case also, Mr. Justice Wright found that the defendant, whom he held not liable, did not sufficiently

(1) 35 Can. S.C.R. 393. (2) [1908] 1 K.B. 233.
(3) 89 L.T. 188.

understand the nature of the guarantee which she had signed.

In *Howes* v. *Bishop and Wife*(1) Mr. Justice Jelf stated a proposition quite inconsistent with the decision in *Cox* v. *Adams*(2); and in *Bank of Africa* v. *Cohen*(3), Mr. Justice Eve said that he would not be prepared to hold that in England the mere absence of independent advice would operate to avoid a contract of the wife for the benefit of the husband.

If the matter were *res integra* in this court, I should certainly treat the opinions of Wright, Jelf and Eve JJ. and those of Leach M.R. in *Field* v. *Sowle*(4), of Hardwicke L.C. in *Grigby* v. *Cox*(5), of Parker V.C. in *Nedby* v. *Nedby*(6), and of Cozens-Hardy J. in *Barron* v. *Willis*(7), as entitled to the very greatest consideration; but the opinion of any judge of first instance, however eminent, cannot be permitted to weigh in this court against a previous deliberate and definite decision by itself.

How far should we, in these circumstances, hold ourselves bound by the comparatively recent decision in *Cox* v. *Adams*(2)?

There are instances in which judges of this court have considered themselves free to decline to follow its earlier decisions with which they did not agree. In the *Burrard Election Case*(8), Gwynne J. (dissenting) expressed his opinion that the Supreme Court is competent to overrule a judgment of the court differently constituted, if it clearly appears to be erroneous.

(1) 25 Times L.R. 171.
(2) 35 Can. S.C.R. 393.
(3) 25 Times L.R. 285.
(4) 4 Russ. 112.
(5) 1 Ves. Sr. 517.
(6) 5 DeG. & S. 377.
(7) [1899] 2 Ch. 578.
(8) 31 Can. S.C.R. 459.

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In *Stephens* v. *McArthur*(1), at page 460, Patterson J. (dissenting) said

> it is indisputable that, as a matter of principle, the reasons given by the court for its judgment in any case may properly be reconsidered, and, if found to be erroneous, corrected, when a similar question arises in another case;

and he indicated that the Supreme Court of Canada should, in this matter, be governed rather by the rules which prevail in intermediate appellate tribunals—such as the English Court of Appeal—than by those which now govern such a final appellate tribunal as the House of Lords.

In the *Stanstead Election Case*(2) this court refused to hold itself bound by a previous judgment dismissing an appeal upon an equal division: *Megantic Election Case*(3); but there is no case in which the court has refused to follow a previous judgment in which a majority concurred. The nearest approach to such a position is that taken by Strong C.J. in *The Queen* v. *Grenier*(4), where he says, at page 53:

> Since the case of *Robertson* v. *The Grand Trunk Railway Co.*(5), it would seem that *Vogel's Case* (6) can scarcely be considered as a binding authority and, at all events, I should not hesitate to reconsider it if a similar question arose.

In *The Grand Trunk Railway Co.* v. *Miller*(7) Taschereau C.J. followed the decision in *The Queen* v. *Grenier*(4), though, if unfettered by authority, he would probably have decided otherwise. Girouard J. also followed it, adding that he was of opinion that it was correctly decided. Davies J. accepted the Grenier decision as binding, as did also Killam J.,

> without intending to indicate any opinion upon the question involved.

(1) 19 Can. S.C.R. 446.
(2) 20 Can. S.C.R. 12.
(3) 8 Can. S.C.R. 169.
(4) 30 Can. S.C.R. 42.
(5) 24 Can. S.C.R. 611.
(6) 11 Can. S.C.R. 612.
(7) 34 Can. S.C.R. 45.

In the Privy Council(1), at page 195, in reversing the judgment of the Supreme Court of Canada, Lord Davey significantly said:

> Their lordships are not sure that * * * they are differing from the real opinion of the learned judges of the Supreme Court.

I have not found any other case in this court in which a previous decision of the court, although tacitly, if not expressly, disapproved of, has nevertheless been followed.

The instances are innumerable in which the court has accepted its own previous decisions as authority without questioning their accuracy. In *Salvas* v. *Vassal*(2), at page 89, Girouard J. said:

> Il n'entre pas dans les attributions de cette cour de reviser ses propres décisions.

In several judgments since *The Grand Trunk Railway Co.* v. *Miller*(3), there occur individual expressions of opinion that the court is bound by its own previous decisions. In *Hébert* v. *La Banque Nationale*(4), Idington J. says:

> The case of *The Merchants Bank* v. *Lucas*(5) binds this court.

In *Leroux* v. *The Parish of Ste. Justine*(6) the court, considering that the case *Toussignant* v. *County of Nicolet*(7) was binding, quashed the appeal. In *Canada Carriage Co.* v. *Lea*(8), Davies J. held the *Town of Aurora* v. *Village of Markham*(9) "applicable and conclusive." In no case since the *Grand Trunk Railway Co.* v. *Miller*(3) has any member of this

(1) *Miller* v. *Grand Trunk Railway Co.*, [1906] A.C. 187.
(2) 27 Can. S.C.R. 68.
(3) 34 Can. S.C.R. 45.
(4) 40 Can. S.C.R. 458, at p. 479.
(5) 18 Can. S.C.R. 704.
(6) 37 Can. S.C.R. 321.
(7) 32 Can. S.C.R. 353.
(8) 37 Can. S.C.R. 672.
(9) 32 Can. S.C.R. 457.

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court, so far as I can find, expressed the view that the court is at liberty to decline to follow its previous decisions in matters of law.

For a summary of the history of *stare decisis* in England, and some of the authorities upon its application in English courts, reference may be made to the first book of Pollock's Jurisprudence (2 ed.), at pages 312 *et seq.*, and to Beal's Legal Interpretation (2 ed.) pages 20 *et seq.*

Lord Eldon, Lord Lyndhurst and Lord St. Leonards are distinguished law lords who thought that judgments of the House of Lords did not absolutely bind the House itself. Lord Campbell always held the opposite opinion to which Lord Wensleydale, Lord Cranworth and Lord Chelmsford assented.

Since the decision in *Beamish* v. *Beamish*(1) the House of Lords has consistently acted upon the latter view. Instances are to be found in *Mersey Docks Trustees* v. *Gibbs*(2), at page 125; *Houldsworth* v. *City of Glasgow Bank*(3), and *Darley Main Colliery Co.* v. *Mitchell*(4), at page 134. Finally, in *London Street Tramways Co.* v. *London County Council*(5), it was expressly held by Lord Halsbury L.C., the other members of the House, Lords Macnaghten, Morris and James of Hereford, concurring, that

> a decision of this House upon a question of law is conclusive and nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House. (P. 381.)

On this sole ground the appeal was dismissed. It may be taken, therefore, as definitely settled that the House of Lords is bound by its own decisions.

(1) 9 H.L. Cas. 274.
(2) L.R. 1 H.L. 93.
(3) 5 App. Cas. 317.
(4) 11 App. Cas. 127.
(5) [1898] A.C. 375.

The Judicial Committee of the Privy Council apparently claims greater freedom in dealing with its former decisions. This is illustrated in a passage from the judgment of Cairns L.C. in *Ridsdale* v. *Clifton*(1), at p. 306, quoted with approval by Halsbury L.C., in *Read* v. *Bishop of Lincoln*(2), at p. 654. See also *Tooth* v. *Power*(3), at p. 292. But the Judicial Committee is not a court of law in the strict sense. Its decision is the advice of a Board to the Sovereign.

Coming to the English Court of Appeal—an intermediate tribunal—we find cases in which that court has felt itself at liberty to decline to follow the decisions of courts of co-ordinate authority: *Mills* v. *Jennings*(4), at p. 648; and *In re Dewhirst's Trusts*(5), are instances. While the court still considered itself free to decline to follow judgments of courts of equal rank, the view was expressed that

> it would not be right to overrule the decision of a court of co-ordinate jurisdiction unless we are clearly satisfied that it was wrong. (*Per* James L.J. in *Wake* v. *Varah*(6), at page 357.)

Several other similar statements might be quoted. But in more recent years the Court of Appeal has held itself bound by its own previous decisions, as well as by those of English courts of equal rank. In *Palmer* v. *Johnson*(7), at p. 355, Brett M.R. said:

> A court of law is not justified, according to the comity of our courts, in overruling the decision of another court of co-ordinate jurisdiction.

In *Nugent* v. *Smith*(8) Cockburn C.J. stated, at p. 433:

(1) 2 P.D. 276.
(2) [1892] A.C. 644.
(3) [1891] A.C. 284.
(4) 13 Ch.D. 639.
(5) 33 Ch.D. 416.
(6) 2 Ch.D. 348.
(7) 13 Q.B.D. 351.
(8) 1 C.P.D. 423.

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We (the Court of Appeal) are, of course, bound by the decision of the Court of Exchequer Chamber, in the case referred to, as that of a court of appellate jurisdiction, and which, therefore, can only be reviewed by a court of ultimate appeal.

In *London County Council* v. *Schewzik*(1), Ridley J. considered himself bound by *Hull* v. *London County Council*(2), the decision of a court of co-ordinate jurisdiction, although, if applicable, he thought it wrongly decided. Joyce J. took a similar view in *Lyon & Co.* v. *London City and Midland Bank*(3), at p. 138. In *Merry* v. *Nickalls*(4), James L.J. said:

To say that the decisions are wrong in point of principle, if that principle was clearly laid down, does not relieve us from the obligation of following the principle of the decision, because the whole theory of our system is that the decision of a superior court is binding on an inferior court and on a court of co-ordinate jurisdiction so far as it is a statement of the law which the court is bound to accept.

In *Pledge* v. *Carr*(5), at page 52, Lord Herschell L.C. said:

We cannot overrule *Vint* v. *Padget*(6), for that was a decision of a court co-ordinate in jurisdiction with ourselves.

and the appeal was dismissed solely on this ground. In *Lavy* v. *London County Council*(7) Lindley L.J., at page 581, said:

The case of *London County Council* v. *Cross*(8), is a decision which I not only think is correct, but it is a decision of the Court of Appeal which we should be bound to follow whether we think it right or not.

In *Dibden* v. *Skirrow*(9), at page 45, Cozens-Hardy M.R. said:

I consider that the later decision (*Hopkins* v. *Great Northern* Railway Co.(10)) binds us.

(1) [1905] 2 K.B. 695.
(2) [1901] 1 K.B. 580.
(3) [1903] 2 K.B. 135.
(4) 7 Ch. App. 733, at p. 751.
(5) [1895] 1 Ch. 51.
(6) 2 DeG. & J. 611.
(7) [1895] 2 Q.B. 577.
(8) 61 L.J.M.C. 160.
(9) [1908] 1 Ch. 41.
(10) 2 Q.B.D. 224.

Fletcher-Moulton L.J. said:

I base my decision on the ground that we are bound by that decision.

Farwell L.J. said:

In my view, the case is governed by the decision of the Court of Appeal in *Hopkins* v. *Great Northern Railway Co.* (1), which, of course, binds us.

In *Re North-Western Rubber Co. and Hüttenbach & Co.*(2) Vaughan-Williams L.J., referring to *Hutcheson & Co.* v. *Eaton & Son*(3), said:

We are bound to follow that decision.

Buckley L.J., although he would have come to a contrary conclusion if at liberty to apply his own judgment to the facts, felt constrained to agree with the other members of the court on the authority of *Hutcheson & Co.* v. *Eaton & Son*(3), a decision of Brett M.R., and Bowen L.J., from which Fry L.J. dissented. While preferring the view of Fry L.J., he thought he ought loyally to apply the opinion of the majority of the court. Other recent instances may be found in the following cases: *In re Coles and Ravenshear*(4); *In re Russian Petroleum and Liquid Fuel Co.*(5); *Fear* v. *Morgan*(6); *In re Stucley*(7); *Fitzroy* v. *Cave*(8); *Williams* v. *Hunt*(9), and *In re Ambler; Woodhead* v. *Ambler*(10).

It is fairly well established, therefore, that the English Court of Appeal now holds itself bound by its own previous decisions in matters of law. Since the express decision of that court in *Pledge* v. *Carr*(11), it

(1) 2 Q.B.D. 224.
(2) [1908] 2 K.B. 907.
(3) 13 Q.B.D. 861.
(4) [1907] 1 K.B. 1.
(5) [1907] 2 Ch. 540.
(6) [1906] 2 Ch. 406.
(7) [1906] 1 Ch. 67.
(8) [1905] 2 K.B. 364.
(9) [1905] 1 K.B. 512.
(10) [1905] 1 Ch. 697.
(11) [1895] 1 Ch. 51.

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is quite improbable that any of its members will in the future hold the view that the court is at liberty, even for grave reasons, to disregard such decisions.

In the House of Lords, in the English Court of Appeal and in this court the recent judgments have all been in the direction of holding previous decisions of these respective courts to be binding on themselves. "Judicia posteriora sunt in lege fortiora," 8 Co. 97—"Judiciis posterioribus fides est abhibenda," 13 Co. 14.

A later and more deliberate decision should be followed in preference to one which is earlier,

Caledonia Railway Co. v. *Walker's Trustees*(1), at page 302, *per* Lord Blackburn.

The Supreme Court of Canada occupies a somewhat peculiar position. From it no appeal lies as of right. By special leave an appeal may be had to the Judicial Committee. In the great majority of the cases which it hears it is a final appellate tribunal; in other cases, it occupies the position of an intermediate appellate court. But, whether it be regarded as final or intermediate, in view of the current of recent decisions to which reference has been made, the attitude of this court towards its previous decisions upon questions of law should, in my opinion, be the same. Of course, if the Privy Council should determine that the law is not what this court has declared it to be, the view of this court must be deemed to be overruled. A decision of the House of Lords should, likewise, be respected and followed though inconsistent with a previous judgment of this court. In the event of an irreconcilable conflict upon a question of law between a decision of this court and a subsequent decision of the

(1) 7 App. Cas. 259.

English Court of Appeal—should such a case arise—in view of what was said by the Privy Council in *Trimble* v. *Hill*(1), the duty of this court would require most careful consideration. (See *Jacobs* v. *Beaver*(2).) But we should not, in my opinion, hesitate now to determine that, in other cases, unless perhaps in very exceptional circumstances, a previous deliberate and definite decision of this court will be held binding, if it is clear that it was not the result of some mere slip or inadvertence: *Bozson* v. *Altrincham Urban District Council*(3). The decision of this court in the *Stanstead Election Case*(4), which is in accord with the views expressed in such cases as *Smith* v. *Lambeth Assessment Committee*(5), at page 328, and *The "Vera Cruz" No.* 2(6), at page 98, may be deemed conclusive authority that judgments of dismissal which have proceeded upon an equal division of opinion are not to be regarded as decisions of this court, but merely as decisions of the court whose judgment has been thus affirmed. See, however, *Lumsden* v. *Temiskaming and Northern Railway Commission*(7), at pages 473, 474.

Though, as stated by Brett M.R. in *The "Vera Cruz" No.* 2(6), it is (except in Ontario, as to which see R.S.O. [1897], ch. 51, sec. 81) no doubt true that

> there is no common law or statutory rule to oblige a court of law to bow to its own decision—it does so on the ground of judicial comity—

it is of supreme importance that people may know with certainty what the law is, and this end can only

(1) 5 App. Cas. 342.
(2) 17 Ont. L.R. 496.
(3) [1903] 1 K.B. 547.
(4) 20 Can. S.C.R. 12.
(5) 10 Q.B.D. 327.
(6) 9 P.D. 96.
(7) 15 Ont. L.R. 469.

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be attained by a loyal adherence to the doctrine of *stare decisis*. I see no good reason why this doctrine should not be applied, and many very cogent reasons why it should prevail in this court. As tersely put by Pratt J. in *Rex* v. *Inhabitantes de Haughton*(1):

> Little respect will be paid to our judgments if we overthrow that one day which we have resolved the day before.

The case at bar is, no doubt, an important case. It may be in one sense "not an ordinary case." It may be that the application to it of the principle of the decision in *Cox* v. *Adams*(2) will do some injustice to the present respondents. But, to quote the Earl of Halsbury, in *London Street Tramways Co.* v. *London County Council*(3), at page 380,

> what is an occasional interference with what is, perhaps, abstract justice as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions.

I have discussed the authorities at length because, in Ontario, this case is regarded as very important and it has been a subject of much speculation how far this court would deem itself bound to follow *Cox* v. *Adams* (2).

Solely because I am convinced that the present case falls within the principle of the decision in *Cox* v. *Adams*(2), and because I consider that that decision binds this court, I would allow the appeal of the plaintiff with costs here and below and would direct that judgment be entered as indicated by the learned Chief Justice of Ontario.

(1) 1 Str. 83.
(2) 35 Can. S.C.R. 393.
(3) [1898] A.C. 375.

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Appeal allowed with costs.

Solicitors for the appellant: *Elliott & Hume.*

Solicitor for the respondent Bank of Montreal:
Alexander Bruce.

Solicitors for the respondent Stuart:
C. & H. D. Gamble & Brown.

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*March 18.
*April 5.

THE COUNTY OF CARLETON.....APPELLANTS;

AND

THE CITY OF OTTAWA AND OTHERS.RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Jurisdiction—Railway crossing—Contribution to cost—Party interested—Municipality—Distance from work.

A municipality may be a "party interested" in works for the protection of a railway crossing over a highway though such works are neither within or immediately adjoining its bounds and the Board of Railway Commissioners has jurisdiction to order it to pay a portion of the cost of such work.

APPEAL by leave of a judge in chambers as to the jurisdiction of the Board of Railway Commissioners to order the County of Carleton to contribute to the cost of a viaduct or overhead roadway over four railway crossings on Wellington Street in the City of Ottawa.

The County of Carleton originally joined with the City of Ottawa in applying to the Board for an order for this work. Subsequently the Village of Hintonburgh, in which the proposed viaduct would be situated was incorporated with the city, and the work, which had been within a few feet of the county boundary was then distant from it nearly a mile. The county, therefore, withdrew from the joint application and it was proceeded with by the city alone. The

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

Board, however, held that the county was still a "party interested" and in granting the application ordered it to pay a portion of the cost. The county appealed to the Supreme Court of Canada challenging the jurisdiction of the Board to make such order.

R. V. Sinclair K.C. and *D. H. McLean* for the appellants.

McVeity for the respondents the City of Ottawa.

Ewart K.C. for the Grand Trunk Railway Co.

W. L. Scott for the Canadian Pacific Railway Co.

The CHIEF JUSTICE and DUFF and ANGLIN JJ. concurred in the judgment of Mr. Justice Davies.

DAVIES J.—The question on which leave to appeal was given in this case, from an order of the Board of Railway Commissioners directing the municipality of the County of Carleton to pay a proportion of the cost of certain protective works ordered at the crossing of the Richmond Road and the Canada Atlantic and other railways, was limited to the jurisdiction of the Board to make the order it did as against the municipality of the County of Carleton.

The ground upon which the jurisdiction was challenged was that, while the crossing in question was, at the time the application was made to the Board for such protective works, within a few hundred feet of the municipal boundary, subsequently, before the case came on for hearing and at the time the order was made, the area within which the crossing existed had

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been legally withdrawn for about a mile from the municipal boundary and the intervening territory brought within the City of Ottawa and, so, the proposed protective works were neither within the municipal bounds of the county or immediately adjoining them.

It was contended on behalf of the municipality that it could not be held to be an "interested party" within the meaning of the "Railway Act" with respect to protective works ordered by the Board at highway crossings which were not within the boundaries of the municipality, and the more so in a case such as the one before us where, it was contended, the highway was not vested in the municipality, but in a toll company.

All questions as to sections 186 and 187 of the "Railway Act of 1903" being *intra vires* of the Parliament of Canada have been set at rest by the decision of this court in the case of *The City of Toronto* v. *The Grand Trunk Railway Co.*(1), and that of *Toronto Corporation* v. *The Canadian Pacific Railway Co.*(2), decided on appeal from the Court of Appeal for Ontario by the Judicial Committee of the Privy Council.

The powers of the Board of Railway Commissioners to order municipalities to pay a proportion of the cost of protective works ordered to be built at highway and railway crossings on railways within the jurisdiction of the Dominion Parliament so far as these crossings were within the municipal bounds or immediately adjoining them were, by these two cases, finally settled against the municipality.

In the latter case, decided by the Judicial Committee of the Privy Council, two of the crossings there in question were over a railway, the southern boundary

(1) 37 Can. S.C.R. 232. (2) [1908] A.C. 54.

of which was the northern boundary of the City of Toronto and so outside of but immediately adjoining the city boundaries.

The question raised in the case before us was whether a municipality was liable if the crossings where the works were ordered was beyond its bounds and not immediately adjoining them.

I am unable to discern any substantial reason for limiting the jurisdiction of the Board of Railway Commissioners in the manner suggested.

If that Board has jurisdiction to order a municipality to pay a proportion of the cost of any work ordered by it to be done at a railway and highway crossing in cases where that work is beyond the bounds of the municipality, even though adjoining it, I fail to see why its jurisdiction should cease if the crossing happened not to adjoin, but to be a short distance beyond the municipal bounds.

The municipality was not an "interested party" within the provisions of the "Railway Act" and so liable to pay a share of the cost of the work at a railway and highway crossing simply because the crossing was within its bounds or "immediately adjoining" them, or because the municipality owned the highway crossing the railway or being crossed by it, but because the works ordered were, in the words of the statute, for the "protection, safety and convenience of the public" and such

> as, under the circumstances, appeared to the Board best adapted to remove or diminish the danger or obstruction arising or likely to arise therefrom,

and because the Board found the inhabitants of the municipality specially interested in these protective works.

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What Parliament was conferring on the Board were powers for the "protection, safety and convenience of the public" at the crossings, alike that portion of the public being carried by the railway and that portion using the highway.

The decision of the Board as to whether a municipality was or was not a party interested was made by the statute binding and conclusive. It is a question of fact to be determined under all the circumstances of each case. The circumstance of a crossing where protective works were ordered being within or without the municipality might be or not be, under all the special circumstances of the case, most material to the decision of the fact whether or not the municipality was an interested party, but it was not, in itself, conclusive. Such a crossing might be within the boundaries of the municipality and yet its inhabitants be very slightly interested in the protective works ordered, or it might be just beyond the precincts of the municipality and yet so situated that a large number of the inhabitants of the municipality were vitally interested in the protective works ordered. In each case the question of fact and the amount of the municipality's contribution were to be determined by the Board.

The municipality represented its inhabitants; the works to be ordered were works for the "protection, safety and convenience" of such inhabitants as part of the public; and the degree and extent to which the municipality was to share the expense of the protective works determined on as necessary was to be decided by the Board. In all cases it was necessarily a question of fact to be decided in the light of all the circumstances and not necessarily dependent upon the arbi-

trary fact of the protective works being within or immediately adjoining the municipality.

Though not within the express terms of the decision of the Judicial Committee in the case above cited, of *Toronto Corporation* v. *The Canadian Pacific Railway Co.*(1), this case is within the reasoning on which that judgment and also the judgment of this court in the *City of Toronto* v. *The Grand Trunk Railway Co.*(2) above cited, were founded.

The following extract from the judgment of the Judicial Committee, as delivered by Lord Collins, shews, in part, the reasoning by which their lordships reached the conclusions they did:

> In the present case it seems quite clear to their lordships that if, to use the language above quoted, "the field were clear," the sections impugned do no more than provide reasonable means for safeguarding, in the common interest, the public and the railway which is committed to the exclusive jurisdiction of the legislature which enacted them, and were, therefore, *intra vires*. If the precautions ordered are reasonably necessary, it is obvious that they must be paid for, and, in the view of their lordships, there is nothing *ultra vires* in the ancillary power conferred by the sections on the committee to make an equitable adjustment of the expenses among the persons interested. This legislation is clearly passed from a point of view more natural in a young and growing community interested in developing the resources of a vast territory as yet not fully settled than it could possibly be in the narrow and thickly populated area of such a country as England. To such a community it might well seem reasonable that those who derived special advantage from the proximity of a railway might bear a special share of the expenses of safeguarding it. Both the substantive and the ancillary provisions are alike reasonable and *intra vires* of the Dominion Legislature, and, on the principles above cited, must prevail, even if there is legislation *intra vires* of the provincial legislature dealing with the same subject-matter and in some sense inconsistent.

I think, therefore, the limitations upon the jurisdiction of the Board of Railway Commissioners sought

(1) [1908] A.C. 54. (2) 37 Can. S.C.R. 232.

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to be put by the County of Carleton in this case are not maintainable and that the appeal must be dismissed with costs.

Idington J.

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

The power of the commission as to directing a municipal corporation to aid in protecting a railway company has been, ever since *The City of Toronto* v. *The Grand Trunk Railway Co.*(1), was decided here, dependent entirely upon the finding of the commission as to whether or not any of the inhabitants of such municipality were interested.

The majority of the court in that case held, as beyond doubt, that, if the inhabitants were interested, the corporation must be held so.

I had supposed, until then, that though the inhabitants had been incorporated, they and the corporation were not, in law, convertible terms, and that the latter could only represent the former so far as its legislative creator had determined it might.

I had also supposed that "municipal institutions" in a province, having as a subject matter been assigned by the "British North America Act, 1867," to the legislature of the province, exclusively to make laws in relation to matters coming within such a subject so assigned, it was not competent for the Dominion Parliament either to add to such power as the creating legislature had seen fit to confer or, above all, to use these institutions for the purpose of levying taxes upon the inhabitants so incorporated when given no

(1) 37 Can. S.C.R. 232.

such power, merely to subserve the execution of any of the powers conferred on the Dominion.

I had supposed any such corporation, in respect of its property, whether of roads or aught else, might, as any other property owner, become, of necessity, subject in relation to such property to the will of Parliament lawfully empowering or directing railway construction and suggested a line might well be drawn for exercising the jurisdiction now in question to cover this property relation, as within the manifest interest of the corporation.

The opinions given by the other members of the court left us no room for doubt that the line should not be so drawn or any line drawn save where Parliament saw fit to draw it.

The "British North America Act, 1867," and the "Railway Act" so interpreted left the matter wholly to the commissioners to find and say what municipal corporations were "interested" within such meaning as was thus assigned in the latter Act.

This case was upheld by the Judicial Committee of the Privy Council, and, later, *The Toronto Corporation* v. *The Canadian Pacific Railway Co.*(1), not only carried quite logically (if I may be permitted to say so) the doctrine further than the former case; but also lays down so wide a principle of action to be applied that it is hard to see what appellants can have hoped to gain by thus flying in the face of judicial authority when armed only with nothing new but only such arguments as had proved of no weight in the highest courts of law entitled to pass upon the matter.

(1) [1908] A.C. 54.

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Appeal dismissed with costs.

Solicitor for the appellants: *D. H. McLean.*

Solicitor for the respondent The City of Ottawa: *Taylor McVeity.*

Solictor for the respondent The G. T. Ry. Co.: *W. H. Biggar.*

Solicitor for the respondent, The C. P. Ry. Co.: *E. W. Beatty.*

THE CANADIAN BANK OF COMMERCE (DEFENDANT) ..... } APPELLANT;

AND

JOSEPH BARRETTE (PLAINTIFF) AND LE SYNDICAT LYONNAIS DU KLONDYKE (DEFENDANTS) ... } RESPONDENTS.

1909

*Feb. 18, 19.
*April 5.

ON APPEAL FROM THE TERRITORIAL COURT OF THE YUKON TERRITORY.

Trust—Banking—Hypothecation of securities—Terms of pledge—Duty of pledgee.

B. sold property to the Syndicat and took as security for the price mortgages on real and personal property and a promissory note and transferred the securities to the bank to secure his present and future indebtedness to it. He signed a document authorizing the bank to realize on the same in its discretion, to grant extensions and give up securities, accept compositions, grant releases and discharges and otherwise deal with them as it might see fit without prejudice to B.'s liability. The note not being paid at maturity, the bank sued the Syndicat and B. upon it and on the covenants in the mortgages and obtained judgment against both. In the same action, the Syndicat, on counterclaim for damages for deceit, had judgment against B. which was eventually set aside, but, while it existed, the bank made a settlement with the Syndicat and discharged the latter from all liability on the judgment of the bank on payment of over $20,000 less than the debt. B. was not a party to this settlement and the bank afterwards refused to give him any information about it or to give him a statement of his account with the bank itself. In an action by B. for an account and to have the bank enjoined from further dealings with the securities:—

Held, that the power given to the bank to deal with the securities was to be exercised for the purpose of liquidating B.'s debt, and, as to the surplus, for B.'s benefit; that, the settlement having

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

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been made solely for the benefit of the bank and in sacrifice of B.'s interests, the bank violated its duty, and had not satisfied the onus upon it of shewing that, had the whole amount of the judgment been recovered from the Syndicat, B. would not have benefited thereby.

APPEAL by the Canadian Bank of Commerce (defendant) and CROSS-APPEAL by the plaintiff from the judgment of the Territorial Court of Yukon Territory, *in banco,* varying the judgment and a supplementary judgment in the action by Craig J., and dismissing the appeal from the first judgment by the present appellant.

The circumstances of the case are stated in the head-note and in the judgment now reported.

A. W. Anglin K.C. and *Glyn Osler* for the appellant.

Holman K.C. and *Congdon K.C.* for the respondent and cross-appellant Barrette.

C. J. Bethune for the respondent, Le Syndicat Lyonnais du Klondyke.

THE CHIEF JUSTICE and GIROUARD and DAVIES JJ. concurred in the opinion of Duff J.

IDINGTON J.—The respondent Barrette sold several mining properties to the respondent, the Syndicat Lyonnais du Klondyke, hereinafter called the Syndicat, and got from it for the balance of purchase money a promissory note for $92,500, secured by mortgages for the like amount respectively on the real and personal property so sold.

These securities were all transferred by Barrette to the bank to secure such sums as he owed or might come to owe it, and the face value of them was largely in excess of any then existent indebtedness due by him.

The note fell due on the 1st October, 1902, and the bank sued the Syndicat as makers and Barrette as indorser and claimed under the mortgages also.

The Syndicat set up by way of counterclaim thereto a claim of damages for deceit alleged to have been so practised by Barrette as to induce the Syndicat to give the note for a larger sum than it should have given.

The claim was made against the bank that its local manager was either party to the alleged fraud or knew of it, and hence the bank not entitled to recover upon the promissory note or at all events only beyond the damages to which the Syndicat might be found entitled.

The case went to trial in this shape and after the trial had lasted some days (and I apprehend the charges against the bank and its manager had failed) Barrette agreed to plead to this counterclaim though not served and fight out the issue thus framed against him.

Upon Barrette taking this bold stand the appellant had no further concern in the issue raised by the counterclaim and the Syndicat was content to fight out that issue with him and let judgment go against it for full amount of the note. The result was a judgment on the counterclaim dismissing it as against the bank, but in favour of the Syndicat against Barrette for $40,500 and for the bank for $101,204.15 against both the Syndicat and Barrette and a reference to adjust accounts on this basis.

This judgment for the bank never was intended to

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be against any one except the Syndicat and on the discovery of its standing also against Barrette, was set aside as against him some years after the order of release I am about to refer to.

Except for the interpretation of the said order of release we are not concerned how it came about or why it disappeared.

This judgment was entered up on the 4th of March, 1903. On the 1st of April, 1903, Barrette appealed to the court *in banco,* and on the 16th of June, 1904, that court reversed the learned trial judge's judgment and dismissed the counterclaim with costs.

Meantime on the 6th May, 1903, the bank and the Syndicat having settled, carried out their settlement by means of an order in the case made by the learned trial judge on a consent signed by their respective solicitors, and without notice to or consultation with Barrette or his solicitors, who were served with it the same day.

This remarkable document, explicit in the earlier and main part of it as anything can well be, distributed the moneys in court between the bank, its solicitors and the solicitors of the Syndicat in sums aggregating $87,156.62 and proceeded thus:

> said payment being intended as a release and settlement in full from all and any claim for moneys, or costs, whatsoever between the Canadian Bank of Commerce, and the Syndicat Lyonnais du Klondyke in this action, or by counterclaim, and an adjustment of all matters of difference between them to this date.
>
> It is further ordered that the plaintiff's suit against the defendant corporation the Syndicat Lyonnais du Klondyke be and the same is hereby dismissed without costs and the counterclaim of the Syndicat Lyonnais du Klondyke against the plaintiff be, and the same is hereby dismissed without costs.

This would, as I have said, seem comprehensive enough to release the judgment in which had merged

the above-mentioned note in respect of which Barrette could only claim by and through the bank.

Is its effect saved from such result by the following later part of the order? It is as follows:

It is further ordered that neither this order nor the settlement between the Canadian Bank of Commerce and the Syndicat Lyonnais du Klondyke made this day shall, in any way, affect the rights or remedies, if any, which the above named defendant by counterclaim, Joseph Barrette, may have against the above named defendant the Syndicat Lyonnais du Klondyke, or that the Syndicat Lyonnais du Klondyke may have against the said defendant Joseph Barrette. Nor shall this order affect any rights which either the said Joseph Barrette or the said Syndicat Lyonnais du Klondyke may have to appeal the judgment now standing against the said Joseph Barrette in this cause, or any rights which either of them may have under the judgment now signed against the Syndicat Lyonnais du Klondyke.

What rights had Barrette that were covered by this? In law he had no rights against the Syndicat and hence no remedies. His rights on this judgment were through and against the bank to have it collect and account for this judgment thus released.

His other rights as to the appeal against the judgment of the Syndicat were his own and needed no reservation. Nor had the Syndicat against him any rights or remedies save relative to that under the counterclaim. At the date of this order of release the judgment stood against both as entered up improperly, but when the judgment is read as it now has to be, not as against joint defendants, but only as against the Syndicat, the paragraph seems senseless. Do the last two lines help the matter?

I am unable to see how any officer of the court could have ventured in face of this order on record to have issued an execution to enforce the judgment. I suggested this difficulty in the course of the argument and am yet without any effective answer to it.

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Most ingenious and plausible arguments were put forward to shew that the purport of the whole dealing was to settle the judgment so far only as it stood then effective and until the reversal of the judgment on the counterclaim when such rights as Barrette had would enure to him.

I fail to see how that reversal would revive any right in the officer of the court to enforce it by issuing execution. And I think no attempt having been made, as was open to the bank in this case, to rectify the form of release or restore the unpaid claim of Barrette, it must have deliberately intended and agreed to the absolute release that appears in the order and it could not hope to reform it.

If ever men were properly pressed by a debtor, whose securities they had, to give needed explanation and help the bank managers and solicitors were by the repeated and long continued demands of Barrette's solicitors from the time of the reversal of the judgment.

They asked for an account and were told Barrette had his pass book and could make it for himself.

Complications needless to dwell upon rendered this an inadequate and improper reply.

Whenever that reversal took place it was Barrette's right and the duty of the bank, pressed as it was, to have issued execution to recover from the Syndicat, or if by reason of this order of release that course had become impossible to have had it amended or account for and make good the loss Barrette had incurred thereby.

They did neither. The manager said it was time enough to ask for an account when a demand was made upon Barrette that none was being made and

thereupon being requested to hand over the securities he refused, and refused explanations of what the ambiguous settlement meant.

The correspondence lasted months before this action was begun.

Barrette's solicitors repeat the request for an account and demand of the bank the transfer of notes, mortgages and all securities, etc.

This evoked a reply from the bank solicitors merely to refer to their answer of the 13th July, which states as follows:

> The securities which were taken from the Syndicat remain in exactly the same position as they were before the settlement was made.
>
> The bank are prepared so soon as final judgment is given in the case to deliver over these securities to the persons properly entitled thereto.

This statement was either true or not. If true the execution should have been issued on the reversal of the judgment against Barrette. And if the bank had no more claim or, as the local manager put it, were not making a demand on Barrette then it was none of the business of the bank to concern itself as to the future course of litigation between Barrette and the Syndicat.

He was entitled the moment the judgment against him was reversed, if the bank made no claim on him, to have these securities.

He was entitled also to know exactly what the bank claimed if it claimed anything as against or binding these securities.

In default of the bank discharging any of these several alternative duties I have referred to, Barrette was well entitled to bring this action as he did in October, 1904. Had it been tried then I cannot see what answer the bank could have had to it.

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And as to the measure of damages Barrette, on such a trial and reference as would have been had then, would have been entitled to claim by reason of the loss of his securities it would just have been that measure which the learned judge has adopted in the court below.

The bank could not answer then that an appeal was intended by some one, nor could it succeed in setting up the claim for the consideration of the damages arising out of the alleged deceit short of and unless it established as matter of law that such a valid claim existed.

We know now that no such valid claim existed; that the law was always against its maintenance and there is no room for speculation as to it.

Nor, I venture to submit, was there ever any room for speculating as to what this court or any other might or might not have done or ordered.

If the bank had duly discharged its obvious duty in law when it learned of the reversal of the judgment *en banc* in the Yukon, neither it nor any one else would have had occasion to speculate.

It would have been protected if the court had ventured to interfere, which I very much doubt.

Courts have long exercised the equitable jurisdiction of setting off one judgment against another when between the same parties in the same rights.

But beyond this they have in many cases, and I rather think uniformly, refused to go.

These parties were not before the court in the same way and rights at all.

The bank had nothing to do with the litigation after its customer came in and the court relieved it.

Nor do I see anything in the circumstances set up

of the threatened appeal by the Syndicat against the bank worthy of a moment's serious consideration. The Syndicat it must be remembered had and kept possession of the properties covered by these securities, dropped their contentions of notice to the bank and their utmost limit of relief was fixed at $40,500 as against Barrette long before the settlement. Beyond relief from a law suit there was nothing to compromise or justify surrendering Barrette's rights whatever the bank saw fit to do with its own.

I therefore conclude that in either alternative construction of the order of release the appellant's case is hopeless. If a full release thereby is given of the judgment then the rights of Barrette were sacrificed as charged. If the judgment remained after the order in full force and effect to the extent of Barrette's rights, then the bank having it in its hands as a security by way of pledge or hypothecation failed to proceed upon it in accordance with law which is almost synonymous with common sense and a proper regard for the rights of others.

As to items of $2,500 costs claimed by the bank as paid between solicitor and client, I see no evidence to warrant them.

We have not the evidence upon which to determine that it was money properly and necessarily expended in defending the title to the security or of collecting it.

And in the general way it is put merely as costs between solicitor and client I suppose it includes the charge for settling with the Syndicat including the charge for drawing up and getting the above order signed.

I doubt if in such a doubtful cause of complaint as this relative to costs we ought to interfere except

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upon the clearest possible ground that there has been error which assuredly does not appear.

As to the judgment directing re-assignment of the securities for the value of which Barrette is to be allowed in the account I do not so read the judgment. Judgments in such cases usually provide for some officer of the court settling the reconveyance of securities when parties cannot agree and if any doubt exists that precautionary clause can be inserted now if desired.

The same sort of thing can be done if any wrong has arisen in regard to the requirement for evidence in writing.

That brings us to the question of the costs of this suit.

Counsel took some pains to make clear that there was and is still a debt due from Barrette to the bank which was not tendered when the securities were demanded.

I have dealt with some aspects of that already. If the case rested on trover tender of amount due might be a necessary preliminary. The case does not necessarily rest on that ground. If the case is rested on the right to redeem and account incidental thereto, then there is no inflexible rule of law requiring tender of the debt, even to entitle to costs.

If the conduct of the mortgagee has been oppressive or unjust in the sense I have elaborated already as existent here relative to the demand for an account or statement of claim and extent of demands by the mortgagee not only is the mortgagor or pledgor freed from the ordinary liability to pay costs when no tender had been made, but is entitled to costs if the trial court sees fit to award them. I think, in view of the facts, they were righteously awarded in this case.

I do not think on the evidence here the cross-appeal can be maintained.

I think the respondent Barrette was entitled to his costs of suit as given; that this appeal should be dismissed with costs to respondents as against appellant.

DUFF J.—This appeal raises the question of the liability of the appellant bank to account to the respondent Barrette for moneys with which Barrette alleges the bank is chargeable in the circumstances I proceed to mention.

On the 27th of June, 1901, Barrette transferred to the bank as collateral security for existing and future indebtedness two mortgages, one of certain chattels, and the other of certain mining claims executed by the Syndicat Lyonnais in favour of Barrette to secure payment of $92,500 payable in October of the same year, and a promissory note of the same date payable at the same time expressed to be collateral to the mortgages.

The Syndicat having failed to pay the sums due under these securities, the bank commenced an action against them upon the covenants in the mortgages as well as upon the promissory note, and on the 16th of February, 1903, judgment was delivered in the action. By that judgment it was adjudged that the bank recover from the Syndicat the sum of $92,500 with interest (in all $101,204.15). At the same time, and in the same action, Barrette was adjudged to be liable to pay to the Syndicat $40,500 on a counterclaim set up against Barrette by the latter. The judgment further provided that upon certain conditions being satisfied the Syndicat might have an account taken of the moneys owing from Barrette to the bank and that the Syndicat should be at liberty to credit on its judg-

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ment against Barrette any amount by which the sum recovered against it by the bank as mentioned above should exceed that indebtedness.

In the following April Barrette appealed from the judgment against him. On the 6th of May, the bank entered into a settlement with the Syndicat which was embodied in an order of court of that date, and which it will be necessary to consider more particularly later.

In June, 1904, Barrette's appeal was allowed by the Territorial Court sitting *in banco*. From that judgment an appeal to the Supreme Court of Canada was brought by the Syndicat, and in the following May judgment was given in favour of the Syndicat restoring the judgment of the trial judge with a reduction of the amount awarded by that judgment.

In June, 1907, the judgment of the Supreme Court of Canada was reversed by the Privy Council, that of the Territorial Court *in banco* being restored and the counterclaim against Barrette dismissed.

It is not disputed that at the date of the settlement referred to the Syndicat had assets in the Yukon Territory sufficient to answer the full amount of the judgment recovered against them; and it is admitted that this condition of things existed in the following June when the judgment against Barrette was reversed by the Territorial Court *in banco;* when, however, that judgment (having been reversed by this court) was finally restored by the Privy Council, these assets had disappeared and with them all possibilty of recovering from the Syndicat the unpaid balance of the judgment.

There are two principal questions for decision. The first is whether in making the settlement referred to the bank violated its duty to Barrette in relation to the securities; and the second, whether, assuming it

did so, the bank is chargeable at the suit of Barrette with the full amount which could have been recovered from the Syndicat at the time the Territorial Court *in banco* delivered its judgment.

As to the first of these questions.

The effect of the transactions of June, 1901, was that the legal title to the securities was vested in the bank; and that the bank alone was invested with authority to enforce them or collect the moneys secured by them. Under the special stipulations of the letter of hypothecation (so called) of 27 June, 1901, the bank was empowered to realize the securities "in such manner as to it might seem advisable" to "grant extensions," to "enter into compositions" and generally to "deal with" the parties to the securities as "it should see fit," without prejudice to the liability of Barrette. The bank acquired in other words the full control of the securities to the exclusion of the plaintiff.

It is not necessary and I will not attempt to define with accuracy the precise nature of the duty which in these circumstances the bank owed the plaintiff in respect of the enforcement of the securities. This much is clear: the securities were to be realized, if realized at all, for the purpose not only of liquidating Barrette's debt to the bank, but as to the surplus, for Barrette's benefit. Respecting the manner in which this was to be done a discretion was under terms of the letter reposed in the bank; a discretion, however, controlled by the dominant obligation that it should be exercised in good faith with a view to the purpose for which it was conferred, viz., to realize the moneys owing upon the securities and so far as with reasonable diligence it could be done to realize the full amount. In this view and for this purpose the bank

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might grant extensions, enter into compositions or special arrangements; but only in this view, and for this purpose. A compromise framed with an eye to the interests of the bank alone, in which the interests of Barrette should be recklessly disregarded or wilfully sacrificed would involve a plain violation of duty on the part of the bank. This, I think, is as much as it is necessary to say upon this point for the purpose of this case.

There was a good deal of controversy as to the effect of the settlement in question. I do not think it really necessary to determine the precise legal effect of it. It was argued and, I think, it is quite clear that until the judgment against Barrette on the Syndicat's counterclaim was reversed, the judgment against the Syndicat could not have been enforced beyond the amount due the bank from Barrette. But the moment the judgment on the counterclaim should be reversed the situation would become wholly changed; in that contingency it would be the plain right of Barrette in the ordinary course to have the judgment enforced to the full extent of his interest in it, to have, that is to say, payment of it or, if proceedings were to be stayed pending a further appeal, to have proper provision made by way of security for the protection of his rights in the meantime.

Now nobody disputes that the documents in which the settlement is embodied are at least ambiguous; and it is perfectly clear that if those documents did—as the bank contends—reserve to Barrette the right, in the name of the bank, to enforce the judgment against the Syndicat to the extent to which Barrette should be interested in that judgment, then it is also plain that the stipulation in the settlement providing that the

action be dismissed was to the extent of that interest nugatory; and that was, of course, a contention which the Syndicat would have disputed to the full extent of its means and ability. Thus Barrette's rights were beclouded by the settlement to such an extent as most seriously to impede him in the enforcement of them, if he should succeed in his appeal; so much so indeed as to substitute for a judgment against the Syndicat a stubborn and doubtful—and, in my view, a hopeless—dispute with the Syndicat. But the grounds of complaint against the bank do not end there. The settlement was made behind Barrette's back; the bank refused to give his solicitors information respecting the terms of it; and refused, too, after the judgment against Barrette had been reversed, to give him the information required in order that he should be able to make up his account with the bank, (a step necessary to enable him in any case to ascertain the extent of his interest in the judgment and to enforce it against the Syndicat); or to take any steps themselves to enforce the judgment against the Syndicat.

It was, I may add, frankly admitted by the bank's agent, what indeed is patent from the correspondence between the agent at Dawson and the head office in Toronto, that in so acting the agent proceeded in total disregard of Barrette's interests.

I think it is impossible to maintain on these facts and in face of this admission that in the dealings I have mentioned, the bank acted in good faith under the powers vested in it under the transactions of June, 1901. The only question indeed which to my mind is at all doubtful is the question whether it sufficiently appears that as a result of these transactions Barrette suffered any loss.

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I have come to the conclusion that the plaintiff having shewn that at the date of the judgment of the Territorial Court *in banco* the full amount of the judgment (had the bank acted in accordance with its duty to Barrette as above indicated) could have been realized; and that the bank in violation of its duty to Barrette having so dealt with the judgment that Barrette was prevented from recovering upon it; the onus was on the bank to shew that had the sum owing under the judgment been realized or security been given the subsequent course of events would have deprived Barrette of the benefit of the security or of the sum thus recovered; and of this onus I think the bank has not acquitted itself.

Appeal and cross-appeal dismissed with costs.

Solicitor for the appellant: *F. J. Stacpoole.*

Solicitors for the respondent and cross-appellant Barrette: *Pattullo & Tobin.*

Solicitors for the respondents Le Syndicat Lyonnais du Klondyke: *Bleecker & O'Dell.*

E. W. RESER (DEFENDANT) ..... APPELLANT;

AND

W. M. YATES (PLAINTIFF) ..... RESPONDENT.

1909
*Feb. 23.
*April 5.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Sale of lands—Conditions—Deposit of price—Compliance with instructions—Vendor refusing to complete—Broker's commission—Remuneration for procuring purchaser.

A broker instructed to sell lands for a price to be deposited in a bank pending arrival of clear title, procured a purchaser who made the deposit to his own credit without appropriating it to any special purpose. On refusal by the vendor to complete the bargain, the broker sued him for a commission or remuneration for the services rendered.

Held, reversing the judgment appealed from (1 Sask. L.R. 247) Idington J. dissenting, that there had not been such compliance with the terms of the instructions as would entitle the broker to recover commission or remuneration for his services in procuring a purchaser.

APPEAL from the judgment of the Supreme Court of Saskatchewan, *in banc* (1), affirming by an equal division the judgment of Newlands J. at the trial, which maintained the plaintiff's action with costs.

The circumstances of the case are stated in the judgments now reported.

Ewart K.C. for the appellant.

G. F. Henderson K.C. for the respondent.

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

(1) 1 Sask. L.R. 247.

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THE CHIEF JUSTICE.—I agree in the opinion stated by Mr. Justice Duff.

GIROUARD J. agreed in the opinion stated by Duff J.

DAVIES J.—I would allow this appeal and enter judgment for the defendant with costs.

I agree that the nature of the plaintiff's agency was to procure a purchaser and not to effect a sale of the defendant appellant's property.

But I also think that under his authority the plaintiff was to procure a purchaser who would deposit

with the Union Bank at Swift Current the sum of $4,000 on or before the 22nd August pending arrival of clear title.

That condition I do not think was complied with by the purchasers procured by plaintiff depositing the $4,000 to their own credit and so that they could withdraw it at any moment they liked. I agree that the condition called for a payment made with the bank in some way insuring that it would remain there for at least a reasonable time as a guarantee to the vendor that the proposed purchaser would carry out the sale if the vendor within a reasonable time produced a clear title to the land.

No such deposit or payment was made. What was done by the proposed purchasers was to deposit a sum of $4,000 to their own credit and not having any relation or reference so far as the bank or the vendors were concerned to the contemplated purchase. The latter could at any moment withdraw it. Yates, the plaintiff, had written the purchaser a letter on August 16th, enclosing a copy of the "terms the vendor Reser would sell on," and explaining to them that "the money of course would remain in the bank until he gave the

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bank the clear titles." They knew, therefore, when they wired the money on the 20th to the bank that the deposit ought to remain in the bank until the purchaser gave or produced to the bank a clear title. But they simply deposited the money to their own credit without any notice whatever to the bank of its object or purpose.

It was open to Yates, the agent, when he received the telegram from the purchasers on the 20th August

change contract to conform to Reser's demands and have him sign them. Have wired four thousand to Union Bank to-day

to have given the bank notice of the telegram he had received from the purchasers in reply to the letter he had written them, and that the money deposited by them was deposited with the object and purpose of fulfilling the contract of purchase on vendor's terms. If he had done so it probably would have been sufficient to satisfy the conditions prescribed by the vendor on which he (Yates) was authorized to sell. He, however, did nothing until the 22nd, the last day for the making of the deposit when instead of notifying the bank he wired the intending purchasers as follows: "Money should be deposited to your credit to be withdrawn by Reser on production of clear title. Instruct bank promptly."

It was then too late. Their instructions were not sent to the bank as requested by Yates until the 24th and were not received until the 25th. In the meantime and at the close of business at the bank on the 22nd Reser had gone to the bank and found out the facts whereupon he immediately wrote Yates that as the condition relating to the deposit had not been complied with the "deal was off."

Yates, it seems to me, has himself to blame for not

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having on or before the close of the 22nd August, after receiving the purchasers' telegram of the 20th, given the necessary notice to the bank of the purchase and of the purpose and object of the deposit and so earmarked the deposit as to make it a compliance with the vendor's terms of sale.

By neglecting to do so and taking the course he did he justified the vendor legally in declaring the deal at an end.

IDINGTON J. (dissenting).—This is an appeal from the Supreme Court of Saskatchewan affirming the judgment of the trial judge for $400 in an action for commissions respondent claimed to have earned by bringing to the appellant a purchaser for land he owned in said province.

The land was entrusted by the appellant to the respondent exclusively for one month from the 18th of July for sale on terms specified in writing bearing that date.

The respondent effected a sale in writing to parties in Illinois signed by them and by appellant through respondent as his agent, but in some respects bound appellant therein to what was in excess of his instructions.

Upon his raising this objection the month had only two days yet to run. The agent who had been at some expense begged, having regard to the distance at which the buyers lived, four days' extension of time to see if objectionable features could not be dropped from the contract and as became a man experienced in business this was conceded by the appellant upon somewhat burthensome terms being added to what he would have been entitled to on the original arrangement with the respondent.

The following is a copy of memorandum the appellant signed to shew what more he wanted:

The following are the terms upon which I agree to sell my farm: *i.e.*, N.E. ¼ of 14-16-14 and N.W. ¼ of sec. 13-16-14, together with all buildings as they stand at present and one-half share of all my share of all crops now on said premises. Terms: $4,000 *to be deposited with the Union Bank at Swift Current on or before August 22nd, 1906, pending arrival of clear title.* Balance to be paid to suit purchaser at 8 per cent. interest or cash on arrival of title without interest if desired.

Purchasers agree to pay any expenses incurred in building granary for said half share of crop and also half share of all harvesting operations and expenses. Possession to be given at opening up of spring, 1907.

Commission to W. M. Yates to be 5 per cent. of purchase price.

(Sgd.) E. W. Reser.

The respondent having procured this wrote the same day one of the intending purchasers who had signed, explaining the situation and enclosing copy of the above and as to the money to be deposited explained

the money of course would remain in the bank until he gave the bank the clear titles.

On the 20th of August, 1906, a telegram was sent signed by both purchasers who had signed the agreement of purchase to the respondent as follows:

Change contract to conform to Reser's demands and have him sign them. Have wired four thousand to Union Bank to-day.

The money thus provided was duly credited by the Union Bank to Murray & Hein, the purchasers, by deposit as of the 20th August as if to their current account.

It seems quite clear that they had bound themselves to buy these lands on the terms set forth in their first agreement to be modified by the hand of the appellant's agent to meet the requirements of the appellant

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as shewn on the above quoted memorandum and had literally complied with the exact terms thereof, stipulating for a deposit of $4,000 with the Union Bank at Swift Current on or before the 22nd August.

The appellant got everything tendered him which his instructions required.

The letter of his own agent upon which the purchasers acted had specified that the deposit

must remain in the bank until he gave the bank the clear titles.

And in accepting the terms offered and acting in pursuance thereof and depositing the money accordingly it would have been idle for them to pretend they had the money on call only.

All that was needed to make the matter binding on the local banker as well as his principals in Illinois was for the appellant to signify assent and inform the banker, who evidently knew no more than to accept the deposit, of the history I have related and the appellant's rights and claims under it to have the money retained for such reasonable time as might enable him to complete the title.

When this stage was reached the respondent had earned his commission and was entitled to be paid, whether the appellant chose to act in the curious way he did or not and refuse to act as ordinary men would have acted.

We are asked to read into these words in which the appellant had framed his instructions and terms he required something that is not there. He might have insisted, if appellant chose to say so, on the gold being brought in a bag and left with the bankers. But he did not.

No explanation appears therein such as is alleged is usual to have done in such cases, namely, to deposit

in specified terms the appellant now pretends would have suited him. No law or legal custom ever existed to interpret the words used in that way and no other.

Nor do I think a prudent business man would dream of placing so much money in the unrestricted power of another an entire stranger without providing for determining or limiting his power of detention.

The letter of Yates, appellant's agent, covered this by the two week's limit the appellant had requested.

This letter containing the two important provisions I have adverted to, one stipulating for the money remaining in the bank until title made, and the other just mentioned naming the two weeks, seems to have been overlooked by the court below. I venture to think the court could have seen in them coupled with the acceptance thereof in the way I have dealt with already, if attention had been drawn thereto, that very protection in law sought for appellant by part of the court.

It was suggested here that he may not have known of that. His own agent it was who, placed by him in a position having the right to do this, had effectually served him and if treated fairly would have explained, on being given a chance, all he had done.

Moreover, the very agreement this agent had a solicitor draw up and which the appellant professes to have been willing to sign contains in it a provision suggesting all this had been provided for. A little reasonableness in this regard on the appellant's part would have led him to be fully satisfied if he had desired to act fairly.

The appeal should be dismissed with costs.

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DUFF J.—I think the conditions of the respondent's right to commission were that on or before the 22nd August, 1906, he should procure a purchaser, that is to say a person willing to enter into a contract of purchase; and that the purchaser should deposit in the bank specified a sum of $4,000 appropriated to the purchase, but actually payable to the vendor only when (within a reasonable time, of course) a title should be shewn.

The respondent had a person willing to purchase before the date mentioned, and the sum required was in the bank, but unfortunately owing apparently to his misapprehension of the terms of his engagement he failed to produce the evidence of his authority to conclude a bargain with the appellant and the sum remained at large at the disposal of the purchasers until after the limit of time specified in his instructions—without being appropriated to the purchase as the terms of the respondent's employment required. I regret the necessity of coming to this conclusion because the respondent's failure was due only to a mistake, and I think the appellant's conduct in taking advantage of that mistake merits the reprobation of all right-minded people.

The appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Grayson & Armstrong.*
Solicitors for the respondent: *Willoughby & Pickett.*

KING'S ASBESTOS MINES (PLAINTIFFS) ..... } APPELLANTS; 1909

*March 10.
*April 5.

AND

THE MUNICIPALITY OF SOUTH THETFORD (DEFENDANT) ..... } RESPONDENT.

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

Municipal corporation—Reservation for highway—Opening first front road — Appropriation — Indemnity — Award — Procès-verbal— Description of lands and owners—Formal defects—Quebec Municipal Code, arts. 16, 903, 906, 914, 918.

In proceedings for the opening of first front roads for which reservations have been made in the grants of land by the Crown, the provisions of the Quebec Municipal Code requiring a description of the lands appropriated for the highway and the owners thereof are imperative and not merely matters of form which may be cured by the provisions of article 16 of that Code, and failure to comply with these requirements nullifies the proceedings.

Judgment appealed from (Q.R. 17 K.B. 566) reversed, Davies and Idington JJ. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Arthabaska, which dismissed the plaintiff's action with costs.

The appellants are the owners of lands in the Township of South Thetford which were granted by the Crown with a reservation of such portion thereof as might be required for public highways. The muni-

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

(1) Q.R. 17 K.B. 566.

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cipal corporation took proceedings for the opening of the first front road across the lands in question, caused a *procès-verbal* to be made locating the highway, took possession and proceeded to cut down trees growing thereon and to construct the road. The municipal valuators reported that, as this was a first front road, there should be no indemnity allowed upon its appropriation and there was no special description of the strip of land taken nor any mention of the names of the owners in the *procès-verbal* or award. The appellants, thereupon, brought an action for trespass, to recover possession of the land so taken and for damages. At the trial, Malouin J. dismissed the action and his judgment was affirmed by the judgment now appealed from.

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

Methot K.C. and *J. A. Ritchie* for the respondent.

THE CHIEF JUSTICE.—This is a possessory action to which defendant pleads counter-possession by virtue of proceedings taken to expropriate the strip of land in dispute for a public highway. Plaintiffs' title and possession are admitted as alleged and the only question at issue between the parties is with respect to the validity of the expropriation proceedings. The Superior Court dismissed the action, holding that the defendant was in lawful possession and on appeal that judgment was confirmed, two judges dissenting, but all the judges there admit that there were irregularities in the expropriation proceedings, which the majority, however, say were covered by the provisions of article 16 of the Quebec Municipal Code. With this conclusion I cannot agree.

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The legislature delegates to rural municipal councils a very wide discretion with respect to the construction and maintenance of works of local improvement on the very proper assumption that their members have adequate knowledge of the wants and wishes of their respective communities, and, realizing that these municipal institutions must be worked out by men little versed in the science of legislation and ignorant of the forms of legal procedure, it provides that their proceedings, if attacked in the courts, are not to be too critically examined and that irregularities, where no substantial injustice is done, or the absence of formalities which are not essential to their validity, are not to be considered as grounds of nullity. I unhesitatingly declare that in my opinion it is the duty of the superior courts in the exercise of that controlling, superintending and reforming power conferred upon them by section 2329 of the Revised Statutes of Quebec to give effect in this respect to the intention of the legislature and not to embarrass or obstruct, but to cooperate with these local administrative bodies in the performance of their duties. See *Parish of Ste. Louise* v. *Chouinard*(1); Meredith C.J. in *Parent* v. *Paroisse de St. Sauveur*(2), at page 261; *Kruse* v. *Johnson*(3), and *Slattery* v. *Naylor*(4). If we were called upon to consider the propriety of opening the road, the apportionment of the work to be done upon it or in any way interfere with what may be properly considered the discretionary power vested in the local authority I would admit that with their better knowledge of local conditions these representatives of the people can be trusted to honestly perform their

(1) Q.R. 5 Q.B. 362.
(2) 2 Q.L.R. 258.
(3) (1898) 2 Q.B. 91.
(4) 13 App. Cas. 446.

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duty in accordance with their local requirements and under the controlling influence of local public opinion.

In this case, however, we have to deal not with a question involving the exercise of a discretionary power, nor are we called upon to say whether, in the circumstances, the proposed action was reasonable or unreasonable. The question for us to decide is: Assuming the exercise of a wise discretion and of a "sweet reasonableness," have any of the formalities which are essential to the validity of the title under which defendants have taken possession of the plaintiffs' property been omitted?

The Quebec Municipal Code provides for the expropriation of lands of private individuals when necessary for the purpose of opening highways the soil in which when open is vested in the municipality; (arts. 752 and 903, C.M.). Expropriation has been defined

> un acte qui enlève à un particulier sa propriété pour la transférer à la partie expropriante (l'Etat, communes, etc.). Planiol, vol. 1, No. 1084.

No principle is better settled than that the power to expropriate must be strictly pursued and exercised subject to the checks and safeguards provided by the Act which authorizes the proceedings; *Saunby* v. *London Water Commissioners*(1); or, as it is put in the French law, "En matière d'expropriation, tout est de rigueur." The Municipal Code requires that upon a petition of the ratepayers asking for the opening of a new road the council must appoint a special superintendent whose duty it is, if, after consulting the interested parties (art. 796, M.C.), he is of opinion that the road should be opened, to make a *procès-verbal* in which he must give certain details set

(1) [1906] A.C. 110, at p. 115.

out in art. 799. It will be observed that no reference to the land to be expropriated is required in the *procès-verbal.* This *procès-verbal* must be deposited with the council and if homologated (art. 808, M.C.) comes into force after certain delays and notices (art. 809, M.C.). After the *procès-verbal* is made and homologated then the land required must be expropriated (arts. 902 and 903, M.C.), and for this purpose the municipal valuators (art. 908, M.C.) visit the locality and make their award which is the *title* by which the corporation becomes the proprietor (art. 903, M.C.) and is entitled to immediate possession.

This award by virtue of which the respondent has dispossessed the appellants does not authorize it merely to enter upon the appellants' property for the purpose of making a road, but it is a translatory title which divests appellants of the soil in the road and conveys it to the municipality with the right immediately to enter into possession, and it is the validity of this award that is in dispute in this appeal—the objections to the *procès-verbal* and notices having been withdrawn at the argument here. Article 918 of the Municipal Code requires that the award which is a condition precedent to the right of the municipality to take possession of the property should contain, in a general way, the same information as any other translatory title. It should give the names of the parties whose land is taken and the description of the property and the price (indemnity) should be fixed, if any is granted, and if not the refusal must be stated. Mr. Justice Würtèle, in *Barrette* v. *Paroisse de St. Barthélemy*(1), expresses the opinion that the provisions of art. 2168, C.C., are applicable to such a docu-

(1) Q.R. 4 Q.B. 92, at p. 100.

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ment and that the property should be described by cadastral number or by metes and bounds; followed by *Pomeroy* v. *Village of Rock Island*(1), at page 343, and in *O'Neil* v. *City of St. Henry*(2). In the award upon which respondents rely there is no mention or description of the lots of which the land taken forms a part and there is no indication of the proprietor of such land and the only reference to indemnity is contained in these words; after dealing with the indemnity due the proprietors of lot 20, the valuators say:

> Quant au reste du dit chemin, nous n'accordons aucune indemnité, vu que ce chemin est le premier chemin de front du dit rang.

It would seem elementary and reasonable that, before a municipality can expropriate a land owner, "they must first set out and ascertain what part of his lands they require," *Saunby* v. *London Water Commissioners*(3); and it would seem equally important for the party expropriating to know what is being acquired and, for the reasons given by Mr. Justice Anglin, in all of which I concur, the names of the owners of the lots should also be given. I cannot approve of the ingenious suggestion that as these proceedings were taken to expropriate the first front road upon the lots in question, no award was necessary because the Municipal Code forbids the valuators to grant an indemnity in such cases (art. 906, M.C.). A long array of judicial decisions in the Province of Quebec, approved of in this court, has, in my opinion, settled this question finally, in so far as cases arising in that province are concerned. It was considered, in

(1) 4 Rév. de Jur. 333. (2) 4 Rév. de Jur. 139.
(3) [1906] A.C. 110, at p. 115.

1866, in *Deal* v. *Corporation of Philipsburg*(1), and in 1873, in the case of *Doyon* v. *Paroisse de St. Joseph*(2), where it is said, at page 195:

Il a été clairement déclaré que les formalités imposées par le statut doivent être suivies rigoureusement, et que lorsque la loi prescrit qu'une chose sera faite d'une certaine manière, il est non-seulement de l'intérêt et de l'avantage de tout le monde de se conformer à ses prescriptions; mais tout ce qui sera fait en violation de ces prescriptions sera considéré comme une nullité.

In 1876, in *Township of Nelson* v. *Lemieux*(3), the same court held again that the formalities prescribed by the statute for the opening of a road and for the expropriation of property of individuals must be rigourously followed and that on pain of nullity.

In 1884, in *Dorchester* v. *Collett*(4), Mr. Justice Tessier, speaking for the majority of the court says, at page 64:

L'examen préalable des évaluateurs, au cas de *refus* d'une indemnité, est donc nécessaire. C'est un principe de droit constitutionnel et de droit civil que l'on ne peut exproprier personne sans indemnité préalable. C.C. article 407.

And in *King* v. *Township d'Irlande*(5), in 1893, Mr. Justice Bossè, speaking for the court, at page 272, gives as the *ratio decidendi:*

Elle est fondée *exclusivement* sur le fait que la sentence arbitrale était nécessaire pour déterminer s'il devait y avoir *indemnité ou non,* et quel devait être le montant de cette indemnité.

Finally, in 1894, in *Chamberland* v. *Fortier*(6), at page 380, speaking for this court, Mr. Justice Fournier after reviewing these cases says:

Les formalités prescrites par nos statuts pour l'ouverture des chemins et l'expropriation des particuliers pour la construction de chemins

(1) 2 L.C.L.J. 40.
(2) 17 L.C. Jur. 193.
(3) 2 Q.L.R. 225.
(4) 10 Q.L.R. 63.
(5) Q.R. 2 Q.B. 266.
(6) 23 Can. S.C.R. 371.

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doivent être rigoureusement observées sous peine de nullité, comme l'ont décidé nos cours.

It has been argued that the *procès-verbal* and the notices should be searched for the information omitted from the award. Even if we admit this, I cannot find in the *procès-verbal* or the notices a description of the property or a proper designation of the proprietors and, of course, there is no mention of the value, but I am of opinion that the valuators' award which is the title under which the municipality claims the right to dispossess the plaintiff should be complete in itself. The Municipal Code says that the award of the valuators vests the property in the corporation (art. 903) and entitles it to take possession, but it also says what the award must contain and all the conditions enumerated in art. 918 are essential to the validity of an award. When a statute confers a right, privilege or immunity, the regulations, forms or conditions are imperative, in this sense that non-observance of any of them is fatal. Maxwell on Statutes (ed. 1905), p. 557.

I would allow the appeal and reverse the judgment of the Superior Court and of the court of appeal, with judgment as follows; and this court rendering the judgment which should have been rendered by the Superior Court doth hereby declare the plaintiffs lawful possessors of the immovables described in their declaration; and the said defendant is prohibited from troubling them in their possession thereof, in which possession it is ordered that the said plaintiffs be reinstated and maintained, and for their trespass aforesaid the said defendant is condemned to pay the said plaintiffs the sum of $25 damages with interest from this day and costs of a possessory action in the Superior Court and also the costs in the Court of King's Bench and in this court.

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DAVIES J. (dissenting).—In this case I have reached the conclusion that the appeal should be dismissed with costs. The grounds of my decision are that the road in question the right to possession of which was in dispute was what is known as a "first front road" subject at any time under the Municipal Code of Quebec to be "appropriated" by the municipality without any compensation except for improvements made or placed thereon. I think Mr. Ritchie, for the respondent, put it very well when he said that these "first front roads" were not like the rest of the lands in the township, but were in the nature of reservations out of the grant. It is true that they are not expressly reserved out of the grant, but they stand under the law in very much the same position as lands which are expressly reserved for roads. Section 906 of the Municipal Code provides for both such cases. It reads:

> No indemnity must be allowed for the land required for the first front road upon a lot, nor for the land reserved for a public road in the grant or concession of a lot.

In the case before us as soon as Mr. Stewart's contention that the minerals to be found on the road bed and the trees growing thereon were to be valued as improvements had been rejected as they were on the argument at bar the appeal stood baldly as a contest with respect to the possession of the land taken as and for a "first front road" on which there were no improvements and as to which the law expressly prohibited any indemnity from being given when appropriated by the municipality.

I was inclined to the opinion that in such a case no valuation at all was required to be gone through. I should have thought that all the sections requiring

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valuation to be made before the right to possession of the road passed to the municipality were inapplicable to a case where valuation was prohibited and being inapplicable were unnecessary.

The argument advanced that because article 918 of the statute directed the valuators (*inter alia*)

to fix the amount of indemnity if they grant any and if not state their refusal

therefore an award must be made, the lands mentioned, and the proprietor indicated, did not seem to me applicable at all to such a case as the one before us where there was not any discretion to grant or refuse indemnity the granting of such being expressly prohibited by statute. The article was obviously applicable only to those cases where the circumstances entitled valuators to give or withhold in their judgment indemnity or damages.

Inasmuch, however, as, owing to a deviation in a part of the road in question valuators were appointed and a valuation actually made, it is not necessary to determine whether a valuation is in every case absolutely necessary or not. The only objection we have to deal with here is that a valuation made, but not containing the name of the proprietor and the number of the lot of which the land taken formed part, is bad and the omissions necessarily fatal.

The objection to the number of the lot being omitted could, I think, in any case be cured by reference to the *procès-verbal* which formed part of the record of the proceedings preceding the valuation. The other defect which might possibly be held fatal in cases requiring a valuation of either lands or improvements cannot in my opinion if proper effect is to be given to

the curative section of the Act, art. 16, be held fatal in this case. That section reads as follows:

> No objection founded upon form, or *upon the omission of any formality even imperative,* can be allowed to prevail in any action, suit or proceeding respecting municipal matters, unless substantial injustice would be done by rejecting such objection, or unless the formality omitted be such that its omission, according to the provisions of this Code, would render null the proceedings or other municipal acts needing such formality.

A valuation of lands with respect to which no indemnity could be awarded is surely the merest formality. No substantial injustice would or could be done by rejecting an objection purely formal and it does appear to me that even assuming the necessity of going through the form of an award which was actually gone through and made in the case before us, the absence from the award of an ingredient which might be essential where land or improvements had to be valued should not in this case where no valuation was possible be held fatal.

Assuming, therefore, I am wrong as to a valuation or award being unnecessary and putting the case at its very strongest against the municipality that the name of the proprietor and number of the lot should have been stated in the valuation or award surely in a case such as we have before us such omission would be no more than the "omission of a formality even imperative" which under this section the courts are directed not to allow "unless substantial injustice would be done."

I am at a loss to conceive how in this case any substantial injustice could be done and would therefore agree with the judgment below and dismiss the appeal with costs.

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Idington J.

IDINGTON J. (dissenting).—For the reasons assigned by Mr. Justice Lavergne and Mr. Justice Cross in support of the judgment appealed from I think this appeal should be dismissed with costs.

It seems that the only grounds (of the many originally taken) now held worthy of consideration are those arising out of the form of the award. One is that the land taken is not described.

How can that be so when it expressly sets forth that the valuators are dealing with the road directed in the homologated *procès-verbal* for the front of the 8th range from lot twenty inclusive to Coleraine township ? I should have thought that comprehensive and definite enough having regard to the limits assigned by law.

And when the valuators expressly state as they do in the award what and to whom compensation is due and is specifically awarded and as to the remainder of the said road that they do not allow any indemnity, seeing this road is the first road for the front of the said range, surely everything called for, including description of the lots now in question, is reduced to certainty.

It thus expressly declares all article 918 of the Municipal Code calls for except its requirement "to indicate the proprietor of such land."

Why is that requirement so needed? Clearly that whatever sum is awarded may be paid the proper party.

But when no sum is awarded what use for the indication of any name?

It would seem as if the well-known maxim *"cessante ratione legis cessat ipsa lex"* might well be here borne in mind. It is said, however, as another reason,

that the question of title is involved. Can that be so when we consider the Act, and especially article 920 thereof, which shews the money may be paid to the party in possession though not the real proprietor ?

Clearly the man actually in possession might have been named though not the real proprietor and yet the title would in due time have passed to the corporation, assuming, of course, everything else as here validly done.

The award was made the 7th of June, 1905, after notice had been duly served on King Bros., who did not choose to appear and who did not appeal within the thirty days given by the Act for doing so.

After everything had been thus done that could or need have been juridically done we are asked to say it was null because the name of King Bros., or some one else, was not inserted in the certificate, though no possible injustice was done or can be said to have been done to King Bros., whose names appear on record as parties notified as owners and who in fact owned these lots. Indeed it was after all this the appellants acquired by deed of the 13th of July, 1905, any right it now has to the lands in question.

Let us see what the curative provision for such a thing says. Article 16 of the Municipal Code is as follows:

16. No objection founded upon form, *or upon the omission of any formality even imperative,* can be allowed to prevail in any action, suit or proceeding respecting municipal matters, *unless substantial injustice would be done by rejecting such objection,* or unless the formality omitted be such that its omission, according to the provisions of this Code, would render null the proceedings or other municipal acts needing such formality.

I have already indicated how little even of a shadow of "substantial injustice" would be done by dis-

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missing this appeal and why as the title is not necessarily derivable from the party who may be indicated in such an award its omission would not render the proceeding null. It seems to have been only the omission of a formality; and that, under the circumstances, a needless one.

It strikes me that the scope and purpose of this section was just to obviate such possible occurrences.

DUFF J. concurred with the Chief Justice.

ANGLIN J.—This action is brought for a declaration of the plaintiffs' right to possession and to recover possession of land which the defendant claims to have expropriated for a road. The validity of the expropriation proceedings taken by the defendants is impugned upon several grounds, to all of which the court of first instance and the Court of King's Bench (Cimon and Gagné JJ. *ad hoc,* dissenting) refused to give effect.

Having regard to the view which I take of one of these grounds of attack, I find it unnecessary to refer to the others. After *procès-verbal* determining the propriety of constructing the road and defining the land required (art. 902), the Municipal Code provides, as a condition precedent to the right of the municipality to take possession, that there shall be an award of valuators fixing or refusing indemnity to the proprietor (art. 903). The appellants impeached the award in this instance for non-compliance with the provisions of article 918 of the Municipal Code which reads as follows:

> 918. In every award rendered by them, the valuators must mention the lot of which the land taken forms part, indicate the pro-

prietor of such land, as well as the by-law, *procès-verbal*, or order of the council in virtue of which such land is taken, and fix the amount of indemnity if they grant any, and if not, state their refusal.

The award in this case "mentions the lot of which the land taken forms part," if at all, only by reference to the *procès-verbal*. Neither directly nor by reference does it "indicate the proprietor." If the requirements of article 918 be merely formalities, though imperative, (must) their non-observance may be excusable under article 16 of the Municipal Code. But, in my view, neither the requirement of the mention of the lot or of the indication of the proprietor in the award can be so regarded; each must be deemed matter of substance.

By article 913 the valuators are required to lodge their award in the office of the council demanding the expropriation, and the secretary-treasurer of the council is required to give public notice (article 232) of such lodgment. The time for appeal from the award is by article 914 restricted to thirty days from the time the notice is so published. As the notice given is merely that the award has been lodged it would appear to follow that a proprietor whose land is covered by it may be prejudicially affected in his right of appeal by an omission from the award of the particulars imperatively directed by article 918. The mention of the lot alone might not suffice. The particular land taken need not be described and the interested proprietor might own only part of the lot (article 19, clause 25), and therefore might not know merely from "the mention of the lot" that the award in fact dealt with his land; hence the requirement that the proprietor should be indicated. Again, there might be error or mistake in the indication of the proprietor; hence the provision

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requiring that the lot be mentioned. With both particulars set out, fair notice is given of the subject of the award and of the interests which it affects. In my opinion the reference to the *procès-verbal* which contains a description of the lands to be expropriated but no indication of the proprietors, is not a mention of the lot in the award sufficient to comply with article 918, which requires that the lot be mentioned "as well as the * * * *procès-verbal.*"

The reference in the award to the notice given to the proprietor—apparently the only document in these proceedings containing any indication of their names —is merely *"après avis dûment donnés"*—quite insufficient to warrant its being treated as an indication of the proprietors in conformity with article 918. Indeed, having regard to the explicit language of the article and the character and effects of the information which it contemplates shall be given by an award duly lodged and notified, I incline to the view that no mere reference, however precise, to another document, however accessible, can be deemed a sufficient compliance with its terms.

In the Court of King's Bench, Mr. Justice Lavergne did not allude to this objection to the validity of the award, disposing of what he deemed "irregularities" on the ground that by virtue of article 914 of the Muncipal Code, the *"sentence arbitrale"* had become final and the plaintiffs were, therefore, bound by it and without remedy.

But if the omission of the particulars in question renders the award a nullity—as I think it does—this answer of the learned judge is, with great respect, quite inconclusive.

Mr. Justice Cross proceeds on the assumption that

the requirement of the omitted particulars is merely a matter of form and that the omission is therefore "inoperative" under article 16 of the Municipal Code. I have already stated why I am unable to accept this view. Mr. Justice Cimon in his dissenting judgment, in which Mr. Justice Gagné concurred, applied to this case a principle familiar to English lawyers, which he states in these words: "En matière d'expropriation toute est de rigueur"; (see *Chamberland* v. *Fortier* (1)); and he concludes that the omission to indicate the proprietor in the *"sentence arbitrale"* is fatal. In this view, for reasons already stated, I fully concur.

Mr. Ritchie contended that, inasmuch as it is admitted that the road to be provided is a "first front road," and under article 906 "no indemnity must be allowed for the land required for a first front road," there was in reality no need for any award in regard to the land taken from the plaintiffs and that title passed from them to the defendant upon the homologation of the *procès-verbal.* He argued that upon its proper construction article 918 only requires that the proprietors to whom compensation is awarded shall be indicated.

Several answers to this view immediately present themselves. The first is that article 918 requires not that the proprietors to whom compensation is awarded shall be indicated, but that indication shall be given of the proprietors of the land taken. Moreover, it requires that as to such land and such proprietors the valuators shall "fix the amount of indemnity, if they grant any, *and if not, state their refusal*"—language which makes it clear beyond doubt that when land

(1) 23 Can. S.C.R. 371, at p. 380.

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is expropriated, whether the owner is awarded or is refused indemnity, the land must be mentioned and the proprietor indicated in the award.

And this is entirely reasonable, because the proprietor who is refused compensation should have the right to question upon appeal the grounds upon which such refusal is based, even in the case of a first front road. *King* v. *Township d'Irlande*(1), in 1893. The mention of the lot from which the land is taken as well as the indication of the proprietor is quite as important where indemnity is refused as where it is allowed.

Then article 903 provides that:

> The corporation becomes the proprietor of such land, and may take possession thereof, without any other formality, from the moment that the decision of the valuators, who fixed *or refused* an indemnity, has become final and without appeal.

The making of an award seems, therefore, to be a condition precedent in every case to the right of the municipal corporation to take possession.

I am, therefore, with great respect, of opinion that, although their objection is highly technical and they have shewn no real prejudice or injury, the appeal of the plaintiffs must be allowed with costs and that their claim for possession of the property in question must be upheld. They should also have their costs in the Superior Court and the Court of King's Bench to be paid by the respondents.

Appeal allowed with costs.

Solicitor for the appellants: *Samuel Deschamps.*
Solicitors for the respondents: *Méthot & Laliberté.*

(1) Q.R. 2 Q.B. 266, at p. 269.

AARON WENGER (DEFENDANT) .....APPELLANT; 1909

AND *May 6. *May 7.

ALLAN DONALD LAMONT AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Amount in controversy—Reference to assess damages—Final judgment.

In 1905 L. and others purchased from W. his creameries on the faith of a statement purporting to be made up from the books and shewing an output for the years 1904-5 equal to or greater than that of 1903. Having discovered that this statement was untrue they brought action for rescission of the contract to purchase and damages for the loss in operating during 1906. The judgment at the trial dismissing the action was affirmed by the Divisional Court. The Court of Appeal reversed the latter judgment, held that rescission could not be ordered but the only remedy was damages and ordered a reference to assess the amount. On appeal to the Supreme Court of Canada:

Held, Girouard J. dissenting, that as it can not be ascertained from the record what the amount in controversy on the appeal was, or whether or not it is within the appealable limit, the appeal does not lie.

Held, per Idington J.—The judgment appealed against is not a final judgment.

Per Girouard J. dissenting.—It is established by the evidence at the trial, published on the record, and admitted by the respective counsel for the parties, that the amount in dispute exceeds $1,000. The court, therefore, has jurisdiction to hear the appeal.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of a Divisional Court which affirmed the verdict at the trial dismissing the action.

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

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Action for rescission of contract and for unstated damages was dismissed at the trial and by the Divisional Court. The Court of Appeal in setting aside the judgment for dismissal ordered a reference to assess the damages reserving further directions and costs. The defendants appealed.

Wallace K.C. moved to quash the appeal for want of jurisdiction.

Watson K.C. contra.

THE CHIEF JUSTICE.—I am of opinion that we cannot now hear this appeal because it is impossible for us to ascertain from the record in its present condition whether or not the amount in controversy is within the appealable limit.

GIROUARD J. (dissenting).—It is established by the evidence on record and admitted by both parties at the bar before us that the matter in controversy in this appeal exceeds the sum or value of $1,000. Following the decision as to the jurisdiction of this court in *The City of Toronto* v. *Metallic Roofing Co.*(1), I am of opinion that this court has jurisdiction to hear this appeal and that the motion to quash ought to be rejected.

IDINGTON J.—The statement of claim makes no demand for any stated amount of damages.

The judgment awards no sum or right of recovery whatever. Nor is it final, but merely reverses the judgment of the learned trial judge and directs an inquiry

(1) Cam. Pr. 17.

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as to damages and reserves further directions and costs.

The case is distinguishable from that of *The City of Toronto* v. *The Metallic Roofing Co.*, cited in Cameron's Supreme Court Practice, at page 17, inasmuch as the statement of claim therein demanded a sufficient amount to render it appealable if that should be taken as a proper test of the amount in controversy, and also because more nearly a judgment awarding a recovery.

I cannot think that we can determine our jurisdiction, in a case of this kind, by means of affidavits respecting the amount of the claims in controversy which is the very thing yet undetermined, and directed by the judgment in question to be found.

Besides, I am unable to find a case overruling the case of *The Rural Municipality of Morris* v. *London & Canadian Loan & Agency Co.*(1), which held that an order for judgment which finally settled the rights of the parties and for all practical purposes might have been looked upon as final, yet was held not so within the "Supreme Court Act" as it had not been entered of record.

I cannot say that the form of judgment here of record at all approaches that in the *Morris Case*(1) in finality.

It may be contrary to my impression on argument that the case falls within what we laid down in the *Union Bank of Halifax* v. *Dickie*(2).

But of this I desire to reserve any opinion for the present. It may be that the appellants are, though in fact entitled to recover a much larger sum than the

(1) 19 Can. S.C.R. 434. (2) 41 Can. S.C.R. 13.

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Idington J.

limit assigned as appealable in Ontario cases, left without any right to appeal.

And it may be that in such cases as take the form of procedure apparent in this case leave to appeal must be got.

The result might if the practice became general give rise to a much more rational basis for appeal than mere amount fixes.

The doubt of our jurisdiction is so great we should refrain from entertaining the appeal, and I think the appeal ought to be quashed with costs of the motion, but no general costs of the appeal.

DUFF J.—The judgment is, in my opinion, not a final judgment. There is a reference to ascertain damages only; no order to pay the amount ascertained; and no adjudication of liability. I am of opinion that the appeal should be quashed.

Appeal quashed with costs.

Solicitor for the appellant: *A. G. Campbell.*

Solicitor for the respondents: *J. G. Wallace.*

FRANCIS HECTOR CLERGUE (DEFENDANT) ..... APPELLANT;

AND

H. H. VIVIAN AND COMPANY (PLAINTIFFS) ..... RESPONDENTS.

1909
*March 15.
*April 5.

Contract—Agreement for sale of land—Deferred conveyance—Default in payment—Remedy of vendor—Reading "or" as "and."

Where, in accepting an offer by V. for the sale of land, C. undertook to pay certain instalments of the purchase money before receiving the deed V. could sue for recovery of unpaid instalments, his remedy not being confined to an action in damages for breach of contract. *Laird* v. *Pim* (7 M. & W. 474) distinguished.

The offer having been accepted by C. for "myself or assigns," to avoid holding the contract void for uncertainty as to the purchaser's identity, the word "or" was read as "and." Idington J. dissenting, on this point.

Judgment of the Court of Appeal (16 Ont. L.R. 372) maintaining that of a Divisional Court (15 Ont. L.R. 280) affirmed.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment of a Divisional Court(2), in favour of the plaintiffs.

The facts are stated by Mr. Justice Britton in giving judgment after the trial as follows:

"The plaintiffs, by their agent, on June 20th, 1903, offered to sell to the defendant property consisting of 3,066½ acres for $125,000, payable as follows: $500 as a deposit upon signing the agreement, $4,500 upon completion of the purchase, and $120,000, in five yearly

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

(1) 16 Ont. L.R. 372. (2) 15 Ont. L.R. 280.

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instalments of $24,000 each in one, two, three, four and five years from the date of the offer, with interest at 5 per cent. per annum, at the time of each instalment, on the whole amount that might from time to time remain unpaid. The purchase was to be completed on July 15th, 1903, at the office of Lefroy & Boulton, Toronto, and the defendant was then to be given possession. It was further stipulated and made part of the offer that the defendant as soon as he had paid three-fifths of the total purchase money, together with all interest accrued on the whole, should be entitled to call for a transfer of the lands, upon a good and sufficient first charge or mortgage being executed upon the whole of the lands to the vendors, to secure payment to them of the balance of the purchase money and interest. The defendant was to have until July 15th, 1903, to examine the title, etc. The vendors were to pay the proportion of taxes and insurance up to the date of the offer, and after that date the defendant was to assume them. Then the offer contained this special proviso: 'Time shall in all respects be of the essence of the agreement of sale, and unless the payments are punctually made at the time and in the manner above mentioned, and if such default shall occur before the execution of the transfers and of the charge or mortgage above mentioned, the agreement of sale shall be null and void and the sale cancelled, and in that event you shall have no right to recover any part of the purchase money already paid.'

"On June 23rd the defendant accepted the offer in these words: 'I do hereby accept on behalf of myself or assigns the above offer, and do agree to become the purchaser of the lands mentioned in it upon the terms and conditions therein contained. F. H. Clergue.'

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"A supplemental agreement was made as to ore extracted from the land before payment in full of the purchase money, but this is not material for consideration in this action.

"On July 15th, 1903, the plaintiffs accepted from the defendant his promissory note for $4,500 at four months from that date, in lieu of the cash instalment, and defendant was allowed to go into possession of the lands. Defendant put a person in charge of these lands as caretaker, and the authority of this person has never been questioned nor countermanded. The note was not paid at maturity, and the plaintiffs recovered judgment for the amount of it and interest, and that judgment has been paid.

"On June 23rd, 1904, there fell due the instalment of principal, $24,000, and interest for one year on $120,000 at 5 per cent., amounting to $6,000, making $30,000. This was not paid.

"On January 19th, 1905, the defendant assigned his rights under the agreement to the Standard Mining Company of Algoma, Limited, and on March 10th, 1905, the plaintiffs, the Standard Mining Company, and the defendant entered into a new agreement, by which the plaintiffs agreed to sell this same property to that company for $125,000, on which the original deposit or payment of $500 by defendant was to be credited.

"Of the balance, the sum of $4,500, together with interest and costs, represented by the judgment against the defendant, was to be paid within one month, and the yearly instalments were to be made on June 23rd in the years 1905, 1906, 1907, 1908 and 1909,

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together with interest, to be computed from June 23rd, 1903. This agreement is a very elaborate and carefully prepared instrument, but it is not necessary for my present purpose to refer to any of its provisions other than the following:

"(1) The mining company was not to be given possession of the lands until the judgment for $4,500, and interest and costs, and a further sum sufficient to make $10,000, had been paid.

"(2) Upon the execution and delivery of that agreement the mining company were for all purposes substituted for and in the place of the defendant with respect to the first agreement (made by offer and acceptance), and the first agreement was to be deemed to be merged in the latter agreement, subject to this, that the latter agreement and anything that might be done thereunder should not affect nor prejudice the claim of the plaintiffs against the defendant in respect of the sums of $24,000 which fell due on June 23rd, 1904, and on June 23rd, 1905, or upon the interest on the unpaid purchase money up to the date of the assignment, viz., January 19th, 1905, or prejudice the right of the defendant with reference thereto; but until the purchasers should pay the first and second instalments of $24,000 each, with interest as aforesaid, the rights of the plaintiffs and defendant should remain as then existing in respect of these instalments and interest. That agreement recited that the plaintiffs made the claim, as now sued for, and that the defendant resisted that claim, asserting that there was not any personal liability on his part for anything beyond the judgment recovered upon his note for $4,500.

"This action is therefore brought to recover the amount due June 23rd, 1904, on principal.....$24,000

"The part of the instalment due June 23rd, 1905—say, seven-twelfths of $24,000.. 14,000

"And interest for one year and seven months from June 23rd, 1903, to January, 19th, 1905, on $120,000—say.... 9,500

"Approximately.....$47,500

His lordship gave judgment for the plaintiffs which was affirmed by the Divisional Court and the Court of Appeal. The defendant then appealed to the Supreme Court of Canada.

Middleton K.C. for the appellant. We rely upon two main defences; (1) that an action will not lie for the purchase price as the vendor has not yet conveyed the lands; and (2) that it was known that the defendant was purchasing for and on behalf of a company, and that it was the intention of both parties that, on the company assuming liability, the defendant should be discharged from all liability. The courts below have erred in holding against us on both defences.

The defendant submits that where a vendor of either land or chattels retains the property in the thing sold he cannot maintain an action for the price. His only remedy is for the damage sustained by the purchaser's default. The courts below have erroneously assumed that the defendant's contention is that the plaintiffs cannot recover at all because the right to recover is in some way dependent upon their readiness to convey or their having conveyed, and have re-

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sorted to cases upon dependent and independent covenants. The defendant's real argument on this branch of the case is that assuming no defence is shewn, the plaintiffs yet having their land can only recover the loss sustained by the breach of contract, that is, the difference between the value of the land and the price agreed on and possibly an allowance for expenses connected with the sale. On this branch of the case we rely on *Laird* v. *Pim*(1); *Moor* v. *Roberts*(2); Dart (7 ed.), page 999; Sugden on Vendors (14 ed.), pages 239-40, and note; *Poole* v. *Hill*(3); *East London Union* v. *Metropolitan Railway Co.*(4); *Pordage* v. *Cole*(5); *Dunlop* v. *Grote*(6); *Thomas and Beatty* v. *Ross*(7); *McArthur* v. *Winslow*(8); Williams "Vendors and Purchasers," pages 937, 958; *Fraser* v. *Ryan* (9); *Cameron* v. *Bradbury*(10).

The same result would follow had the plaintiffs sued for specific performance. The lands would have been sold and the defendant would have been liable for the deficiency.

On the defendant's claim for reformation, the evidence clearly shews that appellant is right.

The court below assumes that the defendant refers to the correspondence after the contract for the purpose of shewing a new contract. The defendant relies upon the correspondence shewing admissions as to what the real bargain was in the first instance. It is in effect admitted by the respondents and by the court

(1) 7 M. & W. 474.
(2) 3 C.B.N.S. 830.
(3) 6 M. & W. 835.
(4) L.R. 4 Ex. 309.
(5) 1 Wm. Saund. 548.
(6) 2 Car. & K. 153.
(7) 19 U.C.Q.B. 370.
(8) 6 U.C.Q.B. 144.
(9) 24 Ont. App. R. 441.
(10) 9 Gr. 67.

below that, if a formal agreement with the Standard Mining Company had been signed before the first instalment fell due, the defendant would not have been liable. The correspondence shews that the company was ready to execute the agreement long before the date in question, and it cannot fairly be argued that the question of the liability of the defendant was to depend on the degree of diligence with which the conveyancing was conducted by the solicitors engaged, and that the defendant was to be made liable because the former documents had not been signed by a named day. Such a construction of the agreement arrived at is contrary to the whole weight of evidence, documentary and oral.

We also refer to *Eastern Counties Rway. Co.* v. *Hawkes*(1); and *Congregation Beth Elohim* v. *Central Presbyterian Church*(2).

Douglas K.C. and *Lefroy K.C.* for the respondents. The rule that no action will lie upon an agreement for the sale of land for the price until the lands have been actually conveyed, or a conveyance tendered, has no application to a case such as this where the agreement of sale provides for payment of the purchase money by annual instalments, and where as here it is expressly agreed that the purchaser is not to be entitled to call for a transfer or conveyance of the land until a certain definite portion of the purchase money has been paid. While the general rule may be that the mutual engagements of the parties to such an agreement are to be considered dependent on each other, the contract may be so worded as to shew that they are

(1) 5 H.L. Cas. 331. (2) 10 Abb. Prac. R. (N.S.) 484.

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independent. The question is to be determined by the intention and meaning of the parties as manifested in the agreement, and the intention that they shall be independent is clearly manifested in the agreement in question. *Pordage* v. *Cole*(1), note 1, page 551; *Yates* v. *Gardiner*(2); *Stavers* v. *Curling*(3), *per* Tindal C.J., at p. 368; *Wilks* v. *Smith*(4), at p. 360; *McDonald* v. *Murray*(5); *Dicker* v. *Jackson*(6); Norton on Deeds (2 ed.), p. 524; Dart on Vendors and Purchasers (7 ed.), vol. 2, p. 1001; *Armstrong* v. *Auger*(7).

The respondents submit that the words "or assigns" do not extend the operation of the agreement beyond what it would possess without them; that they amount to nothing more than saying that if the appellant assigned the benefit of the contract, no objection would be made to his doing so, provided the assignee was acceptable to the vendors, and that they fall far short of an agreement to relieve the purchaser from liability to pay according to the terms of the agreement. It must be borne in mind that the appellant personally agreed to become the purchaser, entered into possession of the property and was in possession thereof when the instalment of purchase money sued for fell due.

The appellant contends that it was expressly understood and agreed that he was not to be personally liable for any amount beyond the deposit and the promissory note for $4,500, and asks to have the agreement reformed accordingly. We submit that no case

(1) 1 Wm. Saund. 548.
(2) 20 L.J. Ex. 327.
(3) 3 Bing. N.C. 355.
(4) 10 M. & W. 355.
(5) 2 O.R. 573; 11 Ont. App. R. 101.
(6) 6 C.B. 103.
(7) 21 O.R. 98.

of mutual mistake on which reformation could be based is made on the evidence; none of the evidence establishes a case for reforming the writing, and this contention was not pressed in the Divisional Court or the Court of Appeal. Pollock on Contracts (7 ed.), pp. 513-515; *Clarke* v. *Joselin*(1).

As to the contention that the respondents elected to cancel the agreement of sale to appellant, inasmuch as they on 27th Jan., 1904, issued a writ of summons against him claiming "damages for breach of contract," the evidence, shews that this action went no farther than the issue and service of the writ, and that so far from its being a cancellation of the contract it was in fact brought for the object of enforcing one of the terms of the contract, viz.: that the current year's taxes upon the lands sold should be apportioned in the usual way between the vendors and the purchaser and that the purchaser should pay the part apportionable for the period between the date of the offer and the end of the year. Moreover, when that action was commenced, no instalment of purchase money had fallen due.

THE CHIEF JUSTICE and DAVIES J. concurred with Anglin J.

IDINGTON J.—I agree with the general reasoning and the result of my brother Anglin's judgment, though I do not think it is a case for reading the "or" as "and."

DUFF J. concurred with Anglin J.

(1) 16 O.R. 68.

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CLERGUE v. VIVIAN & Co.

Anglin J.

ANGLIN J.—For the reasons given by the learned Chief Justice of Ontario I would dismiss this appeal. By the terms of his contract the defendant undertook to pay instalments of the purchase money before he should become entitled to a conveyance. As is pointed out by Parke J. in *Yates* v. *Gardiner*(1), in 1851, this fact entirely distinguishes the present case from *Laird* v. *Pim*(2), so much relied upon by the appellant.

Assuming that there was a binding contract effected by Mr. Clergue's acceptance of the plaintiffs' offer, that contract must have been with Mr. Clergue, at all events in the first instance, and, as pointed out by the learned Chief Justice of Ontario, the agreement contains nothing which would warrant the construction that, upon its assignment by Mr. Clergue, his personal liability under it should cease, not only as to accruing instalments but also as to instalments then overdue.

The only suggestion of difficulty in the case is created by the use of the words "F. H. Clergue *or* assigns" in the plaintiffs' offer and of the words "on behalf of himself *or* assigns" in the defendant's acceptance. If the latter words should be read literally it might be doubtful whether there would be a contract at all. An acceptance by A., on behalf of A. or B., leaves it uncertain who is in fact the party accepting. It is manifest that the parties intended in this case to make a contract, and it is equally manifest that, although Mr. Clergue wished the contract to be so framed that it would expressly provide for his right to assign it, he did not intend to oblige himself to make an assignment of it, and he did intend to put himself

(1) 20 L.J. Ex. 327. (2) 7 M. & W. 474.

in a position, in the event of his not assigning it, to claim the benefit of the contract personally.

There is no doubt of the intention of the parties; and, where sense requires it, there are many cases to shew that we may construe the word "or" into "and," and "and" into "or," in order to effectuate the intent of the parties.

"And there is no case in which any difference has been made as to this point between a will and a deed, when the court are considering how the intention of the parties can be effected." *Per* Lord Kenyon C.J., in *Wright* v. *Kemp*(1), at page 473; see also *Morgan* v. *Thomas*(2), at page 646.

In order to give effect to the intention of the parties the word "or" should be here read "and." So read, the acceptance unquestionably made a contract which became binding upon Mr. Clergue personally. He was bound to pay the instalments as they accrued due, and upon failure to do so was liable to be sued for them. His assignment of the contract, at all events as to matured payments which alone are involved in this action, did not relieve him from liability.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Macdonald, Shepley, Middleton & Donald.*

Solicitor for the respondents: *A. H. F. Lefroy.*

(1) 3 T.R. 470.

(2) 9 Q.B.D. 643.

1909

*Feb 26.
*May 4.

HARRY BUTLER (DEFENDANT) .....APPELLANT;

AND

G. B. MURPHY AND S. T. SMITH, CARRYING ON BUSINESS UNDER THE NAME AND STYLE OF G. B. MURPHY & CO. (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Principal and agent—Broker selling on Grain Exchange—Contract in broker's name—Liability of principal—"Futures"—"Options"—"Margins"—Board rules—Indemnity.

On 14th August, 1907, the defendant, who resided in the State of Nebraska, wrote the following letter to the plaintiffs, grain dealers at Winnipeg, Man.: "Yours of recent date enclosing market report rec'd. I shall be North in about four weeks to look after the new crop and, if you can sell No. 2 oats for 37c. or better, in store Fort William, you had better sell 4,000 bus. for me, and I will be up at Snowflake then so I can look after the loading of them, and I will send the old oats then." The plaintiffs, who were also brokers on the Winnipeg Grain Exchange, sold the oats at 38½ cents on the "Board," without disclosing the name of their principal, for October delivery, becoming personally liable for the performance of the contract according to the rules of the Exchange. Upon defendant refusing to deliver the oats, the plaintiffs purchased the quantity of oats so sold at an advance in price in order to make the delivery and brought the action to recover the amount of their loss thus sustained.

Held, reversing the judgment appealed from (18 Man. R. 111), that the authority so given did not authorize the plaintiffs to make a sale under the Grain Exchange Rules binding upon their principal; that no contract binding on the principal outside of these rules had been entered into, and, consequently, that he was not liable to indemnify them for any loss sustained by reason of their contract.

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

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BUTLER v. MURPHY & Co.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the judgment at the trial, by Macdonald J. and maintaining the plaintiffs' action with costs.

The circumstances of the case are stated in the head-note and in the judgments now reported.

Haydon for the appellant. The judgment appealed from is erroneous in holding, in effect, that the rules of the "Exchange" were incorporated in and became part of the authority to sell and that appellant is liable to indemnify plaintiffs against any loss incurred by them as a consequence of selling in the manner in which they did; that the appellant was a foreign principal and his agents had, therefore, authority to sell in their own name and, having done so, appellant should indemnify them against loss; that instructions by a non-member to a member of a Grain Exchange authorizes the member to contract in his own name regardless of whether the non-member knows that the member belongs to an Exchange or of whether the non-member instructs him to deal or knows that he will deal on that market; that the respondents had authority to contract in their own names; and that privity of contract was established between the buyer and the appellant, still calling appellant a foreign principal.

The respondents were only agents to establish privity of contract between the appellant and a third party and were not authorized or justified in assuming any liability whatever. The custom or rule of the Grain Exchange whereby the "clearing house" became principals with its members was unreasonable and of

(1) 18 Man. R. 111.

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no effect as far as the appellant was concerned. The evidence shews that the liability, if any, assumed by respondents was a liability to the "clearing house" and not to the purchaser of the oats and that that liability was not one of any particular trade, but rather a balancing on each day's transaction. The appellant should not be held to have contemplated as part of the authority to sell grain for him an agreement to indemnify respondents against any such liability.

In the absence of specific instructions to the contrary an agent to sell has only authority to establish privity of contract between his principal as vendor and some third person as purchaser. *Robinson* v. *Mollett*(1). There were no instructions to sell on a particular market, the appellant did not know that the respondents were members of the Exchange or that it existed, he was never informed of the alleged custom, and knew nothing of "margins" or "options." *North-West Transportation Co.* v. *McKenzie*(2); *Northern Elevator Co.* v. *Lake Huron & Manitoba Milling Co.* (3); *Kirchner* v. *Venus*(4), at page 399.

The respondent, Smith, admitted that he did not attempt to sell the grain to any one other than a member of the Exchange, but would not say that he could not have disposed of it elsewhere. He admitted that he might have sold direct to a consumer in which case he would not have incurred any personal responsibility. Even assuming a custom to be incorporated in a contract it can only control the mode of performance, it cannot change its intrinsic character. *Mollett*

(1) L.R. 7 H.L. 802.
(2) 25 Can. S.C.R. 38.
(3) 13 Ont. L.R. 349.
(4) 12 Moo. P.C. 361.

v. *Robinson*(1), at page 656, *per* Willes J. No custom, and certainly not one that is unreasonable, is binding upon a person merely because he instructs a broker on the Stock Exchange to enter into a transaction with him. *Benjamin* v. *Barnett*(2). The principal is not fixed with loss suffered by agents, members of a stock exchange, unless it is found that the contract contemplated that the business would be under and according to the rules of that exchange, or that the rules thereof were incorporated into the contract of employment. *Bibb* v. *Allen*(3); *Irwin* v. *Williar*(4); *Risdon Iron and Locomotive Works* v. *Furness*(5); *Halbronn* v. *International Horse Agency and Exchange*(6); *Robinson* v. *Mollett* (7), at pp. 837 and 838; *Hartas* v. *Ribbons*(8); *Chapman* v. *Shepherd*(9), at p. 237; *Van Dusen-Harrington Co.* v. *Morton*(10); *Duncan* v. *Hill*(11).

Nothing more unreasonable than the alleged custom could be imagined. On the contrary the appellant would expect to enter into a contract where he sold direct and was not asked for margins.

As to the contention that the appellant was a foreign principal and the presumption being that the appellant did not give the respondents authority to pledge his credit, even if this be so, and if in such circumstances the agents might contract in their own names, they had no power to make a contract with an outsider—such as the clearing house. The authority of the agent, in such circumstances, is one of fact, and

(1) L.R. 5 C.P. 646.
(2) 19 Times L.R. 564.
(3) 149 U.S.R. 481.
(4) 110 U.S.R. 499.
(5) [1906] 1 K.B. 49.
(6) [1903] 1 K.B. 270.
(7) L.R. 7 H.L. 802.
(8) L.R. 22 Q.B.D. 254.
(9) L.R. 2 C.P. 228.
(10) 15 Man. R. 222.
(11) L.R. 8 Ex. 242.

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there is no finding by the trial judge on the point, nor could such a finding have been reached, on the evidence. *Webb* v. *Sharman*(1).

The appellant was a home producer, a farmer with land in Manitoba and the grain proposed to be sold was growing on that farm. The plaintiffs were aware of this, and in the preceding years they had themselves bought the crop from off this same farm. They did not treat him as a foreign principal, but simply continued their business relations, the only difference being that, on former occasions, they had bought direct from him instead of acting as his agents to sell. It is clear that they had authority to contract in defendant's name. He was selling the actual grain and he expected, and had a right to expect, that he would receive a contract with some third party to whom the sale was made.

The presumption that an agent has no authority to pledge the credit of a foreign principal only applies between merchants. It does not apply to a single transaction where the foreigner is a farmer. *Hutton* v. *Bullock*(2), *per* Brett J. at page 576; *Kaltenbach, Fischer & Co.* v. *Lewis & Peat*(3).

The rule as to a foreign principal not being liable to be sued or to sue upon a contract made on his behalf by a home agent and preventing the agent from pledging the credit of the foreign principal is based upon convenience, as the other party to the contract should not be expected to investigate the financial standing of or give credit to a foreign principal; *Armstrong* v. *Stokes*(4); *Ireland* v. *Livingston*(5), at page 408; *Elbinger Actien-Gesellschaft* v. *Claye*(6). The effect

(1) 34 U.C.Q.B. 410.
(2) L.R. 9 Q.B. 572.
(3) 10 App. Cas. 617.
(4) L.R. 7 Q.B. 598.
(5) L.R. 5 H.L. 395.
(6) L.R. 8 Q.B. 313.

of *Kaltenbach, Fischer & Co.* v. *Lewis & Peat*(1), is misconceived by Perdue J. A foreigner cannot intervene and claim his rights as an undisclosed principal for all purposes.

The respondents contend that the appellant through his silence and on account of not answering the respondents' telegrams or letters acquiesced in what the respondents had done. The obvious answer is that before notifying the appellant they had already exceeded their authority and all the mischief had been done, they had placed themselves into a position from which they could not recede. *Conmee* v. *Securities Holding Co.*(2). Silence with respect to transactions already past, cannot be held to alter the character of the authority conferred on the agents.

Ewart K.C. and *Noble* for the respondents. It is quite evident that the real reason of the appellant's default in delivering the oats was the unforeseen rise in the price. If the market price had fallen the appellant would have delivered the oats and got 38½ cents per bushel. There would have been no objection then to the sale the respondents had made for him or to the fact that it was made in their own name on his account. The defences raised in his pleading shew that the contention he is now relying upon was not present to his mind when he deliberately defaulted or for long after. All the contentions raised by his statement of defence he either failed to support at the trial or did not attempt to support.

The construction, which the respondents put upon the appellant's instructions, that they were to sell 4,000 bushels of oats for the appellant for future de-

(1) 10 App. Cas. 627. (2) 38 Can. S.C.R. 601.

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livery in the ordinary and customary way in vogue at the place where the sale was to be made is reasonable. If he intended some other construction to be put on this letter he should have made it plain. If he intended his agents to adopt an unusual, and in this case no doubt impossible, way of selling the oats he should have specified this mode of selling in his letter of instructions. Where the authority conferred on an agent is fairly capable of more than one construction, every act done by him in good faith which is warranted by any one of those constructions is deemed to have been duly authorized though the construction adopted and acted on by him was not the one intended by the principal: *Boden* v. *French*(1); *Ireland* v. *Livingston*(2); Bowstead on Agency (3 ed.) 66. The respondents, therefore, having adopted the most reasonable construction and the only reasonable construction under the circumstances, and having carried them out in good faith and having notified their principal, he should not have stood by for over two months without raising any objection. He should be taken as having acquiesced in and ratified what the agents did. Story on Agency, 302; Evans on Principal and Agent, 110.

The appellant contends that he intended his instructions to be taken to mean that the respondents were to have found some purchaser for these oats who would have been willing to look to the credit of a foreign principal for the delivery of the oats and that an agreement to that effect should have been drawn up in which the principals only and not the agents were to be bound. This would have been obviously impossible and unreasonable from any practical point

(1) 10 C.B. 886. (2) L.R. 5 H.L. 395.

of view and it is hardly possible that any grain broker or any grain producer who had for years been dealing with grain brokers would have ever contemplated such a thing. A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which such brokers are governed. *Sutton* v. *Tatham*(1); *Bayliffe* v. *Butterworth*(2); *Pollock* v. *Stables*(3); Dos Passos on Stock Brokers, 424.

The distinction of *Robinson* v. *Mollett*(4) is quite apparent because, in the present case, the contract effected is in strict compliance with the written authority, and the custom of grain brokers contracting in their own names on sales for future delivery, especially when their principals are foreigners, residing in a foreign country, is, to say the least, reasonable.

The appellant being a foreigner, resident in a foreign country, the presumption is against the right of the agents to bind him unless expressly authorized. *Armstrong* v. *Stokes*(5); *Elbinger Actien-Gesellschaft* v. *Claye*(6); *Hutton* v. *Bulloch*(7).

The appellant was, under the contract, in the same position as if it had been made in his own name. His rights would have been the same. He could have sued the buyer either in his own name or in that of the respondents. *Anderson & Co.* v. *Beard*(8); *Levitt* v. *Hamblet*(9); *Ponsolle* v. *Webber*(10); *Scott & Horton*

(1) 10 A. & E. 27, at p. 30.
(2) 1 Ex. 425.
(3) 12 Q.B. 765.
(4) L.R. 7 H.L. 802.
(5) L.R. 7 Q.B. 598.
(6) L.R. 8 Q.B. 313.
(7) L.R. 8 Q.B. 331; 9 Q.B. 572.
(8) [1900] 2 Q.B. 260.
(9) [1901] 2 K.B. 53, at p. 62.
(10) [1908] 1 Ch. 254.

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v. *Godfrey*(1); *Nickalls* v. *Merry*(2); *Browning* v. *Provincial Ins. Co.*(3); *Bell* v. *Plumbly*(4); *Kaltenbach, Fischer & Co.* v. *Lewis & Peat*(5).

The respondents have a right to be indemnified by the appellant against liabilities incurred in executing his orders. *Thacker* v. *Hardy*(6), at p. 687; *Bayley* v. *Wilkins*(7); Bowstead on Agency (3 ed.), pp. 202-210, and cases there collected.

THE CHIEF JUSTICE.—In my opinion this appeal should be allowed with costs for the reasons given in the court below.

GIROUARD J.—I concur in the judgment allowing the appeal with costs.

DAVIES J.—The right to maintain this action seems to me to depend entirely upon the answer to the question whether or not the rules and regulations of the Winnipeg Corn Exchange can be held applicable as against the defendant to the contract of sale of 4,000 bushels of oats alleged by the plaintiffs to have been sold by them as his brokers to Pearson, and which oats defendant failed to deliver. Both Murphy and Pearson were members of this Corn Exchange and there does not seem to be evidence to justify any holding that the sale was not as between them binding under these rules.

It seems equally plain to me that, apart from these rules and regulations, no binding or enforceable con-

(1) [1901] 2 K.B. 726, at p. 738.
(2) L.R. 7 H.L. 530, at p. 547.
(3) L.R. 5 C.P. 263, at p. 272.
(4) 16 Times L.R. 393.
(5) 10 App. Cas. 617.
(6) 4 Q.B.D. 685.
(7) 7 C.B. 886.

tract was made by the plaintiffs as defendant's brokers with respect to this sale.

The trial judge dismissed the action as I gather upon this ground. The Court of Appeal, proceeding mainly upon the ground that these rules and regulations were binding upon the defendant, reversed that judgment and awarded plaintiffs damages equal to the loss he had sustained by reason of defendant's refusal to carry out the contract alleged to have been made on his behalf by the plaintiffs.

Assuming the law to be that these rules and regulations were binding upon the defendant, *quoad* this transaction, I see no reason to doubt that the conclusions of the Court of Appeal were correct and that the broker could recover against his client for indemnity in respect of the grain sold for the client in a way sanctioned by the rules and usages of the grain exchange.

I am not able, however, to see upon what ground these rules can be held applicable to the contract as far as defendant is concerned. He was a farmer, living at the time he gave plaintiffs the authority to sell his oats, in Nebraska but carrying on farming also in Manitoba at a place called Snowflake.

The evidence is clear and uncontradicted that defendant did not know Murphy & Co. in any other character than as dealers in grain. As such he had on several different occasions sold them his surplus grain. The sales were *bonâ fide* sales and had nothing to do with "futures," "options," or "margins." Defendant swears that his

only knowledge of the plaintiffs was that they were grain merchants in Winnipeg buying and selling grain at one cent per bushel. That he supposed they were independent grain merchants and that they

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never informed him they were in any way connected with the Grain Exchange.

There was no evidence in any way contradicting these statements and the previous dealings between the parties tend to confirm them. Defendant swears that "he did not know what a 'margin' or an 'option' was"; that he never did anything except sell his grain, and that the reason why he did not reply to the letters and telegrams the plaintiffs wrote to him asking him to put up margins, etc., was that he "felt that they were trying to ring him into an option deal."

Defendant's authority to plaintiffs to sell reads as follows:

BELLWOOD, NEB., August 14, 1907.

G. B. MURPHY,

Dear Sir,—Yours of recent date enclosing market report rec'd. I shall be North in about four weeks to look after the new crop, and if you can sell No. 2 oats for 37c. or better, in store Fort William, you had better sell 4,000 bus. for me, and I will be up at Snowflake then so I can look after the loading of them, and I will send the old oats then.

Yours truly,

(Sgd.) HARRY BUTLER.

There is some ambiguity about the time of delivery and, in consequence of that, I think that when plaintiffs replied they had sold his oats per slip inclosed for *October delivery,* he was in duty bound, had the slip been enclosed, to have promptly repudiated the construction put upon his letter of a delivery in October if that did not express his intention.

But, as a fact, defendant says, and he is confirmed by his wife, that no such slip was enclosed and that he had no knowledge who the purchaser was and expected further letters giving him the information. The evidence respecting the enclosure of this slip having been in accordance with mercantile custom is

defective and insufficient, and my conclusion is that defendant did not receive it.

As a fact, the further letters and telegrams were demands upon him for $300 and $400 to be put up in margins, and he then concluded as he says that his agents were trying to "ring him into an option deal" and ignored their communications.

As I find the rules and usages of the Grain Exchange were not, under the circumstances of this case, binding on the defendant or applicable to the authority he gave the plaintiffs to sell, the only remaining question is whether or not, apart from these rules and usages, there was any contract for sale of defendant's oats made by his agents, the plaintiffs, which bound defendant.

This question is largely one of the intention of all the parties to be gathered or inferred from the facts and circumstances. As I have said I do not think the rules of the Exchange applied or were ever intended by defendant to apply.

The specific thing the plaintiffs had authority to do was to make a contract for the sale of defendant's oats.

They clearly had no authority to sell to themselves. The contract of sale they were authorized to make was one in which the defendant was to be one party and a person or firm found by the plaintiffs the other. The making of such a contract was, therefore, as said by Brett J. in his answer to the question put to the judges by the House of Lords in *Robinson* v. *Mollett*(1), at page 820:

> The very essence of their contract with the defendant which is a contract of employment.

(1) L.R. 7 H.L. 802.

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This case of *Robinson* v. *Mollett*(1) does not determine the point in question here, but the reasoning on which the conclusions there reached is based is alike instructive and controlling.

I think, in the view I take of the facts of this case, the language of Blackburn J., approved by the Lord Chancellor in delivering the judgment of the House of Lords in *Robinson* v. *Mollett*(1), at page 837, very applicable to this appeal

> that the respondent's mode of executing the appellant's orders was a departure from the ordinary duty of a broker, that duty requiring the broker to establsh privity of contract between the two principals.

It is another mode of expressing what Brett J., said in the quotation I have above given from his opinion.

For the reasons, therefore, that the rules and usages of the Stock Exchange must be eliminated from our consideration in determining the defendant's liability and that the very essence of the contract of employment made between the parties required the broker to establish privity of contract between the two principals and that the contract alleged to have been made was one which though binding between the two brokers under the Stock Exchange rules was not binding upon or enforceable by the defendant, I think this appeal should be allowed and the judgment of the trial judge dismissing the action restored with costs in all courts.

IDINGTON J.—The appellant was a farmer whose home was in Nebraska at the time of the happenings that gave rise to this action, but had been in Manitoba for some years before then where he owned and farmed land, latterly worked on shares.

In doing so he had known respondents as grain-

(1) L.R. 7 H.L. 802.

merchants and sold them part of his crops for three or four years in succession and, being minded to do so again with his crop of 1907, wrote them on the 2nd of August of that year asking the best price for a certain quality of oats "on track at Snowflake" (which was a Canadian Pacific Railway station near his Manitoba farm), "or store Winnipeg, or Fort William" and to have daily market list sent to him for the next thirty days. He added he should have a fair crop at Snowflake.

The following correspondence ensued:

BELLWOOD, NEB., August 14, 1907.

G. B. MURPHY,

Dear Sir,—Yours of recent date enclosing market report rec'd. *I shall be North in about four weeks to look after the new crop and if you can sell No. 2 oats for 37c. or better, in store Fort William, you had better sell 4,000 bus. for me,* and I will be up at Snowflake then so I can look after the loading of them, and I will send the old oats then.

Yours truly,
HARRY BUTLER.

WINNIPEG, Aug. 20th, 1907.

H. BUTLER, ESQ.,
Bellwood, Nebraska.

Dear Sir,—Received your favour 14th yesterday and sold 4,000 bus. October oats for you as per slip enclosed, which we hope you will find correct. Will be glad to have the handling of your car old oats as soon as you are able to get it shipped out. If you will notice we sold this 4,000 bus. for October delivery, which we presume is what you require.

Will be glad to hear from you again at any time.

Yours truly,
G. B. MURPHY & Co.,
W. Scott,
Pro manager.

The appellant denies that he ever received slip referred to, and it is not proven that any such slip was ever put in the letter. The person whose duty it would

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have been to enclose the slip and mail the letter was not called. No explanation is offered for this.

I know of no case where such omission in a chain of proof was ever accepted as proof to found a claim upon.

The appellant says he expected the letter would be followed by a contract binding the purchaser to him and for him to sign binding himself to the purchaser.

Instead, the next thing was a telegram from the respondents dated the 7th of Sept., 1907, asking him as follows:

> Please wire three hundred dollars margins on oats to our credit Bank Hamilton.

The conflict as to another letter concerns no one now, save as to the suspicions the incident suggests, but with which I submit we have nothing to do here.

We have to take the two letters copied above and the telegram of the 7th September and see if it is possible to found on them any obligation on the part of the appellant which would support such a judgment as the Court of Appeal has entered for $985 and reversing the trial judge's dismissal of the action.

The conduct of the appellant has been severely criticized, but boorish or stupid or dishonest conduct does not merely because of its quality found a contract.

We are told these respondents are brokers and hence flows much in law.

They are as one of them describes them "grain merchants." They were not addressed as brokers or commission agents though the latter is what their solicitor calls them in his statement of claim.

The appellant knew them only as the buyers of his grain.

Mr. Smith says frankly in his evidence that such is

the quality of the business they had done with each other and that he never knew the appellant in a margin transaction before. Nor do they offer any excuse for supposing he meant this deal to be something of a different kind from that of marketing his farm produce.

The letter of the appellant does not warrant the wide inferences of fact drawn therefrom to found thereon any application of the authorities cited for what may be undoubted law.

The letter tells them that the appellant in four weeks from the 14th August will go to Snowflake and be there looking after loading of oats and will send the old oats then. And forthwith they rush on to change next day and sell according to terms implied as binding those trading on that grain exchange, 4,000 bushels of oats for October delivery.

The letter does not say October, but indicates a time in September and, as a fact, the oats were stored in grain elevator between the 3rd and the 6th of October.

The Chief Justice of Manitoba erroneously, I submit with great respect, founds his judgment on supposed instructions to sell for October delivery given to a broker with whom the appellant had former dealings.

The facts and the letter do not warrant these assumptions, or any of them and yet each and all are needed to support the holding of the court below.

The appellant denied that he ever dealt in buying or selling any grain on the Grain Exchange or that he knew the respondents or any of them were members of the Exchange or that in any way he was expected to have bound himself to abide by the rules thereof and

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there is not a word to contradict him. And whatever may be said of his failure, from stupidity or want of sense of propriety, to reply to the numerous letters and telegrams the conduct of the respondents pouring out telegrams and letters unnoticed and without stopping to investigate the reason for no reply seems ridiculous.

The man might, for aught they knew, have been dead from the 14th day of August; and, had that been the case, how could they have hoped to look to his estate, with nothing to rest upon but the letter of that date?

Is their position any stronger because the appellant failed to reply?

The act of the agent having exceeded his specific authority how can he add to it by silence of the principal?

The silent contempt of the latter for an agent clearly exceeding his authority may in some cases be most fitting.

In other cases it might be most contemptible conduct to so treat a communication made in good faith, yet how could the doing so add to the expressly limited authority?

If the agent before acting had written saying I understand your instructions to mean so and so and unless I hear from you to the contrary within a named reasonable time and no answer had been vouchsafed the principal's conduct might have bound him but where, as here, the agent goes on to do what evidently he felt was doubtful and then sought for ratification from his principal's silence he presumed too much.

The ratification by conduct of an agent's act as of any other person's acts can only bind when clearly attributable to such a purpose and with full knowledge and appreciation of what the agent had really done.

To be able to understand the question of either ratification or aught else in the case we must determine what was the appellant's intention in his letter of the 14th of August.

Let any one analyze the letter and see how it could be conceivable to take out of it in the light of the past relations and dealings of the parties with each other, authority to make immediate sale on a grain exchange of a future option for October delivery as within what is meant by a man going up in four weeks to harvest, sell and deliver his crop.

The retainer of a broker to go on change or sell or buy such options implies a readiness in the principal to put up such margins as may be necessary from time to time if and when needed and demanded as here.

If the respondents on the failure of the appellant, early in September, to meet such demands of indemnity had brought an action therefor and the true nakedness of this case, divested of the suspicions later events surrounded it with, had become clear, it seems hard to conceive of judgment being given for the $300. Yet, if the claim will not stand that test it must fail.

Then the entire case of a contract made on change to be governed by the rules and practices of that market is so entirely different in every way from what the ordinary farmer's methods of marketing his crops implies that unless the former and not the latter is what an agent to sell is told to adopt the court should not, as of course, assume that such a letter as in question carries with it the authority to adopt the Grain Exchange methods.

So much was this and much more relative to that phase of the case clear to counsel for the respondents that they, in argument, sought to eliminate from the

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case all that appears therein as to the claim for margins.

That will not do. For if the agent had authority to go on to that market he had a right to use and submit to all the legal methods known to arise for and against an agent sent there to deal and the principal as a consequence would be bound to indemnify; and he either ratified all or nothing.

For example, an agent employed merely to form a contract requiring for its validity compliance with the Statute of Frauds would be bound to see the statute complied with or would fail through his own negligence to have become entitled to either commission or indemnity.

On the other hand, he who sends a broker to an exchange where they both well know compliance with the Statute of Frauds may be well nigh impossible, but the other effective means of compelling an agent to observe the contracts he makes there are daily observed these conditions when known to a principal are such as to imply that the principal has undertaken to indemnify step by step if such be the rule or practice even though the Statute of Frauds may not have been complied with.

The rules and practice governing members of the Exchange in question having been ruled out at the trial I put the case, hypothetically, as to the Statute of Frauds, which it seemed to be admitted had not been complied with.

Not having been complied with and the nature of the agency requiring a compliance I think that alone should end the respondent's case. See Wright on Principal and Agent (2 ed.), p. 134.

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The cases relative to what might be the rights and remedies between principals in two different countries or jurisdictions when an agent in the same country as one of such principals has entered into a contract on behalf of the other have little or nothing to do with this case.

In the last analysis all that class of cases and the agent's rights and duties and remedies rest upon, as this must rest upon, what was the intention of the parties.

The real point here is, taking these things into consideration, whether or not the appellant intended when penning the letter and using the expression therein "you had better sell 4,000 bus. *for me*" set as it is in relation to what is to be done, and when it is to be done, and who is to carry it out, the contract of the buyer should have been formed as it was with the agent or with his principal, the writer of the letter.

If it means that the appellant intended the contract to have been with himself as its language and all else I have referred to seem to imply then that privity of contract was never brought about and the respondents' action rightfully failed.

Can any one imagine the respondents would have acted differently had the letter come from Snowflake instead of Bellwood, or that the slightest consideration was given to the International boundary line?

Their great error was in hastily misconceiving the nature of the business they were asked to attend to and attending to something else entirely different.

Hence they have themselves to blame entirely regardless of what the appellant's character or conduct may have been.

I think the appeal should be allowed with costs

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and the trial judge's judgment restored with costs of the courts below.

DUFF J. concurred with Davies J.

Appeal allowed with costs.

Solicitors for the appellant: *Richards, Affleck & Co.*
Solicitors for the respondent: *Hunt, Noble & Card.*

H. B. SEDGWICK AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

THE MONTREAL LIGHT, HEAT AND POWER COMPANY (PLAINTIFFS) ..... } RESPONDENTS.

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*March 9, 10.
*May 4.

ON APPEAL FROM THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC SITTING IN REVIEW AT MONTREAL.

Appeal—Court of Review—Appeal to Privy Council—Appealable amount—Amendment to statute—Application—Notice of appeal—New trial—Marine insurance—Constructive total loss—Trial by jury—Misdirection.

An appeal lies to the Supreme Court of Canada from a judgment of the Court of Review which is not appealable to the Court of King's Bench but is susceptible of appeal to His Majesty in Council. By 8 Edw. VII. ch. 75 (Que.) the amount required to permit of an appeal to His Majesty in Council was fixed at $5,000 instead of £500 as theretofore.

Held, that said Act did not govern a case in which the judgment of the Court of Review was pronounced before it came into force.

By sec. 70 of the Supreme Court Act notice must be given of an appeal from the judgment, *inter alia* "upon a motion for a new trial."

Held, that such provision only applies when the motion is made for a new trial and nothing else and notice is not necessary where the proposed appeal is from the judgment on a motion for judgment *non obstante* or, in the alternative, for a new trial.

In order to determine whether or not a ship is a constructive total loss under a policy of marine insurance the value of the hull when broken up should be added to the cost of repairs. *Macbeth* v. *Maritime Insurance Co.* ((1908) A.C. 144) followed.

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

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Every vessel submerged in a river is not *ipso facto* to be deemed a constructive total loss. The total loss of its cargo rendering the further prosecution of the particular voyage or adventure "not worth pursuing" does not, in itself, warrant a finding that a vessel is a constructive total loss; and the trial judge having instructed the jury that, if they found such a loss on cargo they might, thereupon, find, under article 2522 of the Civil Code, that the vessel itself was a constructive total loss, their finding that the vessel was a constructive total loss was set aside for misdirection and a partial new trial was ordered.

Judgment appealed from (Q.R. 34 S.C. 127) reversed.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal,(1) affirming the judgment entered in the Superior Court, District of Montreal, by Mr. Justice Hutchison, upon the verdict of the jury at the trial, in favour of the plaintiffs for $2,700 with interest and costs.

The circumstances of the case are stated in the judgment now reported.

Lafleur K.C. and *Pope* for the appellants.

R. C. Smith K.C. and *G. H. Montgomery* for the respondents.

The judgment of the court was delivered by

ANGLIN J.—The defendants, marine insurance underwriters, appeal from the judgment of the Superior Court of the Province of Quebec, sitting in review, affirming the judgment of Hutchison J. in favour of the plaintiffs (the insured) upon a policy of marine insurance on the cargo of the barge "Maria." The risk, was upon "total loss" of the cargo caused "by total loss of vessel." The jury found that there was

(1) Q.R. 34 S.C. 127.

an actual total loss of the cargo and a constructive total loss of the barge. The appeal is against the latter finding and generally upon grounds of misdirection.

The respondents raise two objections to the jurisdiction of this court: 1st, that the amount involved, $2,700, does not give the right of appeal; 2ndly, that no notice of appeal was given by the appellant pursuant to section 70 of the Supreme Court Act.

The provincial legislation raising the limit of cases appealable from the Court of Review to the Privy Council from £500 to $5,000 (8 Edw. VII. c. 75) became law on the 25th April, 1908. The judgment in appeal was rendered by the Court of Review on the 22nd April, 1908. The right of appeal had already vested in the appellants when the statute upon which the respondents rely was passed. The statute, which contains no provision making it retroactive and does not deal with procedure only but affects rights, does not in my opinion take away the right of appeal in this case conferred by section 40 of the "Supreme Court Act."

The other objection, based upon section 70 of the Supreme Court Act, is, I think, also ill-founded. That section is as follows:

> 70. No appeal upon a special case, or from the judgment upon a motion to enter a verdict or non-suit upon a point reserved at the trial or from the judgment upon a motion for a new trial, shall be allowed, unless notice thereof is given in writing to the opposite party, or his attorney of record, within twenty days after the decision complained of, or within such further time as the court appealed from, or a judge thereof, allows.

This is not an appeal upon a special case, nor from a judgment upon a motion to enter a verdict or non-suit upon a point reserved at the trial. No point was

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reserved at the trial. Neither do I think it is an appeal "from the judgment upon a motion for a new trial" within the meaning of that phrase in section 70. The motion in the court below was for judgment in favour of the defendants *non obstante veredicto,* and, only in the event of the defendants not being entitled to this relief and as an incidental alternative, for a new trial. In my view the words "motion for a new trial," in section 70, should be read as meaning "motion for a new trial only" and not as including cases in which the motion is substantially for other relief and only as an alternative for a new trial. See *Leishman* v. *Garland*(1), at page 243. Upon any other construction this section would apply to almost every appealable case, which was manifestly not intended.

I therefore think the objections to the jurisdiction cannot prevail.

Upon the merits there can be no doubt that there has been a partial mistrial of this action. The questions for the jury were framed and the trial itself was conducted upon the principles laid down by the English Court of Appeal in *Angel* v. *Merchants Marine Insurance Co.*(2). The mixed question of law and fact, whether or not there had been a constructive total loss of the vessel, was left to the jury, but upon a direction by the learned judge which gave to them an entirely mistaken standard as to what constitutes a constructive total loss. The test of constructive total loss according to the *Angel Case*(2) should be whether the cost of permanent repair would or would not exceed the value of the ship so repaired, and the

(1) 3 Ont. L.R. 241. (2) [1903] 1 K.B. 811.

shipowner is not entitled to add the value of the wreck to the cost of repair in determining whether there was a constructive total loss of the ship. This decision was distinctly overruled by the House of Lords in *Macbeth* v. *Maritime Insurance Co.*(1), and it was there decided that

> in determining the question whether a ship seriously damaged by perils insured against can be treated as a constructive total loss the test is whether a prudent, uninsured owner would have repaired her having regard to all the circumstances. In this calculation the assured is entitled to add the break-up value of the ship to the estimated cost of repairs.

The jury were not asked to find and have not found the break-up value of the wreck as she lay on the bottom of the river. The evidence upon this point, to which little attention seems to have been directed, is unsatisfactory and conflicting.

But the defendants' interests were not prejudiced by the application of the test propounded in the *Angel Case*(2), which is more favourable to them than that established by the *Macbeth Case*(1). This misdirection might not therefore, without more, warrant the setting aside of the finding that the vessel was a constructive total loss.

That every vessel which sinks in one of our rivers is *ipso facto* to be deemed a constructive total loss—as contended by the learned counsel for the respondents—is a view, in my opinion, not warranted by anything said in the *Macbeth Case*(1), and not consonant with the test of constructive total loss there formulated.

In his charge the learned trial judge applied to the question of constructive total loss of the vessel a

(1) [1908] A.C. 144. (2) (1903) 1 K.B. 811.

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test prescribed by article 2522 of the Civil Code for determining when a loss is constructively total, which appears to be intended for application only to the case of loss of cargo. The article reads:

> Total loss may be either absolute or constructive. It is absolute when the thing insured is wholly destroyed or lost. It is constructive when, by reason of any event insured against, the thing though not wholly destroyed or lost becomes of little or no value to the insured, or the voyage and adventure are lost or rendered not worth pursuing.

The learned judge told the jury in effect that a total loss of the cargo would result in the voyage and adventure of the barge being lost or rendered not worth pursuing and, therefore, that if they found that the cargo was a total loss they might find for that reason that the vessel itself was a constructive total loss. He put it in this way:

> Here is the other alternative. It is constructive total loss when the voyage and adventure are lost or not worth pursuing. There is no doubt this voyage was not pursued. It was not continued. Was it worth continuing under the circumstances, with the cargo gone? Now it is a matter for you to decide.

It is impossible to support the finding of constructive total loss of the vessel based upon this direction.

There remains the question whether the motion of the appellants for judgment in their favour *non obstante veredicto* should prevail, or whether their relief must be limited to the granting of a new trial. Upon this question being raised in the course of argument counsel referred to articles 496 and 508 of the Code of Civil Procedure. These provisions are both found in chapter XXI, which is intituled "Trial by jury" and in section X, which is headed "Remedies against Judgments and Proceedings in Reserved Cases." Article 496 reads:

496. The court may, in all cases where the judgment of the trial judge, or the verdict in a reserved case, is attacked, apply any remedy by which it considers that the ends of justice will be attained, even if such remedy has not been specifically demanded by any of the parties.

Article 508 reads:

508. A judgment different, in whole or in part, from that rendered by the trial judge, or from the verdict in a reserved case, may be rendered in any of the following cases:

1. When the facts as found by the jury require a judgment in favour of the party moving or inscribing, or the judge has erred as to the real effect of the verdict;

2 When the allegations of the party in whose favour the verdict or the judgment has been rendered, are not sufficient in law to maintain his pretensions;

3. When it is absolutely clear from all the evidence that no jury would be justified in finding any verdict other than one in favour of the party moving or inscribing.

Dealing first with article 508, it is apparent that when the party moving attacks merely the judgment and does not seek to set aside the verdict the appellate tribunal is given jurisdiction to enter in favour of the party moving any judgment warranted by the findings of fact or the real effect of the verdict. But when the party moving attacks the verdict itself and must set it aside to obtain relief, two restrictions are placed upon the exercise of its power by the court: First, it must be a verdict "in a reserved case"; and secondly, it must be absolutely clear from all the evidence that no jury would be justified in finding any verdict not in his favour. We are not dealing with a reserved case and it cannot be contended that the other provisions apply. It follows that the appellant cannot have judgment *non obstante veredicto* under article 508.

Turning to article 496, it is apparent that a motion against a judgment merely, involving no attack upon the verdict, may be made in any case; but where the

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party moving would attack the verdict there must have been a reserved case to enable the court to exercise the powers conferred by this article. There was not, as already stated, a case reserved by the trial judge. This action came before the Court of Review by inscription of the defendants.

Neither under article 508 nor under article 496, therefore, are the appellants entitled to ask that the findings of the jury should be set aside, new findings made upon conflicting evidence and thereupon judgment entered in their favour.

An instance in which article 496 was successfully invoked by a party dissatisfied with the judgment in an action tried with a jury is found in *Roberts* v. *Hawkins*(1), in 1898.

Whether, where there is a reserved case under articles 496 and 508, the appellate courts in Quebec should exercise wider powers than are exercised by English appellate tribunals under the judicature rules is a question which I desire to leave open for future consideration should such a case arise. See authorities collected in Snow's Annual Practice, 1909, at page 574, in the Yearly Practice, 1909, at page 539, and in Holmested & Langton's Judicature Act, (Ont.) (3 ed.) pages 812-814, 1059; also *Ferguson* v. *Grand Trunk Railway Co.*(2), *per* Lemieux J., at p. 82.

Upon the important question as to the break-up value of the wreck there is no finding of the jury. Their finding of constructive total loss based upon misdirection as to the application and effect of article 2522 C.C. must be set aside. The making of a new finding upon

(1) Q.R. 7 Q.B. 428; 29 Can. S.C.R. 218.

(2) Q.R. 20 S.C. 54.

that question would involve determining the break-up value, which, according to the evidence, may be any sum between $100 and $700, and it might be necessary to pass upon the credibility of the witnesses who give evidence upon it. That is eminently a function of the jury which should not in my view be usurped by an appellate court. *McLachlan* v. *The Accident Ins. Co. of North America,* in 1890, (1).

Some of the findings of the jury, such as the 8th and 9th, seem quite irrelevant; but, if disregarded, they will probably be innocuous. They may, therefore, be allowed to stand with the other findings properly made. The questions covered by these latter findings it seems unnecessary to submit to the consideration of a fresh jury.

It follows that the judgment below should be vacated and the finding of the jury upon the 10th question set aside. The action should be remitted to the Superior Court in order that another jury may determine the break-up value of the wrecked vessel, which they should be asked to find specifically. They should also be asked to find whether the vessel was or was not a constructive total loss according to the test propounded in *Macbeth & Co., Ltd.* v. *Maritime Ins. Co.*(2). Upon the findings already made and which are undisturbed, supplemented by such new findings, the Superior Court will then direct such judgment to be entered as it deems proper.

The appellants should have their costs of the appeal to this court and of the proceedings in the Court of Review. The costs of the abortive trial should abide the event of the new trial.

(1) 34 L.C. Jur. 43.

(2) [1908] A.C. 144.

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Motion to quash dismissed and appeal allowed with costs.

Solicitors for the appellants: *Lafleur, Macdougall, Macfarlane & Pope.*

Solicitors for the respondents: *Brown, Montgomery & McMichael.*

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COMPANY—*Sale of stock—Evidence of title—Duty of vendor—Defective certificate.*] When shares in the stock of a company are sold for cash and a certificate delivered with a form of transfer indorsed purporting to be signed by the holder named therein who is not the seller, the latter must be taken to affirm