REPORTS

OF THE

SUPREME COURT

OF

CANADA

REPORTER

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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

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

" John Idington J.

" Lyman Poore Duff J.

" Francis Alexander Anglin J.

" Louis Philippe Brodeur J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA :

The Hon. Charles Joseph Doherty K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA :

The Hon. Hugh Guthrie K.C.

ERRATA ET ADDENDA.

Errors and omissions in cases cited have been corrected in the Table of Cases Cited.

Page 147, last line of quotation, for "1915" read "1910."

Page 446, line 2, for "seems" read "seem." Line 3, for "adherent" read "inherent."

APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NOTED SINCE THE ISSUE OF VOL. 55 OF THE SUPREME COURT REPORTS.

Geall v. *Dominion Creosoting Co.; Salter* v. *Dominion Creosoting Co.* (55 Can. S.C.R. 587, 39 D.L.R. 242). Leave to appeal refused, May, 1918.

Gibb v. *The King* (52 Can. S.C.R. 402). Appeal allowed with costs, July, 1918. (42 D.L.R. 336).

Prest-O-Lite Co. v. *Peoples Gas Co.* (55 Can. S.C.R. 440, 38 D.L.R. 379). Leave to appeal refused, May, 1918.

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OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

ARTHUR. M. GRACE (Plaintiff).....Appellant;

AND

WALTER A. KUEBLER, CARL BRUNNER AND FREDA BRUNNER (Defendants)..... } Respondents.

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*May 10, 11.
*Oct. 9.

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

Sale of land—Payment by instalments—Assignment of purchase moneys—Absence of notice to purchaser—Payment by purchaser to vendor—Registration of caveat by assignee.

Under the provisions of the Land Titles Act of Alberta, the payment by a purchaser to his vendor of the purchase moneys, without notice of an assignment from the vendor to a third person, is valid.

The registration of a caveat by the transferee does not amount to such notice.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), which affirmed the

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

(1) 11 Alta. L.R. 295.

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judgment of Harvey C.J. at the trial (1), and dismissed the plaintiff's action with costs.

The material circumstances of the case and the questions in issue on the present appeal are fully stated in the judgments now reported.

Armour K.C. and *A. H. Clarke K.C.* for the appellant.

Bennett K.C. and *Sinclair K.C.* for the respondents.

THE CHIEF JUSTICE.—Mr. Justice Stuart prefaces his judgment in the Appellate Division with the observation that

> the practice which seems to have obtained to some extent in this province whereby an owner of land, who has entered into a solemn agreement to convey the land to another upon payment of certain money, deliberately puts it out of his power to fulfil his contract by himself transferring the land to a third party * * * is a reprehensible one.

The qualification does not seem too severe, and it may be added that it is also invalid, unless it be in the case of an innocent purchaser without notice, of which there can be no question here, as the deed of assignment to the appellant sets out the sale already made to the respondents. An owner of the land, who had agreed to sell it, has parted with his ownership and has nothing left but the bare legal title.

The transfer of the title here was never effected as the transfer was not registered.

The appellant, in my opinion, had only an assignment of the debt, and registration does not enter into the case at all.

It seems unnecessary to say that the mere assignment of the debt could not affect the respondents, without notice. This was recognized, no doubt, in putting the respondents in as parties to the assignment of the 5th April, 1913, to acknowledge receipt of notice

(1) 11 Alta. L.R. 296.

thereof, and it is strange that, if they were not asked to execute the deed, it should never even have been brought to their knowledge.

The Land Titles Office cannot be used for the purpose of giving any such notice. It would be extraordinary, if it could, that a purchaser should have to search his vendor's title every time before paying an instalment of the purchase money.

I think the appeal should be dismissed with costs, but I have considerable doubt whether the appellant is entitled to the reference offered him by the judgment on the trial.

DAVIES J.—This was an appeal from the judgment of the Court of Appeal for Alberta (McCarthy J. dissenting), affirming a judgment of the trial judge, Chief Justice Harvey, dismissing the plaintiff's, appellant's, action to recover from respondents part of the purchase money of certain lands which the respondents had purchased from one Steinbreker and which purchase money had been assigned to the plaintiff-appellant subsequently to Kuebler's purchase of the lands from Steinbreker.

The facts are stated by Mr. Justice Beck in his judgment as follows and I agree generally with the conclusions of law he reached upon those facts:—

There is really no dispute about the facts. I state them briefly.

John and Arthur Steinbreker made on the 27th June, 1912, an agreement to sell certain land to W. A. Kuebler and Carl Brunner. The price was $21,600, payable $4,600 down and the balance, 6 payments of $2,834 or $2,833 on the 27th September, 1913 to 1918.

The land at the date of the agreement was subject to two mortgages for $2,000 and $500 held by one Thompson. By instrument dated the 5th April, 1913, the Steinbrekers assigned the moneys then owing by the purchaser to the plaintiff, stated therein to be $17,000 with interest at 6 per cent. per annum from the 27th June, 1912, and by the said instrument purported to grant and transfer to the plaintiff all their interest in the land, but expressly "subject to the terms covenants and conditions contained in the said articles of agreement."

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Concurrently therewith the Steinbrekers executed a transfer of the land to the plaintiff.

The land at that time being subject to mortgage the duplicate certificate of title ought to have been and no doubt was in the Land Titles office.

The plaintiff—and in this perhaps he was right—did not register the transfer to him; but on the 7th April, 1913, he registered a caveat claiming an interest in the land "under and by virtue of a transfer of the said described property of date 9th (a mistake for 5th) of April, 1913, from John Steinbreker and Arthur Steinbreker, registered owners, to Arthur M. Grace."

Neither of the two purchasers—defendants—had any notice of these dealings between the Steinbrekers and the plaintiff, or of the caveat, until long after they had paid the Steinbrekers the full amount of the purchase money, which, however, they paid in entire good faith a considerable time before its maturity.

This action was brought by Grace to recover by way of an action for specific performance the balance of the purchase money, which by the agreement the defendants, Kuebler and Carl Brunner, had covenanted to pay to the Steinbrekers and which they had assigned as above mentioned to the plaintiff.

Freda Brunner was made a party defendant because she had on the 24th January, 1914, registered a caveat claiming an equitable interest as purchaser from her co-defendants or one of them of a one-third interest in the land.

The defendants by way of counterclaim asked that the plaintiff be ordered to transfer the land to them.

There cannot be any doubt apart from the provisions of the "Land Titles Act" in Alberta which may affect the matter in controversy in that province that where a mortgagee assigns his mortgage and the mortgagor has not received notice of the assignment, he discharges his liability under the mortgage by payment to the mortgagee.

I cannot draw any distinction in this respect between a purchaser who has entered into an agreement for the purchase of land and covenanted to pay the vendor the purchase moneys in instalments and an ordinary mortgagor. Payment by such purchaser to his vendor of his purchase money without notice of any assignment from the vendor to a third person of such purchase moneys is a good payment and *pro tanto* discharges the purchaser from further liability.

The Ontario decisions would seem to have settled the law in that province in the same way, notwithstanding the provisions of the "Registry Act" of the province.

The main contention on the part of the appellant was that the legal effect of the filing of the above mentioned caveat by him was sufficient under the "Land Titles Act" to protect his rights exclusively to receive the purchase moneys Kuebler had agreed to pay Steinbrekers for the land, that it constituted constructive notice, to Kuebler and that after the filing of such caveat Kuebler made any payments to any one else at his peril.

The plaintiff had full actual knowledge of the defendants' purchase and agreement to pay and he did not beyond filing such caveat give any notice to the defendants of the transfer to him of the land and the assignment of the purchase moneys Kuebler had agreed to pay. He relied entirely upon the effect of the caveat which he registered and in effect contended that the right of the defendant to pay Steinbreker such purchase money unless and until he had received notice of the transfer and assignment, was defeated by the statute and that the filing of the caveat was sufficient notice.

The result of this contention if maintained would be that a mortgagor or purchaser such as defendant would be obliged to search the registry every time he made a payment on his mortgage or agreement to purchase in order to protect himself.

With the result of course we are not concerned if the "Land Titles Act" in its provisions relating to the filing of caveats has the effect plaintiff contends for.

Now I understand a caveat is something which

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protects the existing rights of a man filing it in and to the lands mentioned in it. It does not create any new rights.

The question then immediately arises what were the plaintiff's rights with respect to these lands and the purchase moneys Kuebler had covenanted to pay for them at the time plaintiff filed his caveat.

They were of course the right to receive those moneys which had been assigned to them and to give a proper discharge to the party paying them.

But they did not involve an *exclusive* right to receive them unless and until they had given the party liable to pay them notice of their rights.

These rights were, in my opinion, subject to the right of the purchaser of the land to pay to the vendor from whom he had purchased the moneys he had covenanted to pay him unless and until he, the purchaser, had notice that such moneys had been assigned to another.

That right was in my opinion an equitable one which the filing of a caveat did not annul or abrogate.

The opinion of Mr. Justice Holroyd of the Supreme Court of Victoria on the point is cited by Mr. Justice Beck from the case of *Nioa* v. *Bell* (1). That learned judge said in speaking of the effect of the provisions of the "Victoria Transfer of Land Act" (which is substantially the same as the "Alberta Land Titles Act") that:—

> To have destroyed it (the old equitable doctrine as to notice) the language should have been extremely clear and explicit, because it is a doctrine founded on the *plainest principles* of justice.

I conclude therefore, concurring with both courts below, that the filing of the caveat in this case did not

(1) 27 Vict. L.R. 82, at p. 85.

displace the equitable doctrine of the right of a mortgagor or purchaser such as Kuebler was, to pay the purchase money he had covenanted to pay to the person he had covenanted to pay to, unless and until he had received notice of the assignment of such moneys to a third person and that the mere filing of a caveat in the Registry Office was not such notice.

"It did not," as Stuart J. says in his reasons for judgment

> protect him (the plaintiff-appellant) from the exercise by the purchaser of rights which he knew the purchaser had, rights, indeed, which were the very subject of his own contract with the vendor,

and which of course were exercised without any actual notice or knowledge of appellant-plaintiff's assignment.

I would dismiss the appeal with costs.

IDINGTON J.—The appellant, as the assignee of John and Arthur Steinbreker who had sold land in Alberta to the respondents Kuebler and Karl Brunner, sought specific performance of the contract after the purchasers had paid the price to the Steinbrekers in cash and a promissory note of fifteen hundred dollars which had passed into a third party's hands for value. The cash payments were made partly at the time of the sale and later by a reduced sum agreed upon in which considerable discount was allowed the purchasers in consideration of cash anticipating the time given by the agreement for payment thereof.

The appellant had made a loan to the Steinbrekers upon the security of the assignment to him of the said contract and other securities.

He never gave any notice of this assignment to the respondents, or either of them, and it is not pretended they had any notice of the assignment until long after they had paid in full, in the manner I have mentioned.

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These facts seem rather a novel foundation upon which to rest an action for specific performance at the suit of the appellant as an assignee of the contract for sale and purchase, hoping to enforce thereby a second payment of the price by the purchasers.

I should, but for the fact evidenced herein to the contrary, have said such a claim was hardly arguable on the ordinary principles governing such suits.

And when we find that, in Alberta, there is an express statutory provision which deals with assignments of choses in action, validating them upon notice in writing to the debtor, only from the date of such notice and then only subject to the equities which would have existed but for the enactment, we are puzzled to find it argued that there are some provisions in the "Land Titles Act" which enable a creditor in the case of sale and purchase of land to impose upon his debtor the obligation to search the Registry Office at the time of making any payment, no matter how trivial the amount of his instalment, before he can safely pay the man he bought from.

Logically followed out the argument would require this search, on every occasion of payment, to ascertain whom to pay what he desired to pay.

I must say it seems a startling proposition. And when we turn to the instrument of assignment by virtue of which this claim is set up and we find it expressly limited as follows:—

> To have and to hold the said lands and premises unto and to the use of the said assignee, his heirs and assigns forever, subject to the terms, covenants and conditions contained in the said Articles of Agreement,

we must ask ourselves whether it is possible that the Legislature, enacting such a statute as the "Land Titles Act," can really have intended to have so dealt

with the contractual relations of parties concerned in sales and purchases of land, as to bring about such confusion.

I do not think it ever so intended or so expressed itself.

The usual way in which purchasers protect themselves against such possible frauds as the vendors committed and are in question here is to register a caveat. But what is a caveat for? Surely it never was conceived as a something to enable the vendee to protect himself against the assertion of right on the part of the vendor. His agreement binds him and no need of it for that purpose as the appellant assignee is equally bound. It is intended solely as against others, not parties to the contract and bound by it, but who innocently might have purchased and but for its registration have acquired a right.

Yet it has been argued herein that, because the appellant as assignee of the contract of sale registered a caveat to protect himself against subsequent assignees of the same contract, hence he is entitled to enlarge thereby the rights conveyed to him beyond that which the instrument under which he claims gave him.

I do not think such a consequence was ever conceivable as flowing from the non-registration of a caveat.

But then it is said and proven that besides the assignment of the lands, contained in the assignment of the purchase money, there was another instrument simply transferring the land and that the caveat covers that also and that upon the proper or improper production of that transfer for registration it would take the place of that caveat and have the effect given thereto of vesting the lands in appellant.

One answer to that is, appellant has not got so far. And as to the caveat itself it only pretends that he has

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an interest and the affidavit of the agent thereto in order to effect its registration states his principal has a good and valid claim upon said land.

Investigation herein has shewn just what that claim is. It never justified a claim as the purchaser or anything but what the instrument first mentioned above conveyed.

The caveat was quite proper as a protection of what the appellant had acquired thereby.

In any way one can look at these instruments the caveat cannot enlarge their effect and the argument resting upon section 97 of the Act does not help appellant, unless we are to assume that by a fraudulent use of the substitution of the transfer for the caveat, when on the facts the appellant had no right to acquire registration or continue the caveat, he might gain something.

Speaking as respectfully as one can of such a proposition it seems an idle play upon words in disregard of the entire purview of the statute.

I think the principle that *Rose* v. *Watson* (1), proceeds upon is still good law, and that the appellant is but a trustee, who is bound to obey the order of the court and convey to the purchasers when required thereby. And that is not inconsistent with but may proceed upon the exposition of the principle as dealt with in *Howard* v. *Miller* (2), even though that was the converse of this as to the requirement of specific performance. The counterclaim is, I hold, maintainable.

The appeal should be dismissed with costs.

I do not see anything calling for our judgment on the question reserved by the learned Chief Justice as to the possible right of subrogation as to mortgages and have not examined same.

(1) 10 H.L. Cas. 672.

(2) [1915] A.C. 318.

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DUFF J.—I think this appeal should be dismissed. The most important of Mr. Armour's contentions was that, while the appellant took any interest he acquired by the transfer and assignments under which he claims, subject to the rights of the respondents as purchasers from Steinbreker under the agreement of the 27th June, 1912, yet these last mentioned rights were subject to this—that in paying the purchase money to the Steinbrekers, as each successive payment was made, notice must be imputed to them of any dealing by Steinbreker, with his title properly appearing on the registry; and that notice consequently must be imputed to them at the time the payments in question were made of the transfer and agreements under which the appellant claims by reason of the caveat filed by the appellant.

After full consideration I think the argument must be rejected and that the appeal fails. I think the law is settled that a vendor is acting in violation of a vendee's rights if he attempts to dispose of the property sold to any person other than the purchaser and an injunction will lie to prevent him from carrying any such intention into effect; *Hadley* v. *London Bank* (1); and such a disposition, if completed, gives the purchaser the right to rescind and to sue for damages; *Synge* v. *Synge* (2). The judgments in *Ex parte Rabbidge* (3), really rest on the provisions of the "Bankruptcy Acts" and I think the dictum of Moulton L.J. in *In re Taylor* (4), at page 573, must not be taken too absolutely.

It is clear, however, that the vendor may assign the benefit of his contractual rights under the contract and the assignee may enforce those rights, assuming the provisions of the law with regard to assignments

(1) 3 DeG. J & S., 63.
(2) [1894] 1 Q.B. 466, at p. 471.
(3) 8 Ch. D. 367.
(4) [1910] 1 K.B. 562.

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to be fulfilled, and the assignee to be in a position to require the vendor to carry out his obligations under the contract. It is elementary, however, that as against the assignee claiming under an assignment of the vendor's contractual rights, the vendee is entitled to deal with the vendor until he has received notice of the assignment. See the observations of Lord Cairns in *Shaw* v. *Foster* (1). It follows that the vendee having no notice of the assignment under the vendor's contractual rights, could not be affected by a caveat, unless there is some statutory provision giving to a caveat the effect of a notice in such circumstances. I can find nothing in the statute pointing to that. Section 84 authorizes the filing of a caveat in the form mentioned

> against the registration of any person as transferee or owner of any instrument affecting such an estate or interest unless such instrument be expressed to be subject to a claim of the caveator.

There is nothing in this language pointing to the conclusion that a caveat is intended to operate as a warning against the mere payment of money; nor indeed do I think, speaking generally, that the office of the caveat is anything more than to protect rights which otherwise might be prejudicially affected by some conflicting registration.

ANGLIN J.—In my opinion notice to the debtors Kuebler and Brunner that their debt to the Steinbrekers had been assigned to the appellant Grace was necessary in order to complete his title to it so as to render subsequent payment by the purchasers to their original creditors made in ignorance of that assignment ineffectual to discharge their debt. Section 101 of the "Lands Titles Act," invoked by Mr. Armour,

(1) L.R. 5 H.L. 321, at p. 339.

is, I incline to think, applicable only to the interest of the vendee or encumbrancee. The proviso certainly so indicates. If applicable at all to a transfer by the original vendor or owner, in my opinion it has to do with the transfer of his right, title and interest in the land only—not in the debt. Moreover, any such transfer is explicitly made

> subject to the conditions and stipulations in such assignment contained,

i. e., in this case to the original purchasers' right to have the land conveyed to them on payment of the debt—their purchase money. The registration of a caveat by Grace did not amount to the requisite notice to them of the assignment to him of their debt to the Steinbrekers. It would, no doubt, be notice of his interest in the land to persons subsequently dealing with it—but not to persons in the position of Kuebler and Brunner so as to render their payments to the Steinbrekers ineffectual to discharge their debt or to entitle Grace to compel them to make such payments again to him. A search of title by Kuebler and Brunner when they entered into their agreement to purchase would have shewn their vendors, the Steinbrekers, to be then the registered owners of the land. In merely making their payments, they were not persons subsequently dealing with it to whom registration in the interval would be notice; *Gilleland* v. *Wadsworth* (1); *Williams* v. *Sorrell* (2). To their subsequent payments the equitable principle of the mortgage cases applies in which it is held:

> that as against an assignee without notice (meaning without notice to the mortgagor) the mortgagor has the same rights as he has against the mortgagee, and whatever he can claim by way of set-off, or mutual credit, as against the mortgagee, he can equally claim against the assignee.

(1) 1 Ont. App. R. 82. (2) 4 Vesey 389.

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Turner v. *Smith* (1); *Norrish* v. *Marshall* (2). I find nothing in the "Alberta Land Titles Act" which excludes this equitable doctrine;

to have destroyed it clean and explicit language would be necessary. *Nioa* v. *Bell* (3). The insufficiency of registration as looked the fact that in that case the prior mortgage notice in such cases is illustrated in the case of *Pierce* v. *Canada Permanent Loan Co.* (4). I have not overwas registered. Here the actual and complete notice which Grace had of the rights of the original purchasers when he advanced his money and took his security puts him in a position less favourable in the eyes of a Court of Equity than he would have held had he had merely the constructive notice which registration gives to persons whom it affects. *Underwood* v. *Lord Courtown* (5). The equitable doctrine is that notice which gives real and actual knowledge affects the conscience of the person who receives it. An attempt by him to give to rights acquired with such notice an effect inconsistent with and destructive of prior rights of which he has had the notice is looked upon by equity as a fraud which it cannot countenance. I should require very explicit language indeed to lead me to the conclusion that the legislature in enacting the "Land Titles Act" intended to give to registration under it an effect which would render this wholesome equitable doctrine unenforceable. I am not certain that it is not expressly saved by s. 139 of the statute.

The express notice of Kuebler and Brunner's rights and of their position in regard to the Steinbrekers which Grace had when he acquired his interest clearly distinguishes this case from *McKillop* v. *Alexander* (6),

(1) [1901] 1 Ch. 213, at p. 220.
(2) 5 Madd. 475, at p. 481.
(3) 27 Vict. L.R. 82.
(4) 25 O. R. 671; 23 Ont. App. R. 516.
(5) 2 Sch. & Lef. 41, at p. 66.
(6) 45 Can. S.C.R. 551.

to which I refer merely to make it clear that it has not been overlooked. Grace in fact acquired his interest in the land subject to Kuebler and Brunner's right to increase or better their pre-existing interest in it by payments on account of purchase money made to their vendors until notified that that right had ceased. The increase or betterment of Kuebler and Brunner's interest in the land by the payment which they made was therefore not adverse to or in derogation of the interest which Grace was entitled to protect by registration, whether of his assignment and transfer or of a caveat. By failing to notify his position to them he permitted their right to pay their vendors to subsist as something anterior to and higher than his right to hold the land as security for payment to him of the sums for which he had contracted in consideration of his advances to the Steinbrekers.

Until Kuebler and Brunner had notice of the assignment to Grace, they were entitled to treat the Steinbrekers as their creditors and to make payments to them and payments so made discharged their debt *pro tanto*. Under the assignment of the agreement and the ancillary transfer of the land the appellant Grace held the latter upon trust to convey it to Kuebler and Brunner upon their purchase money being paid to the persons entitled to receive it. As to Kuebler and Brunner, until notice to them of the assignment, the Steinbrekers were so entitled as against Grace, of whom and of whose rights Kuebler and Brunner knew nothing, whereas Grace had full notice of their obligations and rights under their agreement with the Steinbrekers. If the rights of the parties depended upon a balancing of their equities based upon the character of the duty of each towards the other, I should hold that the duty of the appellant to give

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notice of his assignment was higher and stronger than any duty of Kuebler and Brunner to search the registry before payment of each instalment of their purchase money in order to make certain that no entry there would disclose that their vendors had parted with their interest in the land and their right to receive the purchase money under their contract. In the absence of notice to the contrary they were entitled to assume, and to act on the assumption, that the right to receive their money had not been transferred. The appellant had actual and complete notice of the position of the respondents and took the risk of their innocently making payments to their vendors. The respondents, in my opinion, had not even constructive notice of the rights of the appellant. It was undoubtedly the failure of the latter to give notice that afforded the Steinbrekers the opportunity to pose as still entitled to receive payment from Kuebler and Brunner.

I am, therefore, of the opinion that the respondents' debt under their agreement was discharged by their payment to the Steinbrekers and that, under the trust on which he took it, the appellant is bound to convey the land to them.

I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Clarke, Carson, Macleod & Co.*

Solicitors for the respondents: *E. A. Dunbar.*

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JOSEPH ELIE BÉNARD (PLAINTIFF)..... } APPELLANT;

*May 31.
*Oct. 9.

AND

LADY MARGARET HINGSTON (DEFENDANT)..... } RESPONDENT.

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

Landlord and tenant——Lease—Liability of landlord—Repairs—Damages—Flood—Vis major—Art. 1614 C.C.

The appellant was about to go into occupation of premises leased by him from respondent, when water inundated the basement, and a former law-suit was in part decided in the appellant's favour. The respondent executed some extensive repairs to the building, according to advice from experts, in order to prevent similar troubles and appellant took possession of the premises. In the spring following, a second flood occurred, causing considerable damage, for which appellant took action against respondent, on the grounds that the respondent's contrivances for keeping away the water were defective and that the respondent was under obligation to protect him from river flooding.

The judgment appealed from (Q.R. 25 K.B. 512), reversing the judgment of the Superior Court and dismissing the appellant's action, was affirmed.

Per Davies J.—It is not necessary, to bring an event within the scope and meaning of the words *vis major* or the Act of God, that such an event should never have happened before; it is sufficient that its happening could not have been reasonably expected.

Per Anglin J.—Upon the evidence, appellant's action did not fall within art. 1614 C.C., as he is presumed to have been willing to take the premises in the condition in which they were after the repairs had been made with the risk of further trouble from inundation of which he was or should have been aware; or if the flood was so extraordinary that it could not have been anticipated, the defence of *vis major* should prevail.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), reversing the judgment of the

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

(1) Q.R. 25 K.B. 512.

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

The circumstances of the case are fully stated in the above head-note and in the judgments now reported.

Arthur Brossard K.C. and *Ed. Fabre-Surveyer K.C.* for the appellant.

P. B. Mignault K.C. and *L. P. Crépeau K.C.* for the respondent.

THE CHIEF JUSTICE.—I am to dismiss the appeal with costs. The cross-appeal was abandoned.

DAVIES J.—I agree that this appeal should be dismissed.

I do not think that art. 1614 of the Civil Code covers the case of damages arising solely from *vis major* and the case before us is such a one.

Mr. Surveyer's contention was that the landlord's liability to the tenant under art. 1614 extends to "all defects and faults in the thing leased" that skill and science could provide against.

But that contention should only be accepted subject to the limitation that it does not extend to damages arising solely from *vis major* or the act of God.

As a matter of fact there was no defect or fault in the premises leased within the meaning of those words of the art. 1614.

The damages were caused by a combination of a very heavy rainfall and an abnormal overflow of the River St. Lawrence. It is not necessary to bring such an event within the scope and meaning of the words *vis major* or the act of God, that such an event should never have happened before; it is sufficient

that its happening could not have been reasonably expected. That is the true test under the English authorities and on principle. *Nitro Phosphate Chemical Co.* v. *London & St. Katharine Docks Co.* (1).

The only additional precaution which it is suggested the landlord should have taken against such an unexpected flood as that which occurred in 1913, I agree with Mr. Justice Cross, even if practicable would certainly have been inefficient as against such a flood.

IDINGTON J.—This appeal should be dismissed for the reasons assigned in the judgment appealed from and in the notes of the Honourable Justices Cross and Carroll in support thereof.

DUFF J.—This appeal should be dismissed with costs.

ANGLIN J.—Since the defendant (respondent) has acquiesced in the judgment allowing a diminution in the plaintiff's rental, the only question now before us is as to the right of the latter to recover damages for injuries sustained from the flooding of the leased premises in the spring of 1913. The evidence, in my opinion, establishes that with full knowledge and appreciation of the danger of flooding, to which the situation of the property unavoidably exposed it, and of the means which the defendant had taken to prevent, as far as possible, the consequences of inundation due to the waters of the St. Lawrence overflowing its banks, the plaintiff accepted the premises as having been put in the best possible condition and as meeting all requirements on which he was entitled to insist as a tenant. He had himself obtained

(1) 9 Ch. D. 503.

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the report of an engineer as to what could and should be done to protect the basement of the building, as far as possible, from being flooded, yet he neither asked for nor suggested any precautionary measures greater or other than those which the defendant had taken. She had employed an architect, an engineer and a contractor, all of the highest reputation, and had faithfully carried out their recommendations.

I agree with Mr. Justice Cross that the only additional precaution suggested at the trial was probably impracticable and that, however serviceable it might have been had the rise of the river been less, it would not have availed to save the premises from being flooded in the inundation of 1913. The plaintiff's claim so far as it is based on defects in the construction of the building or in the contrivances adopted for keeping out and taking care of the water, is unfounded. Under the circumstances stated I also agree with Mr. Justice Carroll that the case does not fall within art. 1614 C.C., the lessee being presumed to have been willing to take the premises in the condition in which they were after the repairs of 1912 had been made, with the risk of further trouble from inundation, of which he was or should have been aware. The authorities cited fully warrant this conclusion. Dalloz, Receuil periodique 1900, 1, 507; Dalloz 1849, 5, 272; Guillouard, Louage, pp. 137 & seq.; Agnel, Code et Manuel des Propriétaires, (2 éd.) 295; Planiol, 2, p. 559, No. 1688; Pothier, Louage No. 113; 25 Laurent, No. 117.

If on the other hand the flood of 1913 was so extraordinary that it would not be reasonable to hold that the plaintiff, notwithstanding his undoubted knowledge of local conditions, should have anticipated it and should therefore be deemed to have assumed its

attendant risks, it would seem impossible to escape the alternative conclusion that the defence of *vis major* should prevail.

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Appeal dismissed with costs.

Solicitors for the appellant: *Brossard & Pepin.*
Solicitors for the respondent: *Elliott, David & Malhiot.*

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*Oct. 24.
*Nov. 13.

FERNAND BROUSSEAU..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

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

Criminal law—Counselling to commit offence—Criminal common law of England—Criminal Code, ss. 69, 161.

Every one is guilty of an offence who counsels another to commit it, whether the person so counselled actually commits the offence or not.

Demanding money from a contractor for aid in securing contracts from a municipal corporation is counselling the contractor to commit the offence mentioned in sec. 161 of the Criminal Code.

The criminal common law of England is still in force in Canada, except in so far as repealed, either expressly or by implication.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), reversing the judgment of the Court of Sessions of the Peace, at Montreal. The accused, appellant, was discharged before the trial court; and the respondent prayed for a reserve case before the Court of King's Bench, appeal side which was granted. The Court of Appeal reversed the Magistrate's decision and sent the prisoner back for sentence.

The circumstances of the case and the questions of law are stated in the above head-note and in the judgment now reported.

N. K. Laflamme K.C. for the appellant.

J. C. Walsh K.C. for the respondent.

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

(1) Q.R. 26 K.B. 164.

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THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs. The appellant was charged before the magistrate with having, he then being Mayor of the Council of the Town of Sault au Récollet, demanded from Beaulieu and Chagnon, two contractors with the municipality, the sum of $2,500, as a consideration for his aid in procuring them new contracts from the municipality and renewing others in process of execution.

We are asked to say whether, these facts being admitted, they disclose a criminal offence.

I have no doubt that, as found by the majority below, the charge as laid comes directly within the language of section 69 (d) of the Code. In effect, that section provides that every one is party to and guilty of an offence who counsels or procures any person to commit the offence. I am of opinion that the word "and" in the first line is to be read disjunctively. If the offence is committed then the accused is a party to it; or, if the offence is not committed, then he who counsels is guilty of a substantive offence. It was suggested, but I hope not seriously, that in demanding payment the accused cannot be said to have counselled payment. I construe "counsel" used in collocation with "procure" to mean "advise" or "recommend" and the demand made in the admitted circumstances means at least that.

In *Rex* v. *Higgins* (1), Lord Kenyon said:—

> It is argued that a mere intent to commit evil is not indictable, without an act done; but is there not an act done when it is charged that the defendant solicited another to commit a felony? The solicitation is an act.

Here the accused is charged with having actually asked and demanded the money, which is by section

(1) 2 East 5 at page 17.

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69 made an offence in itself; and of that act the accused admits he was guilty. To incite to commit a felony, when no felony is committed, is generally a common law misdemeanour. *The Queen* v. *Gregory* (1). See also *Reg.* v. *Ransford* (2).

Further it is an indictable misdemeanour at common law for any person in an official position corruptly to use the power of his position by asking for a bribe, which is exactly this case, and there can be no doubt in so far as this court is concerned that the criminal common law of England is still in force in Canada, except in so far as repealed either expressly or by implication. *The Union Colliery Company* v. *The Queen* (3), at p. 87.

Complaint is made that on this construction the accused is not informed specifically of the law under which he is being proceeded against; but while the Code provides that with respect to certain offences the accused is entitled to particulars, ss. 957, 852 and 854 Criminal Code, I am not aware of any provision which requires the prosecuting officer to give notice to the accused that he is being proceeded against for the breach of some particular section of the Code or for a common law offence.

The appeal should be dismissed with costs.

DAVIES J.—I think section 69 of the Criminal Code clearly makes a person who counsels or procures another to commit an offence, guilty of a specific offence, whether the person so counselled actually commits the offence he is counselled to commit or not. It is the counselling or procuring which constitutes the offence irrespective of the effect of such counselling

(1) L.R., I.C.C.R. 77. (2) 13 Cox 9.
(3) 31 Can. S.C.R. 81.

or procuring and so in the case before us the defendant, being at the time Mayor of the town, in soliciting money for his assistance in endeavouring to procure municipal contracts for certain parties, Beaulieu and Chagnon, brought himself within the provisions of this section.

I would therefore dismiss the appeal.

IDINGTON J.—I am of the opinion that under section 69 of the Criminal Code, every one is party to and guilty of an offence who actually commits it or counsels another to commit the offence, and that when the appellant offered himself as a man to be bribed, he was suggesting and, in the ordinary meaning of the word, counselling those to whom he offered to prostitute his office for a price, and was guilty of the offence to be done.

I therefore think the Court of Appeal was right in answering the second question in the way they did, and that the appeal should be dismissed.

DUFF J.—I agree with Mr. Justice Idington.

ANGLIN J.—The purport and intent of clause (*d*) of s. 69 of the Criminal Code in my opinion is to make it an offence to counsel any person to commit an offence whether the actual commission of the latter offence does or does not ensue. I entertain no doubt that the defendant in soliciting money from Beaulieu and Chagnon as a consideration for his aid in procuring municipal contracts for them counselled them to commit what would be an offence under s. 161 of the Code.

Appeal dismissed.

1917
*May 9.
*Oct. 9.

THE TORONTO GENERAL TRUSTS CORPORATION (DEFENDANT)..... APPELLANT;

AND

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

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

Taxation—Succession duties—Property in province—Mortgage—Foreign mortgagee.

The debt secured by a mortgage on lands in Alberta, registered under the provisions of "The Land Titles Act," is property in the province" within the meaning of section seven of "The Succession Duties Act" (5 Geo. 5 c. 5 [Alta.]), though the domicile of the mortgagee is out of the province and the debt is a specialty debt. Anglin J. dissenting.

By the Act the mortgage after registration, is to remain in possession of the Registrar of Titles. The mortgage in this case was executed in duplicate the registrar and the mortgagee each retaining one. That retained by the mortgagee was in his possession when he died at Ottawa, Ont.

Held, Anglin J. dissenting, that such possession by the mortgagee did not make the mortgage "property out of the province."

Per Davies J.—The duplicate retained by the registrar is the original mortgage.

Per Anglin J.—The mortgage executed under the seal of the mortgagor is the evidence of the debt independently of registration and is conspicuous at the domicile of the mortgagee.

Though a seal is not essential to the validity of a mortgage in Alberta, if it is executed under seal the debt is a specialty. Idington J. *dubitante*.

Held, per Duff J.—In the sense of international law a mortgage on land is an immovable.

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

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

This appeal raises a question of law which is indicated in the above head-note. One Grigg a resident of Ottawa held a mortgage on land in Alberta and when he died the Provinces of Ontario and Alberta each claimed the right to succession duties on the value of this mortgage. An action was brought by the Alberta Government against the appellant as administrator *cum testamento annexo* of Grigg for the amount of such duties and a special case was submitted to the Supreme Court of the province. It was heard before Mr. Justice Hyndman who held that the duties could be collected and his judgment was affirmed by the Appellate Division.

Hogg K.C. and *Ford K.C.* for the appellant. Unless affected by the registration provisions of the "Land Titles Act" this case is settled by authority in favour of Ontario. See *Commissioner of Stamps* v. *Hope* (2); *In re Muir Estate* (3).

The debt and security on the land are created apart from and independently of the registration, *Jellett* v. *Wilkie* (4).

Lafleur K.C. for the respondent referred to *Ivey* v. *Commissioners of Taxation* (5), and *Purdom* v. *Pavey & Co.* (6).

THE CHIEF JUSTICE.—This case does not, I think, present any difficulty and if I entertained any doubt about the correctness of the judgment appealed from the question is concluded by the authority of the Privy

(1) 11 Alta. L.R. 138.
(2) [1891] A.C. 476.
(3) 51 Can. S.C.R. 428.
(4) 26 Can. S.C.R. 282.
(5) 3 N.S.W. St. R. 184.
(6) 26 Can. S.C.R. 412

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Council, notably in the decision in *Payne* v. *The King* (1). The facts of that case are practically identical with those in the present appeal. The testator resided in Victoria and had a mortgage of lands in New South Wales. The instrument of mortgage was in the form authorized by the "Real Property Act" of New South Wales (26 Vict. No. 9) and was not under seal; it was in Victoria at the date of the testator's death. The debtor as well as the testator resided in Victoria. It was held that

> the debt though a specialty debt in New South Wales was a simple contract debt in Victoria and recoverable under a Victorian probate.

That was all that was necessary to decide in the case but in their Lordships' judgment it was added,

> it may well be that in order to discharge the mortgage probate duty would also have to be paid in New South Wales.

For material purposes I think the "Real Property Act" of New South Wales and the "Land Titles Act" of the Province of Alberta are alike. For this and the reasons given by the trial judge I think it impossible to contend that the mortgage was not a specialty debt in the Province of Alberta and I do not know that it would matter if t were considered to be also a specialty debt in the Province of Ontario.

The property was an asset of the testator in the Province of Alberta and it was not disputed that if it were such it was property within the interpretation in section 3 of the "Succession Duties Act" and subject to the duties thereby imposed.

It is well established that the name under which duties are imposed is immaterial if the intention of the legislature is clear. It is only in cases of ambiguity that comparison can be made with probate, succession

(1) [1902] A.C. 552

or other duties for the purposes of endeavouring to ascertain what may be supposed to have been the intention of the legislature in using words which have acquired a particular meaning in other well known statutes. *Rex* v. *Lovitt* (1).

The appeal will be dismissed.

DAVIES J.—I entertain no doubt that the mortgage in question in this case of lands situate in the Province of Alberta and the debt secured thereby were taxable by the Province of Alberta and came within the provisions of the "Succession Duties Act" of that province, unless it can be held that at the time of the death of the mortgagee who was domiciled and resident in the Province of Ontario and in whose possession at such time a duplicate copy of such mortgage was found, the rule in *Commissioner of Stamps* v. *Hope* (2), operated to make this specialty debt "conspicuous" in that province.

After giving the facts of the case and the arguments at bar much consideration, I have reached the conclusion that the judgment of Mr. Justice Hyndman, the trial judge, confirmed by the Appeal Court of Alberta, was correct and that the artificial judicial rule as to the situs of the debt laid down in *Hope's Case* (2), does not apply in this case, because of the provisions of the "Land Titles Act."

The reasons for his judgment given by the trial judge commend themselves to me. I agree with him that the real security for the payment of the debt in question is the mortgage registered and held in the Land Titles Office, just as the certificate of title entered and kept in the register is the essential evidence of title, and that "the mortgage upon which the

(1) [1912] A.C. 212. (2) [1891] A.C. 476.

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deceased would have had to rely for the enforcement of his security would be the instrument registered with and retained by the registrar."

I think section 23 of the "Lands Titles Act" clearly operates to overcome the artificial rule laid down in *Hope's Case* (1) as to the situs of the mortgage and as to where it was "conspicuous" at mortgagee's death.

It reads as follows:—

> Instruments registered in respect of or affecting the same land shall be entitled to priority the one over the other according to the time of registration and not according to the date of execution; and the registrar, upon registration thereof, *shall retain the same in his office*, and so soon as registered every instrument shall become operative according to the tenor and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land or the estate or interest therein mentioned in the instrument.

So soon as registered, every instrument shall become operative according to its intent. The Registrar is required to "retain the registered instrument in his office." The fact that a mortgagee may have his mortgage executed under seal and in duplicate and may retain and keep in his possession such duplicate copy, cannot in my judgment avail to defeat this statutory requirement that the registered mortgage be retained by the registrar in his office.

The mortgage specialty debt, therefore, in my judgment, would be conspicuous in the province where the mortgage security is required to be registered and kept, and the duplicate copy which the mortgagee may, for convenience or other reasons, take with him abroad to his residence, cannot have the effect contended for of making the debt "conspicuous" at such residence in another province.

The legislature having full power and authority

(1) [1891] A.C. 476.

in the subject matter has so legislated as to make the mortgage when registered and retained in the registrar's office the statutory and official mortgage and the situs of the specialty debt should be held to be the place where the statute has declared the registered mortgage shall be retained.

I would therefore dismiss the appeal and answer the question submitted in the special case in the affirmative.

IDINGTON J.—Since this appeal was argued counsel in response to an inquiry from the bench during the argument have submitted the following admission:—

> The parties admit that at the date of the execution of the mortgages referred to in the stated case, the mortgagors were resident in the Province of Alberta, and that the place of payment of the debt was in each case in the Province of Alberta.

This I take it is to be read as part of the admissions of fact upon which the case is asked to be decided.

The statute in question is the "Succession Duties Act" of Alberta, assented to 22nd October, 1914, of which section 7 provides as follows:—

> 7. Save as otherwise provided, all property of any person, situate within the province, and passing on his death, shall be subject to succession duties, at the rate or rates set forth in the following table, the percentage payable on the share of any person or beneficiary being fixed by the following or by some one or more of the following considerations as the case may be:—
>
> (*a*) Net value of the property of deceased;
>
> (*b*) Place of residence of person or beneficiary;
>
> (*c*) Value of property taken, wherever situate;
>
> (*d*) Degree of kinship or absence of kinship to the deceased.

The determination of the question submitted must turn upon the words

> all property of any person, situate within the province, and passing on his death

in their plain ordinary meaning having due regard to the general purview of the statute in which the section is found and the specific provisions therein illuminating

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what is intended to be expressed by the words "passing on his death," but subject always to the limitations of the taxing power of the province as expressed in the "British North America Act," section 92, item 2.

The property attempted to be taxed is a number of mortgages which can only derive their efficacy from and by virtue of the statutes of Alberta having exclusive legislative jurisdiction over property and civil rights in the province.

The "Land Titles Act" of that province declares, by section 60 thereof, how a mortgage may be constituted, and by section 61 thereof, what it is to be, and cannot be, and by other sections how it may be registered.

No seal is required any more than under our English law to a will. Yet some one, doubtless through ignorance, has been known to affix a seal to such a will; and it is admitted seals were needlessly used in the execution of the mortgages in question herein.

Does that sort of error constitute a will a specialty? Or does the affixing of a seal to an Alberta mortgage constitute it any greater security on the land than the "Land Titles Act" declares it to be?

And if the mortgagee desires to enforce it as against the land he can only go to the courts of Alberta and rely upon the laws of Alberta to realize the security out of the land.

Personal remedies he may have elsewhere for the debt but even that is admitted to be payable in each of the cases herein involved in Alberta, and *primâ facie* only recoverable there.

How can such a debt and such a security be held to be situate elsewhere than in Alberta? We are told because, probably by accident, someone affixed a seal and constituted the debt a specialty, and therefore

because in certain circumstances in English law a presumption exists that the property in that specialty is situate where the mortgagee was domiciled, hence that is the meaning which we must attribute to this Alberta statute.

Is it conceivable that such a highly technical meaning was present to the mind of the Alberta Legislature?

Suppose the mortgage had contained no covenant but the mortgagee had, after its registration, taken a bond under seal for payment of the same debt which it secured and kept it with him till his death, would the mortgage, thus freed from such questions as rest upon the covenant being therein, be situate in Alberta or Ontario? How fine can the distinctions be drawn and yet supply the reasoning by which the mortgage can cease to be property situate in Alberta? Some one might tell us that the debt merged in the sealed bond and hence must be situate where the bond is found. However all that may be surely that is not the kind of process of reasoning by which we will be best able to determine what the Legislature of Alberta had in view.

Is it not plain and palpable that the legislature, if we regard the general purview of the "Succession Duties Act" and its manifold provisions, had determined to reach out with all its taxing power to tax the security and the debt due by one of its own citizens as property situate in and taxable by it in the event of death necessitating that such property should pass to someone else and could only pass by virtue of Alberta laws to someone else?

Such is my reading of the statute; and of the power to enact it I have no manner of doubt. And if I had

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a doubt of the meaning of the language used the obvious consideration that the power was intended to be fully exercised would weigh much with me in arriving at the meaning of the words "situate within the province."

I can conceive of the case where the security had become nil and the debtor had become resident elsewhere than in Alberta at the time of his death, yet perfectly solvent and the debt recoverable from him, in such case that the doctrines resting upon the nature of a specialty debt might well be looked to for guidance in relation to the right of taxation by some other province than Alberta. Then in such case it might be hard to argue that the property at the death was situate in Alberta unless, as admitted herein, the debt was payable there.

It was pressed upon us in argument that Ontario was making a claim to duties in relation to these same mortgages. I pass no opinion upon the question of whether or not it can maintain such a claim, or upon the much wider questions either of the economic wisdom or justice of either claim.

Yet it may not be impertinent to suggest that, where a man's money has been invested and enjoyed the protection of the laws of that place, an enforced contribution, called taxation, to the maintenance thereof, cannot be held to fall beyond the limits of direct taxation.

The trouble is, however, that direct taxation may, as well as any other form of taxation, carry in it an element of injustice. With that we have (paradoxical as it may sound) nothing to do.

So long as the struggle over these succession duties is fought out upon the lines of highly technical reasoning, perfectly sound where relevant, instead of measur

ing the meaning of legislation by the plain ordinary sense of the language used and then clearly operative within the taxing power of the legislature, will the day be postponed for an adjustment of the respective rights and duties of the provincial legislatures.

The problems involved are by no means easy of solution on a just basis. And double taxation may in law be inevitable, so it seems to me, if legislatures fail to observe justice. Perhaps wise men investing in the west will avoid needless seals and watch the Statute of Limitations.

I think the appeal must be dismissed and I am glad to see the parties concerned have by agreement relieved us of deciding the question of cost.

DUFF J.—It will be convenient, first, to consider whether the securities in question were at the death of the testator taxable subjects in Alberta, that is to say, subjects within the power of Alberta to levy taxation upon. They are mortgages constituted under the "Alberta Land Titles Act" as mortgages; that is to say, as affecting the lands mortgaged they are operative by virtue of the provisions of the statute in consequence of registration pursuant to section 60 of that Act. By section 62 the usual remedies for the enforcement of the rights of a mortgagee are given to the holder of the mortgage. By section 62 a power to enter in default of payment of interest or principal, power of sale upon notice and authority to the Registrar of Titles to grant an order for foreclosure on certain conditions are all given. By the provisions of the Act the security may be released by an entry on the certificate of title made by the registrar under the prescribed conditions and may be assigned by a registered transfer in the prescribed form, and the Act

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provides that upon registration of such a transfer not only the transferee's interest in the land and all his rights, powers and priviliges pertaining to the land, but also the right to recover the mortgage debt shall pass to and become vested in the transferee. The case of the absence of the mortgagee from the province is dealt with by a provision which enables the mortgagor by leave of the judge to pay the amount of the mortgage debt into a bank and to procure the release of the mortgage by the registration of a memorandum prescribed by the statute.

I have no difficulty in the conclusion that these registered instruments create interests in land which are assets in Alberta. The point, indeed, is concluded by a decision of the Judicial Committee of the Privy Council in *Walsh* v. *The Queen* (1). I quote from the judgment of the Board, delivered by Lord Watson, at page 148:—

> Though resting partly upon personal obligation the debts are all charged upon real and personal estate which the appellant himself alleges to be "in Queensland." Although the debt is not yet due and payable, so that the creditor has no occasion to resort to his security, it is in vain to suggest that a debt covered by security is in the same position with one depending on personal obligation only. The market value of assets of that kind is, in most cases, so greatly enhanced by what the appellant represents as an immaterial and accessory right, that they are generally known and dealt in as securities. It is unnecessary to attempt a precise definition of the relation in which a mortgagee or other incumbrancer who has not taken possession stands to the subjects of his security. It is sufficient for the purposes of this case to say that he has, not merely a *jus ad rem*, but a present interest in and affecting these subjects, which is preferable to the interest of the mortgagor. Is such an interest in property admittedly situated in Queensland an asset in Queensland within the meaning of the Act? That is the sole question arising for decision in this appeal, and its merits lie within a very narrow compass.
>
> The appellant's counsel did not dispute that the debtor's interest in the subjects which he assigned in security was an asset in Queensland; and they went so far as to admit that the creditor's interest would also be so, if he enforced his security by entering into possession. Independ-

(1) [1894] A.C. 144.

ently of any concession in argument, neither of these propositions appears to be attended with doubt. Laying aside, as plaintly untenable, the theory that, until he has attained possession, the creditor's right consists in the bare personal obligation of his debtor, it would be difficult to find any good reason for holding that it includes no interest in the subjects of the security which is capable of valuation. The personal obligation to pay may not be an asset in Queensland; but it does not follow that the debt due, so far as it is charged upon an estate within the colony, and gives the creditor a real and preferable interest in that estate, is not an asset in the colony. Such an interest is certainly property of the company, and property in the colony, because it affects the estate which is admittedly situated there.

See also *Henty* v. *The Queen* (1), at page 574.

The appellant company relies upon section 61 of the Act, which is as follows:—

A mortgage or incumbrance under this Act shall have effect and security but shall not operate as a transfer of the land thereby charged.

The corresponding section of the Manitoba statute was considered in *Yockney* v. *Thompson* (2), in which it was unanimously held by this court that this last mentioned section which goes further than section 61 had not the effect now contended for. The enactment in the Manitoba Act provides (sec. 100) that the mortgage shall not operate as a transfer of the land thereby charged "or of any estate or interest therein." It was nevertheless held that an agreement to execute a mortgage was sufficient to constitute a foundation for a caveat under section 130 of that statute, on the ground that the beneficiary of the agreement (the vendee) desiring to file a caveat to protect his rights under the agreement was a person claiming an "estate or interest in land" within the meaning of section 130. My view of these sections is expressed in my judgment in that case, in these words:—

The effect of section 100 was fully considered in *Smith* v. *The National Trust Co*(3). It was there pointed out that, as regards land

(1) [1896] A.C. 567. (2) 50 Can. S.C.R. 1.
(3) 45 Can. S C.R. 618.

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registered under the new system, title is consummated by registration and that the effect of section 100 is that the holder of a "mortgage or incumbrance" registered under the Act has not vested in him, in whole or in part, the registered title. The execution and registration of the mortgage, in a word, does not immediately effect any dismemberment of the mortgagor's registered title. In that sense the mortgagee has no estate or interest in the land.

I entirely agree, however, with the learned trial judge that it is something very much like a contradiction in terms to say that a mortgagee, having the powers of sale and foreclosure vested in him by the statute, together with other rights as to the possession of the land which the statute gives him, has not, in the broader sense of the words, an interest in the mortgaged land. I do not think section 130 can properly be limited to those cases in which the claim is a claim to be registered as possessor in whole or in part of the registered title. In other words, I do not think it can be properly limited to those cases in which an "interest is claimed" in the restricted sense in which "interest" is used in section 100.

That there was an interest, and a taxable interest in the sense above mentioned, in these lands at the time of the death of the testator seems therefore clear.

As Lord Watson pointed out, however, in *Walsh* v. *The Queen* (1), the question whether or not the mortgage debt could properly be the subject of taxation in Alberta is not necessarily the same question. But the answer, I think, to that question must be in the affirmative.

The instrument, as we gather from the stated case, was in the statutory form with some additional covenants, and, further, was executed in duplicate under the seal of the mortgagor in every instance, a formality not contemplated by the form. One duplicate was in possession of the testator at the time of his death, in Ontario, where he was domiciled, and the other remained in the proper registry office in Alberta. I do not find it necessary to consider the point raised as to whether the statute requires that the mortgage or the duplicate of the mortgage should be left in the

(1) [1894] A.C. 144.

registry where it is registered. The fact is, that in each case this was done and that in doing this the parties acted in accordance with the usual practice.

The mortgage debt was in the sense of international law an immovable. That, I think, results from the decision of the Court of Appeal and especially from the judgment of the Master of the Rolls in *Re Hoyles* (1). I quote from pages 183 and 184:—

> I think a mortgage debt secured by land is to be regarded, not as a movable but as an immovable. The authority of text-writers is strongly in favour of this view. Story, s. 447, expressly includes "charges on lands, as mortgages," as in the sense of the law immovables and governed by the *lex rei sitæ;* and Dicey states that "immovable property includes all rights over things which cannot be moved, whatever be the nature of such rights or interests" (Dicey, 2nd ed. p. 76; see also p. 496). Thus a Scotch heritable bond has always been treated by our law as immovable although there is a personal obligation to pay: *Jerningham* v. *Herbert* (2); *In re Fitzgerald* (3). But apart from authority, I should have arrived at the same conclusion from considering the nature and extent of the rights of a mortgagee of freehold land. If he sues on the covenant to pay he must reconvey the land on payment. If he has parted with the land, otherwise than in exercise of a power of sale, he would be restrained from suing on the covenant: *Lockhart* v. *Hardy* (4); *Palmer* v. *Hendrie* (5); *Kinnaird* v. *Trollope* (6). The result is that a mortgagee cannot assign the mortgage debt effectually without also ransferring the security upon the land.

Every word of this is applicable to the securities now under consideration. It follows from the fact that they are immovables that the law governing their assignment, their discharge and their devolution is the law of Alberta.

Moreover, they can only be effectively assigned, that is to say, assigned in such a way as to protect the rights of the assignee, by something done in Alberta. They can only be effectively discharged, that is to say, discharged in such a way as to protect the interests of the mortgagor by something done in Alberta. They

(1) [1911] 1 Ch. 179.
(2) 4 Russ. 388.
(3) [1904] 1 Ch. 573, at p. 588.
(4) 9 Beav. 349.
(5) 27 Beav. 349; 28 Beav. 341.
(6) 39 Ch.D. 636.

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can only be effectively enforced in Alberta because of the debtor being resident in Alberta and the common rule requiring the debtor to seek out his creditor and pay him being abrogated by the provision that I have mentioned; in other words, the debt being in substance a debt being payable in Alberta, the mortgagee could not even effectively sue upon the debt in Ontario. The circumstance that one duplicate of the instrument executed by the mortgagor was in the mortgagee's possession in Ontario strictly can have no bearing because if it be said that for that reason the debt had its situs in Ontario, precisely the same reasoning leads to the conclusion that the debt had also its situs in Alberta. Whether you take these instruments as constituting together one instrument, or as constituting separate instruments, the result is the same for the purposes of this appeal. If they are one instrument, then the instrument was just as much in Alberta as in Ontario; if two separate instruments, it is equally obvious that neither can be considered, exclusively of the other, to determine the locality of the debt.

But does the statute in question effectively cover these securities? On that point I can entertain no doubt whatever. The word "property" is so broad as to admit of no escape from it. What I have said already will sufficiently indicate the reason why, in my opinion, *Commissioner of Stamps* v. *Hope* (1), has no application. And it may be added that probate in Ontario would neither be necessary nor sufficient to enable the executors to enforce their mortgage debt. Westlake, pages 115 and 116; *Whyte* v. *Rose* (2), while probate in Alberta would be both necessary and sufficient, *ibid.*

(1) [1891] A.C. 476.

(2) 3 Q.B. 493.

But there is a consideration which I should like to emphasize in addition to what I have already said and it is this: As Lord Macnaghten said, speaking for the Judicial Committee in *Payne* v. *The King* (1), if an attempt were made by the appellant company to enforce these mortgages in Ontario and if, by some accident (the present debtors, for example, being in Ontario), it succeeded in obtaining judgement, the company would not be permitted to enforce the judgments against the debtors in person without first providing for the discharge of the mortgages. That could only be done effectively by registration on the books of the registry office in Alberta and I can conceive no manner of reason for doubting the power of the Province of Alberta to require as a condition of the registration of such discharges the payment of duties such as those imposed by the Act in question. The same remark applies to a transfer. In other words, in normal circumstances, the executors cannot effectively realize on these securities either by enforcing the covenants for payment or by a sale of them without resort to the registration machinery provided by the "Land Titles Act."

In view of these considerations, it would seem an extraordinary conclusion that for the purposes of taxation these debts are deemed by construction of law to have locality in Ontario and not to have locality in Alberta.

ANGLIN J. (dissenting)—It is the common case of both parties to this litigation that the property on which the Province of Alberta seeks to levy succession duties is a debt secured by mortgage on lands in that province —that this debt, which the mortgagor has covenanted

(1) [1902] A.C. 552.

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under seal to pay, is a specialty debt—and that its artificial situs for purposes of taxation is where the specialty was "conspicuous" at the date of the mortgagor's death. That there may be no room for doubt as to the position taken by the respondent on these points, I quote from his factum the propositions numbered 2 and 3.

> 2. The locality of a simple contract debt is at the domicile of the debtor and that of a specialty debt where the specialty is found at the time of the creditor's death.
>
> 3. The mortgage in the present case being a deed under seal constitutes a specialty debt.

The parties differ only in their views as to what was the situs of the specialty—as to where it was "conspicuous"—the appellant administrator asserting that it was at the City of Ottawa, Ontario, where the mortgagee resided and where an original of the mortgage (which had been executed in duplicate) was found amongst his effects; the respondent claiming that it was at the registry office in Alberta where the other original of the mortgage had been deposited for registration in conformity with the requirements of the "Alberta Land Titles Act."

No doubt what passed or devolved on the death of the mortgagee was the debt owing to him. Incidentally, but only as an accessory (*Lawson* v. *Commissioners of Inland Revenue*) (1), the security and the contingent right to enforce it also passed. But no estate in the Alberta land devolved, because under the "Land Titles Act" of that province (s. 61) a mortgage or incumbrance does not "operate as a transfer of the land thereby charged." The case in this aspect is more favourable to the appellant than it would have been had the subject of devolution been a debt secured by a common law mortgage, the de-

(1) [1896] 2 Ir. Rep. 418, 434-6.

volution of which would have carried with it an interest in land in Alberta.

The debt existed as a specialty debt enforceable by virtue of the mortgagor's covenant apart from, and independently of, registration of the instrument evidencing it. When the "Land Titles Act" by section 25 (so much made of by the respondent) provides that instruments shall have priority according to the time of registration and that

> so soon as registered every instrument shall become operative according to the tenor and intent thereof and shall thereupon create, transfer, surrender, charge or discharge as the case may be, the land or the estate or interest therein mentioned in the instrument,

it is obviously only the operation and effect upon the land, or the estate or interest therein, to be transferred or charged that is dealt with. The operation and effect of an instrument as creating or evidencing a debt or other obligation independent of the security for its payment or fulfilment is not in contemplation and is in nowise affected. The mortgagee might enforce the mortgagor's covenant although the mortgage were never registered; and, if it should be registered, proof of that fact would be wholly irrelevant in an action on the covenant in which the plaintiff's claim would be established by production of the duplicate original in his possession.

The duly appointed personal representative of the mortgagee in the jurisdiction where the debt has its legal locality is the person entitled to collect it and to enforce payment of it from the debtor, and, upon his default, by resorting to the securities taken to provide against that event. That, for purposes of identification or to obtain a status in the local courts in order to enforce the security, he might require to obtain ancillary probate or administration from the State or province in which the security was situate does not

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affect the situs of the debt itself or his right to collect it. *Payne* v. *The King* (1).

If for an entire single debt security were taken by a mortgage (containing a covenant for its payment) upon two parcels of real estate, one in Quebec and the other in Alberta, the mortgagee residing in Ontario and there holding an original of the instrument containing the covenant, could it be successfully or even plausibly contended that the situs of the specialty debt was other than Ontario? Would it be in Quebec, or would it be in Alberta? Anything that could be said for a situs in Alberta would obviously have equal force as an argument in favour of the situs being in Quebec. There is only one debt and it can have but one legal locality, and that, according to English law, must be where the specialty is "conspicuous." Highly artificial as this rule of law undoubtedly is, it is too long and too firmly established to permit of question. If the bond or covenant for payment were contained in one document and the mortgage security in another, as was formerly customary, the fact that a duplicate of the latter was deposited for the purpose of registration where the land charged was situate could not affect the situs of the debt evidenced by the bond or covenant for payment, which would depend solely upon where that document was found. The fact that the two instruments, the bond or covenant and the mortgage, are now for reasons of convenience or economy usually embodied in a single document does not alter their distinct legal characteristics. The duplicate original of the debtor's covenant in the Alberta registry office at the time of the mortgagee's death was there only because the parties had incorporated it in the mortgage instead of executing a

(1) [1902] A.C. 552, 560.

separate bond. The instrument held by the creditor as evidence of the debt due him and upon which he would undoubtedly have proceeded in any action brought to enforce the debtor's personal obligation was the document held by him in Ottawa. There is nothing in the record to shew that the personal obligation of the debtor is not perfectly good or that the debt will not be paid at maturity on demand; and the presumption is that it will. It may never be necessary to resort to the accessory security. Its actual value to the estate may be little or nothing.

It does not appear from the reports of *Hope's Case* (1), whether a duplicate original mortgage had been similarly deposited in the registry office in New South Wales. I rather think that must have been the case. Hogg on Australian Torrens Titles, pp. 104 (s. 36), 88, col. 1 line 3, 761. Although not so stated in the report I have little doubt that there was also a duplicate original mortgage deposited in the Michigan registry office in the case of *Treasurer of Ontario* v. *Pattin* (2). Such a fact would not have escaped the attention of the learned counsel and judges concerned in those two cases. In each the situs of the specialty debt was held to be at the residence of the mortgagee amongst whose effects the instrument evidencing it was found.

The decision *In the estate of Sir William Clark* (3), is instructive and closely in point.

Ivey v. *Commissioners of Taxation* (4), much relied on by the respondent, is distinguishable in that the question there at issue was not the situs o property but the source of an income. In so far as the court may have held that the effect of registration was to give to the specialty debt a situs at the place of regis-

(1) [1891] A.C. 476; 12 N.S.W.L.R. 220.
(2) 22 Ont. L.R. 184.
(3) 28 Vict. L.R. 447.
(4) 3 N.S.W. St. R. 184.

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tration of the mortgage, regardless of the place where the instrument creating the specialty should afterwards be found, it would seem to have ignored or disregarded the decision in *Hope's Case* (1). No doubt for the purpose of making title to the land the duplicate original on deposit in the registry office, or rather the copy thereof made in the register itself, may be deemed the sole original and the copy in the mortgagee's possession "really a duplicate of that which forms the effective instrument." *Ivey's Case* (2). But that is not the case where the question is one not of title to the land charged as security but of the existence and nature of the debt secured. See *Re McLachlin* (3).

The question before us is not as to the constitutional power of the Province of Alberta to provide for the taxation of securities held by decedents, wherever domiciled, upon real property in that province, or to impose fees, based on the amounts of the debts secured, for the granting of letters probate or of administration sought to enable foreign executors or administrators to realize by enforcing securities on Alberta real estate. Within the restrictions imposed by section 92 (2) of the "B.N.A. Act," I should not question the power of the province to impose such taxation. The duty demanded in the case at bar, however, is not based on the value of the security in Alberta either intrinsic or to the estate. It is based upon the whole mortgage debt regardless of the value of the security, and would be the same if the value of the personal obligation of the debtor were unquestionable or if the mortgagee had also held other security of indubitable value on property situate

(1) [1891] A.C. 476; 12 N.S.W.L.R. 220.

(2) 3 N.S.W. St. R. 184.

(3) 14 W.N. (N.S.W.), 45.

elsewhere. The claim made is that by virtue of the provisions of the "Alberta Land Titles Act" and registration pursuant thereto the situs of the mortgage debt itself is in Alberta and that that debt is therefore subject to duty under section 7 of the "Alberta Succession Duties Act" as "property * * * situate within the province."

For the reasons above stated I am, with respect, of the opinion that it was not so situate. I would therefore allow this appeal and answer the question proposed by the special case in the negative.

Appeal dismissed with costs.

Solicitors for the appellant: *Emery, Newell, Ford, Bolton & Mount.*

Solicitor for the respondent: *W. G. Harrison.*

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*Oct. 23.
*Nov. 28.

PARKER ARCHIBALD (DEFENDANT)..... } APPELLANT;

AND

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

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Statute — Construction — Mandamus — "Nova Scotia Fishing Act" — Fishing licence—Municipal corporation—2 Geo. V., c. 18 (N.S.), 6 & 7 Geo. V., c. 27 (N.S.)

By sec. 2 of the "Nova Scotia Fisheries Act" of 1912 (2 Geo. V., ch. 18), every resident of the Province is given the right to go on foot along the banks of any river, stream or lake and to go on or across the same for the purpose of lawfully fishing therein except as to the land of an occupant licensed under the Act. From sec. 3, the provision that such right should not apply "to lands situate in a municipality where no by-laws imposing any licences are in force," was eliminated in 1916 (6 & 7 Geo. V., ch. 27). By sec. 6 any municipality "may by by-law provide for the issue of licences under this Act" and for regulation of the fees and by sec. 7 the clerk is required to keep a record of the licences issued and the fees paid.

Held, that the provisions of sec. 6 respecting the issue of municipal licenses cannot be construed as imperative and on the neglect or refusal of a municipal council to pass the said by-law an "occupant" may obtain the issue of a licence by a writ of mandamus.

Held also, Davies J. dissenting, that such writ may be directed to the clerk of the municipality.

Per Davies J.—The writ should have been directed to the municipal council requiring it to pass the necessary by-law.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), ordering a writ of mandamus to issue against the appellant.

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

(1) 35 D.L.R. 560.

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The prosecutor, Hensley, was an occupant of land in the County of Halifax and entitled to a licence to fish in Indian River in said county. The County Council had never passed the by-law authorized by sec. 7 of the "Fisheries Act" for the issue of licences and regulation of the fees and on his application a writ of mandamus was issued directed to the clerk of the council ordering him to issue the licence. This appeal is from the judgment ordering the issue of the writ.

J. J. Power K.C. for the appellant. The clear intention of the Act is that a municipal by-law is necessary before a licence to fish can be granted. See *Slattery* v. *Naylor* (1).

The amendment to the Act in 1916 does not make a by-law unnecessary. *Townsend* v. *Cox* (2), at page 518; *Laird* v. *McGuire* (3); *Reg.* v. *Freeman* (4).

T. S. Rogers K.C. for the respondent, referred to *Commissioner of Public Works* v. *Logan* (5), at pages 363-4; *Attorney-General* v. *Horner* (6), at page 257; *Bradlaugh* v. *Clarke* (7), at page 380.

THE CHIEF JUSTICE.—At first sight I thought as I suppose any one would have thought that this action was misconceived in that the mandamus should have been asked to be directed to the municipality of the County of Halifax rather than to one of the corporation's officials, namely, the appellant, the municipal clerk.

Upon consideration, however, I have come to the conclusion that the judgment appealed from is right.

The reference in the "Act respecting the rights of

(1) 13 App. Cas. 446.
(2) [1907] A.C. 514.
(3) 40 N.S. Rep. 129.
(4) 22 N.S. Rep. 506.
(5) [1903] A.C. 355.
(6) 14 Q.B.D. 245.
(7) 8 App. Cas. 354.

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fishing in the Province of Nova Scotia" (Acts of 1912, ch. 15), to municipal councils, is in section 6 which provides:—

> 6 (*i*) The municipal councils may by by-law provide for the issue of licences under this Act, and fix and regulate the fees to be paid by occupants for such licences in respect to fishing rights appertaining to lands within their respective municipalities, but no fee payable for any licence issued under this Act shall exceed the sum of fifty dollars.

Now this section is *primâ facie* only permissive and in order to see whether it should be read as imperative we must consider whether any further provision essential for the working of the Act is left to be provided by the municipal councils. I do not think it is; the nature and purpose of the licences not only clearly appears in the Act, but the form of a licence which "any occupant may obtain" is given in the schedule to the Act; there is provision for the dating of the licence and the period for which it shall remain in force; then it is provided that the "licence shall be issued by the municipal clerk" and there is a section imposing on him the further duty of keeping a record shewing the particulars therein set forth concerning all such licences issued, such record to be open for inspection as herein mentioned by any person without charge.

Now if the permissive section 6 were not in the Act at all there is here a sufficient machinery for carrying out the intention of the legislature without the necessity of any by-laws being passed by the council to "provide for the issue of licences." No fees can be taken unless the fees to be paid are fixed and regulated by the council, but they are in no way essential to the issue of the licence; if the council does not choose to exact any fees it is so much to the advantage of the licensee; for it is not to be supposed

that he is to be deprived of his right to obtain a licence because the council do not exercise the right for which permission is given to fix the fees to be paid.

The Act not having imposed any obligatory duties on the council but only given permission for the exercise of rights which must be regarded rather in the light of privileges, the duties expressly imposed on the clerk of the council, the named official, must be treated as imperative and addressed to him personally. For the fulfilment of his duties he requires no authority or instruction from the council. The duties are not judicial or discretionary but purely administrative, and that being so I think a mandamus will lie to compel him to perform them and to issue a licence in a proper case.

The appeal should be dismissed with costs.

DAVIES J. (dissenting).—I think the direction given by the statute to the clerk of the municipality is dependent upon the by-law having been passed by the council providing for the issue of the licences and fixing the fees which should be paid for them.

As stated by the Chief Justice of Nova Scotia, I think it was the clear duty of the council to have made such provision and that of the clerk to have acted upon it, and issued the licence in accordance with it. But I cannot construe the Act as authorizing the clerk to issue licences free because no by-law had been passed.

In my judgment the mandamus should have issued not to the clerk to issue the licence but to the council to discharge its clear statutory duty of providing for the issue of the licences and for the fees payable on them.

I would therefore allow the appeal on this sole ground and not on those suggested by the appellant's

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counsel that the municipal council was vested with the power of determining whether or not there should be public fishing on and through an occupant's lands, or whether or not fishing licences should be granted.

I do not think any such power was conferred on the council by the statute. Their duty was simply to make regulations providing for the issue of licences and fixing the fees to be charged for them. On that being done their clerk's duty was to issue the licences in accordance with their regulations. If they refused or failed to discharge that duty they can be compelled by the court to perform it.

But their neglect or refusal does not confer upon their clerk the right or duty to issue licences without payment of any fee or at a fee he may determine, or to determine what degree of neglect on the council's part vested the right and power in him to issue the licences.

IDINGTON J.—I think the construction of the statute in question adopted by the court below in granting the relief prayed for as against the appellant, is well founded. Clearly sections 4 and 5 are independent of the rest of the statute and for the express purpose of enabling occupants, such as the prosecutor, of land, other than owners of timber land, to enjoy their own property free from the exercise of the rights given to strangers elsewhere in the statute.

Section 5 enabled such occupants to protect themselves, and section 7 enabled the public to ascertain whose lands had become so protected, and strangers were prohibited from entering thereon for fishing purposes.

Section 6 is simply a permissive power given the municipal councils named therein to derive revenue

by fixing a fee to be paid by those concerned on obtaining the licence.

I think the appeal should be dismissed with costs.

DUFF J.—This appeal should be dismissed with costs.

ANGLIN J.—If the statute had remained as it was in 1912, a great deal might have been urged in support of Mr. Power's contention that the Legislature had left to the municipal council the right to determine whether or not the procuring of a licence should be "imposed" on the owners of several fisheries as a condition of preserving their rights. Under the Act of 1912, it was only where the council had provided by by-law for the issue of such licences that the right of fishing in inland waters bordering upon privately owned "uncultivated land," (not being "timber lands"), was conferred on residents of the province. Until the council saw fit to exercise the powers given to it by section 6, the public right did not accrue and it was unnecessary for the "owner" or "occupant" to exclude it by obtaining a licence from the municipal clerk. It would seem not improbable that under such circumstances the duty of the clerk to issue such a licence would arise only if the council had passed a by-law "imposing licences."

But the amendment of 1916 entirely changed the situation. Thereafter, the public right conferred on residents of the province exists whether a by-law under section 6 providing for the issue of licences has or has not been enacted. In order to preserve his private right and to exclude the public the owner of "uncultivated land" must now obtain a licence. The effect of the change in the statute, in my opinion, is not, as argued by Mr. Power, merely to remove a

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restriction upon the public right of fishing imposed by the earlier Act, but also to change the character of the duty imposed by section 5 on the clerks of municipal councils and to take from the councils the right to determine whether uncultivated lands of private owners or occupants should or should not be subject to the provisions of the statute—leaving it in their discretion however to "fix and regulate," within the prescribed limit, and subject to the approval of the Governor-in-Council, what fees, if any, such owners or occupants should be required to pay for the licences which section 5 requires the municipal clerks to issue. The duty of the latter to issue licences is no longer dependent upon the exercise by the councils of their powers under section 6. Upon payment of the fees fixed by the council, if any, or, in the event of the council failing to exercise the power conferred by section 6, without payment of any fee, the clerk is obliged to issue a licence in the prescribed statutory form. Otherwise it would be left to the discretion of municipal councils to determine whether the private fishing rights of "occupants" should be conditionally preserved or unconditionally confiscated—a result which it is scarcely conceivable that the legislature contemplated.

While I think it quite probable that it was intended to impose a duty upon municipal councils to provide for the issue of licences—leaving to their discretion the amount of the fees (if any) to be exacted (within a prescribed limit)—I am not satisfied that that intention has been expressed. Although the word "may" is taken as equivalent to the word "shall" where "the doing of a thing for the sake of justice or the public good" is authorized, its *primâ facie* connotation is permissive or enabling. I am not satisfied that it is

not so used in section 6. Having regard to section 23 (11) of the "Interpretation Act," (R.S.N.S. 1900, ch. 1), only a clear case of impelling context would justify giving it an imperative construction. The use of the word "shall" in section 5 indicates that the word "may" was used advisedly in section 6 and in a permissive or enabling sense. Moreover, there would appear to be grave difficulty in the way of curial enforcement of any such duty as it has been suggested is imposed upon the municipal councils by section 6, especially in view of the provision of subsection 2 which subjects any action taken by them to the approval of the Governor-in-Council.

It by no means follows that because there is a duty cast on the donee of a power to exercise it, that mandamus lies to enforce it; that depends on the nature of the duty and the position of the donee. *Julius* v. *Bishop of Oxford* (1).

No such obstacle presents itself to the enforcement of the duty imposed on the clerk by section 5.

It seems to me probable that the clerk would have a right to demand indemnity from the municipal council for any expenses properly incurred by him in carrying out the provisions of ss. 5 and 7. But if not, the fact that no provision is made for such expenses does not alter the imperative nature of the duties imposed upon him by the statute or deprive the respondent of the right to invoke the aid of the court to compel their performance.

Appeal dismissed with costs.

Solicitor for the appellant: *Thomas Notting.*
Solicitor for the respondent: *T. S. Rogers.*

(1) 5 App. Cas. 214, at p. 241.

1917
*Oct. 17.
*Nov. 28.

LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE SAINT BONIFACE. APPELLANT;

AND

THE TOWN OF TRANSCONA..... RESPONDENT.

ON APPEAL FROM A JUDGE OF THE COUNTY COURT OF WINNIPEG, PROVINCE OF MANITOBA.

Statute—Construction—Assessment—Rate—Value of property—"Assessment Act," R.S.M., [1913] c. 134, s. 29.

The Manitoba "Assessment Act," R.S.M. [1913] ch. 134, sec. 29, provides that "in cities, towns and villages all real and personal property may be assessed at less than actual value or in some uniform and equitable proportion of actual value, so that the rate of taxation shall fall equally upon the same."

Held, that this legislation does not authorize the assessment of property at more than its actual value.

APPEAL and CROSS-APPEAL from the decision of the senior judge of the county court of Winnipeg, reducing the assessment on appellant's property from $160,000 to $88,000.

The appellant claims that the assessment is greatly in excess of the real value, the respondent that the value should be that of normal times and that under the legislation quoted in the head-note the property could be assessed at more than its actual value provided that the whole assessment for the property was uniform and equitable.

Chrysler K.C. for the appellant. There are no reported cases upon the interpretation of this Act or of one containing the like provisions but the following

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

decisions may be referred to: *Pearce* v. *City of Calgary* (1); *Grierson* v. *Edmonton* (2); *City of Strathcona* v. *Edmonton and Strathcona Land Syn.* (3); *Crawford* v. *Linn Co.* (4).

Taxing Acts should be construed strictly, *O'Brien* v. *Cogswell* (5).

Hull for the respondent. This legislation was first enacted in 1909 and the decisions of the county court judges under it have been uniformly in favour of our contention. When re-enacted in 1910 the legislature adopted this judicial interpretation. See *Greaves* v. *Tofield* (6); *Jay* v. *Johnstone* (7).

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

DAVIES J.—The main and substantial question arising on this appeal was as to the true construction of section 29 of "The Assessment Act" of Manitoba.

That section reads:—

> In cities, towns and villages all real and personal property may be assessed at less than actual value or in some uniform and equitable proportion of actual value, so that the rate of taxation shall fall equally upon the same. The expression "actual value" used in this section shall mean the fair market value of such property, regardless of a prospective increase or decrease, either probable, remote or near.

As I understood the argument of counsel for the respondent, it was that uniformity was the controlling principle embodied in this section and that it did not matter in applying that principle whether the assessment was above or below the actual value of the lands assessed.

I was impressed during the argument with the

(1) 9 West. W.R. 668.
(2) [1917] 2 W.W.R. 1138.
(3) 3 Alta. L.R. 259.
(4) 5 Pac. R. 738.
(5) 17 Can. S.C.R. 420.
(6) 14 Ch. D. 563.
(7) [1893] 1 Q.B. 189.

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LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE SAINT BONIFACE v. TOWN OF TRANSCONA.

Davies J.

force of this contention but after giving the question much consideration have concluded that it cannot be upheld.

The general principle that in construing legislation imposing taxation clear language must be found supporting the taxation must be borne in mind.

Now in the section before us while express language is used permitting assessment at *less* than actual value, there is no such language permitting assessment at *more* than actual value.

It was contended that such permission should be inferred from the words

> or in some uniform and equitable proportion of actual value.

These are vague and indefinite words and I do not think that from them alone a permission should be inferred to assess at more than the actual value of the land.

They are useful and probably necessary in cases where the permission to assess at less than the actual value is exercised as in such case preserving the general principle of uniformity and providing that the permission so to assess must be exercised not in a haphazard way but uniformly

> so that the rate of taxation shall fall equally upon the same,

which latter words I construe to mean upon all the lands and property assessed. If the policy of assessing "lands and personal property" at *less* than their actual value is adopted by the assessors it must be applied generally "to all real and personal property" and on some fixed principle, so that uniformity may be maintained and injustice prevented.

But, however that may be worked out under the statute, it seems to me reasonably clear that no intention to assess property beyond its actual value can be assumed or inferred.

I am not insensible to the many and great difficulties which existing conditions of the absence of any actual value of the lands in many parts may give rise to in making an assessment. But if the two main principles which I suggest are followed these difficulties can be largely minimized if not entirely overcome. These principles are that the Act does not authorize assessments greater than the "actual value" of the property assessed which the section goes on to say means

> the fair market value of such property regardless of a prospective increase or decrease, either probable, remote or near,

and that when assessed at *less* than the actual value it must be done on a uniform principle applied to all the lands and property assessed.

I concur therefore in allowing the appeal with costs, and reducing the assessment to $40,000. There is some evidence at any rate justifying that figure as the actual value of the lands assessed and there does not appear to be any justifying a higher valuation.

IDINGTON J.—I find no valid reason in the argument set up to support the claim to assess appellant's property at a sum beyond its valuation.

Whether we consider "The Assessment Act" or "The Municipal Act" or both together, and read the words "value," "actual value," "market value," respectively used therein and according to their proper force and effect within the recognized rules of interpretation and construction, there is to be found no warrant for resorting to the particularistic method of interpretation we are asked to adopt, and thereby render much of the language used and legislation it expresses, null and absurd.

I doubt if ever such methods of interpretation and construction should be tolerated, though we must

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admit courts of law have too frequently lent a willing ear thereto, and only for that reason do I think such an argument pardonable.

Counsel for respondent did not seem to deny that Mr. Chrysler's analysis and inferences from the evidence which placed the total value at $40,000, were fair.

The appeal should be allowed with costs and the assessment fixed at $40,000, the reduction of $48,000 being applied distributively in proportion to the relative sums fixed as to the assessment of each parcel involved, pursuant to the judgment of the district judge's decision.

DUFF J.—The appeal should be allowed with costs, and the assessment reduced to $40,000.

ANGLIN J.—The sole question on this appeal is whether under section 29 of the "Manitoba Assessment Act," (R.S.M., 1913, ch. 134), an assessment of land in excess of its value is permissible in cities, towns or villages.

By section 422 of the "Municipal Act" (R.S.M. 1913, ch. 133; amended 1916, ch. 72, s. 10) the maximum rate of taxation (exclusive of certain special rates) to be levied in cities, towns and villages is fixed at two cents on the dollar of assessed value. Sec. 423 of the same statute requires that the rates shall be calculated at so much in the dollar upon the actual value of assessable property, except as otherwise provided in the "Assessment Act" for cities, towns and villages.

The only provision of the "Assessment Act" by which it is otherwise provided is section 29, which reads as follows:—

In cities, towns and villages all real and personal property may be assessed at less than actual value, or in some uniform and equitable proportion of actual value, so that the rate of taxation shall fall equally upon the same. The expression "actual value" used in this section shall mean the fair market value of such property, regardless of a prospective increase or decrease, either probable, remote or near.

The *primâ facie* meaning of the word "proportion" in this collocation is clearly "portion." That is the meaning which ninety-nine men out of a hundred would give to it. The only ground for suggesting that it bears another meaning is the presence in the section of the preceding phrase, "at less than actual value," and the connecting conjunction, "or." It is argued that to avoid redundancy the word "proportion" must be given the meaning of multiple, or fraction of a multiple. But tautology in statutes is something quite too common to warrant such a straining of the ordinary meaning of the word "proportion" in order to avoid it. I think the purpose of all the words following the word "value," where it first occurs in section 29, is to provide that in the event of the basis of the assessment of land being "less than actual value" the same fraction of value must prevail in all cases "so that the rate of taxation shall fall equally." The word "or" is not used disjunctively to separate the expression of two distinct ideas, but, as is quite ordinary, to indicate that the idea expressed in the phrase, "at less than actual value," is repeated in another form in the word "proportion," with the qualification of uniformity and equitability superadded, the purpose being indicated by the succeeding words,

so that the rate of taxation shall fall equally upon the same.

It may of course be conceded that the section is not a model of draughtsmanship.

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The form of oath prescribed for the assessor affords a very strong indication that the legislature in fact used the word "proportion" in the sense of portion. Moreover, were it otherwise—if assessed values might be "boosted" indefinitely—the purpose of the restriction of the rate of taxation in cities, towns and villages to two cents on the assessed value would be defeated. It would indeed be purely illusory. If in fact personalty has been assessed in Transcona "at its actual cash value," (s. 33), or on any lower basis, the "uniformity" provision of the statute is violated by the assessment of the appellant's land. The basis of assessment of realty must be the same as that of the assessment of personalty (s. 29).

It would require unmistakable language to authorize an assessment of any property at more than its value. Nothing in section 29 of the "Assessment Act" warrants attributing to the legislature an intention to do anything so extraordinary, and the other statutory provisions referred to preclude such a view.

Mr. Chrysler admitted that there is evidence justifying an assessment of $40,000. Mr. Hull stated that he could not point to any evidence which would support a higher figure.

The appeal must be allowed with costs throughout and the assessment reduced to $40,000.

Appeal allowed with costs.

Solicitors for the appellant: *Munson, Allan, Laird & Davis.*

Solicitors for the respondent: *Hull, Sparling & Sparling.*

J. E. GIROUX..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

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*Oct. 24.
*Nov. 28.

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

Criminal law—Indictment without preliminary inquiry—Option—Speedy trial—Jurisdiction—Criminal Code, ss. 825, 826, 827, 828, 873.

A bill of indictment was preferred to the grand jury against the appellant under sec. 873 of the Criminal Code, and a true bill was found. The appellant was arraigned and pleaded not guilty. On the day fixed for the trial, he moved to be allowed to elect for a speedy trial under the provisions of Part XVIII. of the Criminal Code, and the presiding judge, with the consent of the Crown prosecutor, granted the motion. The appellant was subsequently arraigned in the Court of Sessions of the Peace and found guilty.

Held (Idington and Duff JJ. dissenting), that the judge of the Court of Sessions of the Peace had jurisdiction to try the offence.

APPEAL from the judgment of the Court of King's Bench, Appeal Side (1), affirming the judgment of the Court of Sessions of the Peace, at Montreal.

The accused, appellant, was found guilty by the trial judge, but he prayed for a case to be reserved for the Court of Appeal.

The circumstances of the case and the questions submitted on the reserved case stated by the trial judge for decision by the Court of King's Bench, are stated, as follows, by Mr. Justice Cross, in his reasons for judgment in the court appealed from.

(See Q.R. 26 K.B., at pp. 331 and 332.)

"The accused Giroux appeals against a conviction

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

(1) Q.R. 26 K.B. 323.

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of theft made against him by the judge of Sessions upon a speedy trial.

"He had not been committed for trial by a justice. The prosecution commenced by a bill of indictment preferred to the grand jury by direction of a judge.

"He pleaded to the indictment and a day was fixed for trial; but on the day so fixed, he elected to take a speedy trial. Effect was given to his election and he was tried as above mentioned.

"The learned trial judge has reserved for our decision the question whether the election of speedy trial could be made or was valid, seeing that there had been no preliminary inquiry; that he had pleaded to the indictment and had been afterwards admitted to bail until this day fixed for his trial by a jury."

N. K. Laflamme K.C. for the appellant cited *King* v. *Wener* (1); *The King* v. *Thompson* (2); *The King* v. *Sovereen* (3); *Reg.* v. *Burke* (4); *The King* v. *Hébert* (5); *The Queen* v. *Gibson* (6); *The King* v. *Komiensky* (7); *The Queen* v. *Lawrence* (8).

J. C. Walsh K.C. for the respondent.

THE CHIEF JUSTICE.—An indictment for theft and receiving stolen goods was found by the grand jury of the District of Montreal in April, 1915, against the appellant. On that indictment, he was arraigned and filed his plea of not guilty. The trial was fixed for a subsequent day, when the appellant, before the trial commenced, moved for leave to make his option to be tried by the Quarter Sessions under the pro-

(1) 6 Can. Cr. Cas. 406.
(2) 14 Can. Cr. Cas. 27.
(3) 20 Can. Cr. Cas. 103.
(4) 24 O. R. 64.
(5) 10 Can. Cr. Cas. 288.
(6) 3 Can. Cr. Cas. 451.
(7) 6 Can. Cr. Cas. 524.
(8) 1 Can. Cr. Cas. 295.

visions of section XVIII. of the Criminal Code. The presiding judge with the consent of the Crown Prosecutor granted the motion and gave the leave asked for; and, on the same day—May 17th, 1915—the appellant entered into a recognizance before a judge of the Sessions of the Peace "to appear in person at the Court of the Sessions of the Peace on the 27th May then instant," to answer to the charge of theft for which he had been indicted.

After much inexplicable delay the appellant was finally tried before the judge of the Sessions and found guilty of the offence with which he was charged. At his request, two questions were reserved for the consideration of the Court of Appeal.

On the application of appellant's counsel, that court also examined into the sufficiency of the evidence to support the conviction. In the result, all the questions were answered adversely to the pretensions of the appellant. Mr. Justice Carroll dissented from the answer of the majority to the first question, which was to this effect: Could the accused, Giroux, charged with the offence of larceny on an indictment preferred by the Crown Attorney, with the written consent of the judge presiding at the assizes, elect, in the circumstances which I have just detailed, to be tried before the Sessions of the Peace under Part XVIII. of the Criminal Code?

In the view which I take of the case, it will be unnecessary for me to deal with the other questions and upon which there is no dissent in the lower court.

As I have already said, the indictment found against the appellant was preferred under the provisions of section 873 of the Criminal Code. No information had been lodged with a magistrate, no preliminary

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investigation had been held and consequently there were no depositions and no commitment for trial, and it is in consequence argued on behalf of the appellant that the material necessary to enable him to exercise his right to elect under the provisions of ss. 826, 827 and 828 of the Code did not exist.

It is not necessary for me to express any opinion as to whether the appellant could as of right, in the circumstances of this case, exercise his right to elect; but I have no doubt whatever that the leave given by the trial judge on the application of the appellant with the consent of the Crown Prosecutor had for its effect to validate all the subsequent proceedings before the judge of the Sessions. I do not say that the consent of the appellant conferred jurisdiction on the judge of the Sessions but the latter had jurisdiction of the subject matter and in that respect was not dependent upon the appellant's consent. The consent is only important in this aspect of the case. It may be that by pleading to the indictment the appellant chose his forum and acquired the privilege to be tried by a jury. But by his application for leave to be tried by the judge of the Sessions he waived this privilege and selected another forum which he had a perfect right to do with the consent of the prosecuting officer.

The new forum had, as I have already said, complete jurisdiction to try the offence with which the appellant was charged and it is equally certain that he not only appeared voluntarily before the judge of the Sessions to answer the charge but at the trial he with the assistance of counsel cross-examined the Crown witnesses and examined witnesses on his own behalf. The only possible objection to the proceedings before the Sessions Court is that a bill of indictment

had been already found against him at the Assizes for the same offence as that for which he was tried in the Court of Sessions and that indictment remains undisposed of.

But the trial on that indictment was suspended on appellant's own request, and his conviction before the judge of the Sessions and the sentence would be a complete bar to any further proceedings on the indictment. As Graham J. said in *Re Walsh* (1), at p. 19: "The case of *Reg.* v. *Burke* (2), shews what becomes of the indictment." In my opinion the proper course would be to move to have it quashed.

To sum up. Both courts had jurisdiction to try the offence. Assuming that the prisoner had by his plea to the indictment selected his forum and acquired the right to be tried by a jury, it was open to him to waive that choice and he was also free to forego the privilege of a trial by a jury. Consent cannot confer jurisdiction but a privilege defeating jurisdiction may always be waived if the trial court has jurisdiction over the subject matter.

I venture to say that to set aside the proceedings below would in the circumstances of this case amount to a travesty of justice. I have carefully read the cases referred to in the factum and at the argument and when considered with reference to the particular facts with which in each case the judges were dealing, I do not find that they give us much assistance.

In the *Burke Case* (2), the defendants had elected to be tried by the County Court Judge under the "Speedy Trials Act" and indictments were subsequently found against them at the assizes for the offences for which they had so elected to be tried.

(1) 23 Can. Cr. Cas. 7.

(2) 24 O.R. 64.

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The question at issue was whether they could be deprived of their right to be tried by the County Court Judge and it was there decided that the right to elect to have a speedy trial was a statutory right of which the defendants could not be deprived if they were in a position to avail themselves of it.

In *The King* v. *Sovereen* (1), the prisoner argued that a person out on bail is entitled to elect to be tried by a judge without a jury after an indictment is returned founded on the facts disclosed by the depositions taken at the preliminary inquiry and it was held that he is not entitled as of right upon bill found and arraignment thereon to elect to be tried without a jury. The prisoner was in that case committed for trial by a magistrate and the indictment on which he was committed was preferred as in this case by the Crown Prosecutor with the written consent of the trial judge. It is only in this last respect that the cases are analogous.

It is not necessary to say more than this that I agree with the opinions expressed in *The King* v. *Sovereen* (1) by Chief Justice Moss and Mr. Justice Magee. The prisoner in that case claimed to be entitled to make his election as of right and as Magee J. said, he had not put himself in a position to claim that right, not being in custody and not having given notice to the sheriff. The Chief Justice, with whom Garrow J.A. and Latchford J. concurred, said:—

> I am unable to think that it was the intention to give an accused person the *general right to elect* to be tried without a jury.

In *Re Walsh* (2), it was held:—

> A person sent up for trial for an indictable offence and against whom while out on bail a true bill is found is entitled on being taken into custody to elect for a trial without a jury.

(1) 20 Can. Cr. Cas., 103. (2) 23 Can. Cr. Cas. 7.

In this case, the appellant, with the consent of the Crown Prosecutor and the approval of the judge, waived his right to be tried by a jury at the Assizes and then voluntarily appeared before a court having jurisdiction over the offence with which he was charged. He was then put upon his trial for the offence for which he had been indicted; he was assisted by counsel, examined and cross-examined witnesses and now seeks after he has been found guilty to escape the consequences of his own free choice. I fail to understand how ss. 826 *et seq.* have any application to the facts of this case.

I am of the opinion that this appeal must be dismissed.

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

IDINGTON J. (dissenting).—The learned judge who presided at the March term of the King's Bench, Crown Side, for the District of Montreal, duly directed, pursuant to section 873 of the Criminal Code, an indictment for theft and receiving stolen goods knowing them to have been stolen to be presented to the grand jury against the appellant.

Thereupon the grand jury found a true bill upon which the appellant was arraigned and pleaded not guilty to the said indictment, on the 25th April, 1915, when the trial was duly fixed for the 17th May following.

He had never been prosecuted before any Justice of the Peace in respect of the said offence or committed by any such Justice of the Peace to stand his trial. The preferring of the indictment to and return of a true bill by the grand jury followed by appellant's arraignment, his plea thereto and appointment of a

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day for trial of that issue comprised all that took place.

In short there was not the slightest semblance of any such proceedings having been had as to lay the foundation for such a proceeding as contemplated, by the speedy trial provisions of the Criminal Code, to be necessary to give jurisdiction for the exercise of any of the rights, duties or powers furnished thereby.

Yet on the day fixed for his trial, when presumably everything was ready therefor, instead of its taking place he asked to be allowed to elect to be tried by a judge under the said speedy trial provisions. Without any jurisdiction to do so on the part of the presiding judge, or vestige of authority on the part of the Crown officer, each seems to have graciously assented to this novel proposition for the disposal of an indictment, found by the grand jury in a higher court, being transferred to a lower court, on the part of one who had (as expressed by the late Mr. Justice Würtele in regard to a man before him in the like plight), conclusively and exclusively elected to be tried in due course according to law by a jury.

Doubtless this assent was inadvertently given without reference to the express terms of the Criminal Code providing for the manner of trial of any one indicted before and presented by a grand jury, as having been truly so indicted.

It is stated in appellant's factum that on the same day he went before Mr. Justice Bazin and made his option for a speedy trial in the Court of Special Sessions of the Peace.

The case before us, however, only shews that on the 17th May, 1915, the accused appeared before Adolphe Bazin, Esquire, judge of the Sessions of the Peace for Montreal, and entered with a surety into a

recognizance to appear on the 27th May at the Court of General Sessions of the Peace in person to answer the indictment found against him for theft and so continue from day to day until discharged.

The first speedy trial provisions were enacted in 1869, by 32 & 33 Vict. ch. 35, and confined to the Provinces of Ontario and Quebec and with many amendments later were extended to other provinces.

The purpose had in view was to enable those committed for trial to avoid being kept in suspense for many months awaiting the coming of a court with a jury, if they should choose to dispense with their right to a jury trial.

Those innocent gladly availed themselves of such an opportunity. Those guilty of some trifling offence which might be adequately punished by a shorter term than they probably would serve, if unable to find bail, were equally glad to avail themselves of the privilege. And even those who could find bail were in very many cases likewise pleased to put an end, by so electing, to the painful suspense they were enduring.

Such legislation furnished also a public gain, in saving the time of jurors, both grand and petit at Assizes or Sessions.

In this peculiar case it is hard to find what good cause was to be served by applying the speedy trial provisions of the Act, for it was not until the 14th of the month of January following that the appellant was actually put upon his trial and pleaded again "not guilty," before the district judge, when some witnesses were examined, and the case was adjourned till the 20th Jan., when it was again adjourned till the next day, only to be adjourned again till the

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1st February, and only after three more adjournments ended by the judge finding him guilty.

Thereupon there was the special case reserved to determine whether the judge ever had jurisdiction to take such proceedings.

The Act itself and the many amendments to it gave rise in course of time to many cases, and reserved cases, relative to the jurisdiction of the judge in the given circumstances of each such case. Hence there were decisions of the higher courts or judges thereof in a great variety of circumstances in the Provinces of Quebec, Ontario, Manitoba, British Columbia and Nova Scotia.

These decisions would not, of course, bind us if an obvious misconception of the law had occurred in them all.

So far from there being diversity of opinion there has been developed a uniformity of opinion relative to the main features of the statute founding jurisdiction.

In not a single instance did it occur, till this case, where an indictment of a grand jury duly found and pleaded to was, notwithstanding the express provisions by the procedure sections of the Criminal Code, attempted to be transferred to another and lower court for trial.

In effect that is what was attempted here in rather an off-hand fashion.

The case of *Reg.* v. *Burke* (1), shews how when the accused had been improperly, in violation of his right to elect, indicted and induced to plead to the indictment, he could free himself from such a predicament.

Assuming the denial of legal right as was assumed in that case, the proper course was adopted of quashing

(1) 24 O. R. 64.

the indictment. Then the accused was free to exercise his right.

No such phase is presented in this case. The indictment and plea thereto still stands ready for trial as it was two years or more ago.

Of the many cases I have referred to, presenting the true situation of accused in such circumstances, I would refer to the opinion of the late Mr. Justice Würtele in the case of *The King* v. *Wener* (1), wherein at page 413 he spoke as follows:—

> The Criminal Code does not prescribe that an accused can elect to be tried without a jury when, without a preliminary enquiry or without a committal or an admission to bail, and subsequent custody for trial, a bill of indictment has been preferred by the Attorney-General or by any one by his direction, or with the written consent of a judge of a court of criminal jurisdiction, or by order of such court, and thus remove the prosecution from the forum to which it properly belongs to another to which jurisdiction has not in such case been given by law. In the absence of any statutory provisions or statutory authority an accused has no right in such a case to demand and obtain a trial in any other court than the one in which the indictment was found, and which has jurisdiction over the case, and is seized with it.

And I would also refer to the opinion of the late Sir Charles Moss, Chief Justice of Ontario, in the case of *The King* v. *Sovereen* (2), before the Court of Appeal for Ontario, so late as 1912, after all the existing amendments had been made to the speedy trial provisions of the Criminal Code. At p. 105 he spoke as follows:—

> Speaking for myself, and with the utmost respect for those who have indicated or expressed a different view, I think that where, as here, a person committed for trial, and whether in custody or upon bail, has not, before a bill of indictment has been found against him by a grand jury, taken the steps necessary to enable him to elect to be tried by a judge without a jury, he is not, upon bill found and arraignment thereon, entitled as of right to ask to be allowed to elect to be tried without a jury. If that is not the effect of the legislation, it places it in the power of the accused not merely to postpone his trial, but to render futile all that has been done by the grand jury, and necessitate

(1) 6 Can. Cr. Cas. 406. (2) 20 Can. Cr. Cas. 103.

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a compliance with all the forms prescribed by section 827 of the Code, including the preparation and preferring by the prosecuting officer of a charge in accordance with the directions given in sec. 827.

I am unable to think that it was the intention to give an accused person the general right to elect to be tried without a jury. On the contrary, I think that the intention was to give it only in cases in which the exercise of such an election would or might effect a speedy trial of an accused person, and thereby save the delay which waiting for a trial by jury might involve.

I agree with these opinions. In either case there was some basis for the accused to have elected had he chosen to do so before plea.

In the case before us there never was the semblance of any such basis. I conclude therefore that there was no jurisdiction in the district judge to have accepted any such so called election or to try the accused under such circumstances and the appeal should be allowed accordingly.

There being no jurisdiction the second point reserved falls to the ground and we have no right to answer the question propounded upon the evidence.

DUFF J. (dissenting).—I concur with Mr. Justice Idington.

ANGLIN J.—Upon a bill preferred by Crown counsel with the consent of the presiding judge under s. 873 (1) of the Criminal Code, the grand jury, at a sittings of the Court of King's Bench (Crown Side), held in Montreal, presented an indictment charging the defendant with theft—an offence cognizable by the Court of the Sessions of the Peace. Upon arraignment the defendant pleaded "not guilty," and a subsequent date for his trial was thereupon fixed. He was meantime released on bail. On the date fixed he surrendered himself for trial and then demanded that he be allowed to elect to be tried under Part XVIII. of the Code by a judge of the Sessions of

the Peace. Counsel for the Crown consented and an order was made granting the demand. He accordingly appeared on the same day before Bazin J. and made his formal election for speedy trial. He was afterwards tried and convicted by Choquet J., presiding at a special sittings of the Court of the Sessions of the Peace. He thereupon sought, and in view of the decisions in *The King* v. *Sovereen* (1), and some other cases, quite properly was accorded a reserved case for the decision of the Court of King's Bench upon the question (submitted in the form of two questions), whether, under the circumstances stated, his election for trial under Part XVIII. of the Code was valid and sufficient to give the judge of the Court of Sessions jurisdiction to try him. I deal with the question so reserved, to which, as I understand it, the special jurisdiction conferred on this court by section 1024 of the Criminal Code is restricted.

Under section 825 of the Code, every person committed for trial for an offence within the jurisdiction of the general or Quarter Sessions of the Peace may, with his consent, be tried under Part XVIII. A person in custody awaiting trial, however he may so find himself, is under s.s. 4 to "be deemed to be committed for trial within the meaning of the section." The defendant, in my opinion, was "in custody awaiting trial" on the charge, when he had surrendered himself for trial on the appointed date. *Re Walsh* (2); *The King* v. *Thompson* (3). I read "the charge" as meaning the charge mentioned in s.s. (1), *i.e.*, a charge cognizable by the Court of Sessions. The interests of justice are protected, as far as Parliament considered such

(1) 20 Can. Cr. Cas. 103. (2) 23 Can. Cr. Cas. 7 at p. 9.
(3) 14 Can. Cr. Cas. 27 at p. 30.

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protection necessary, by the provision of s.s. 5 that, where the offence charged is punishable with imprisonment exceeding a period of five years, the Attorney-General may require a trial by jury.

I see nothing in any provision of the Code, as it now stands, which precludes an election for trial under Part XVIII. by an accused under indictment, no matter how or when presented, if he comes within the comprehensive terms of section 825. The difficulty which formerly existed owing to the supposed impossibility of complying with section 827 in the absence of depositions taken upon a magistrate's preliminary investigation in cases where such investigation had been waived and the accused had consented to be committed for trial without it, was overcome by the insertion of the words "if any" in s. 827 by 8 & 9 Ed. VII., c. 9, s. 2. Any similar difficulty in cases of indictments, preferred under the section now numbered 873 was thus likewise removed.

It is contended that the special provision made by s. 828 for re-election after indictment by a person who had already elected for trial by jury imports an intention to preclude the right of election in other cases after indictment. But the *raison d'être* of this provision was not to provide for the case of an indictment having been found, but to confer or make clear the right to a second election. Its terms, however, pointedly indicate that the presentment of an indictment was not regarded by Parliament as a bar to the right of election. No good reason can be suggested why, if the man who has already elected for a jury trial should be allowed to re-elect after indictment and up to the moment when his actual trial begins, the man who has never elected should be debarred from doing so by the presentment of an indictment.

As Mr. Justice (afterwards Chief Justice) Graham said in *Re Walsh* (1):—

> When Parliament did draw the line of exercising the option as it does in sec. 828, sub-sec. 2 (the re-election provision), it provided that he (the accused) may exercise "the election at any time before such trial (*i.e.*, before a jury) has commenced."

I agree with the views expressed upon this point by the learned judges of the Nova Scotia Appellate Court in *Re Walsh* (1) and by Howell C.J.A. in *The King* v. *Thompson* (2).

But it may be said that after plea to the indictment, at all events, the right of election is irrevocably gone for two reasons: that the plea is an election of forum; and that upon arraignment the trial has already commenced. Neither reason in my opinion is sound.

Assuming that the plea should be regarded as an election of and submission to the forum of the Court of King's Bench and a jury trial, it was the first and only election made by the accused and by s. 828 express provision is made for a re-election by a prisoner who has elected to be tried by jury "at any time before such trial has commenced." That the arraignment is not part of the trial—that the trial only begins after plea—appears from the heading "Arraignment and Trial" (s. 940) in the Code itself and is established by many authorities collected in the judgment of Graham E.J. in *Re Walsh* (1), at p. 17. Parliament has therefore in explicit terms provided for an election after plea, since plea precedes the commencement of the trial. The reasoning of Mr. Justice Graham and Mr. Justice Ritchie in support of the right of election after indictment seems to me conclusive in a case such as that before us. If Parliament, which, in enacting

(1) 23 Can. Cr. Cas. 7 at p. 17. (2) 14 Can. Cr. Cas. 27 at p. 30.

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s. 828, had election after indictment brought expressly to its attention, did not mean that that right should exist where an indictment is preferred under s. 873, notwithstanding the comprehensive terms in which secs. 825 and 828 are couched, I think it certainly would have said so by an explicit exception. In the case of re-election, whatever the offence and however punishable, by the proviso to sec. 828 after indictment the consent in writing of the prosecuting officer acting under s.s. 2 of s. 826 is required, and in any case either the judge or the prosecuting officer may prevent effect being given to a second election (s.s. 3). The requisite consent of the prosecuting officer was given here.

With great respect for the learned judges who hold the contrary view, in my opinion, the fact that the indictment under which the accused was awaiting trial had been preferred under s. 873 (1) of the Code, did not prevent his exercising the right of election either under s. 825 or s. 828 and the judge of the Court of Sessions of the Peace therefore had jurisdiction to try him.

The tendency of the courts in the earlier cases to place a narrow construction upon the "Speedy Trials" provisions of the Criminal Code has been adverted to in the *Thomson Case* (1) and *Walsh Case* (2). It should probably be attributed to the view strongly held by many, lawyers as well as laymen, that trial by jury, especially in criminal cases, should be preserved intact. But Parliament by one amendment after another has overcome the several restrictions that judges have from time to time sought to place upon the right to elect for trial before a judge of the Court of Sessions,

(1) 14 Can. Cr. Cas. 27 at p. 30. (2) 23 Can. Cr. Cas. 7 at p. 17.

thus evincing its policy and determination that this mode of trial shall, as far as possible, be available within the limits and subject to the safeguards which it has prescribed, and its desire that the sections of the Code providing for it should receive a liberal rather than a narrow construction.

Upon another question, as to the sufficiency of the evidence, which the Court of King's Bench allowed the defendant to raise, there was no dissent in that court and there is therefore no right to appeal here.

Appeal dismissed.

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*Nov. 7.
*Nov. 28.

W. M. GERMAN (PLAINTIFF).....APPELLANT;

AND

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

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

Negligence—Municipal corporation—"Gross negligence"—Ice and snow—Personal injuries—Weather conditions—"Municipal Institutions Act," R.S.O. (1914), c. 192, s. 460(3).

Sec. 460(3) of the "Ontario Municipal Institutions Act" provides that "except in cases of gross negligence a municipality shall not be liable for injury caused by ice or snow upon a sidewalk." The City of Ottawa undertakes the work of removing snow from the sidewalks and keeping them safe for pedestrians.

Held, that failure to sand or harrow a sidewalk before 9 a.m. of February 2nd, when the conditions calling for it only arose on that morning, if negligence at all, is not "gross negligence," and the city is not liable for personal injury caused at that hour by ice on the sidewalk especially if it was not a place of special danger nor on a street of heavy traffic and did not call for immediate attention.

Held, also, that reducing the working staff on the day of the accident was probably not "gross negligence" in the absence of evidence that such reduction caused the injury.

Held, per Fitzpatrick C.J. and Idington J. dissenting, that after a thaw for some days the temperature fell on the afternoon of the day preceding the accident and the city officials should have realized that the sidewalks would be dangerous on the following morning. It was, therefore, "gross negligence" to reduce the working staff and to fail to do work on the sidewalk where the accident occurred.

The judgment of the Appellate Division (39 Ont. L.R. 176) was affirmed.

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

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

(1) 39 Ont. L.R. 176.

The material facts are stated in the above headnote.

Belcourt K.C. for the appellant. "Gross Negligence" has been defined by this court to be "very great negligence:" *City of Kingston* v. *Drennan*(1).

The defendants in allowing the dangerous condition of the sidewalk, where the plaintiff was injured, to remain until 9 a.m., without sand or harrowing, was very great negligence. See *Huth* v. *City of Windsor* (2); *Cranston* v. *Town of Oakville*(3).

The findings of fact by the trial judge should be maintained: *Johnston* v. *O'Neill*(4).

Proctor for the respondent, cited *Ince* v. *City of Toronto*(5); *Bleakley* v. *Corporation of Prescott*(6); *Lynn* v. *City of Hamilton*(7), and *Palmer* v. *City of Toronto*(8).

THE CHIEF JUSTICE (dissenting).—I concur with Mr. Justice Idington.

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

IDINGTON J. (dissenting)—The learned trial judge gave effect to the claim of the plaintiff by finding that the respondent had been grossly negligent of its duty in relation to the ice on the sidewalk which caused the appellant to fall and thereby suffer serious injury. The Court of Appeal reversed that decision and much was made of the opinion judgments of the Chief Justice in appeal and of Mr. Justice Lennox on the part of the court, relative to the question of what constitutes gross

(1) 27 Can. S.C.R. 46.
(2) 34 Ont. L.R. 245, 542.
(3) 10 Ont. W.N. 175, 315; 55 Can. S.C.R. 630.
(4) (1911) A.C. 552, at page 578.
(5) 27 Ont. App. R. 410; 31 Can. S.C.R. 323.
(6) 12 Ont. App. R. 637.
(7) 10 Ont. W.R. 329.
(8) 38 Ont. L.R. 20.

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negligence within the meaning of the "Municipal Act," section 460, sub-section 3.

Chief Justice Meredith, in attempting to define what might be claimed as and to define "gross negligence," said:—

> If the same condition of the sidewalk, or a like condition, as that which existed when the respondent fell upon it had continued for a considerable number of days, negligence, and even gross negligence, would have been proved if that condition could practicably have been prevented.

I cannot agree with this definition, and to the implications therein when applied to streets in a thickly populated part of a city like Ottawa.

In every case in which the term "gross negligence" has to be considered, regard must be had to all surrounding circumstances in which the city or municipality is placed in relation to the work in question and the reasonable requirements for prompt and efficient service in relation to the maintenance thereof in good repair. What might be gross negligence in a densely populated part of a city like Ottawa might not be gross negligence, or perhaps negligence at all, in a rural municipality possessed of a highway over which there might not be a traveller for days at a time.

Parties concerned in litigation dependent upon the section in question might be well advised on either side to be ready to present more direct evidence of the surrounding facts and circumstances than are made clearly to appear in this case. What exists of common knowledge available to a judge and what inferences may be drawn from the evidence that was given I think must be held sufficient in this case to enable us to pass upon the judgment in question.

At all events I think the learned trial judge must be presumed to have been in quite as good a position to determine the crucial fact of whether there was

"gross negligence" or not as any appellate court. We have some evidence as to the extent of Ottawa and some general knowledge of the size and general character of the city, and I think we may also be able to use our stock of common knowledge relative to the vicissitudes of climatic conditions in Ottawa.

Along with that we have evidence directly bearing upon the conditions existent in what is sometimes referred to in Canada as a January thaw.

It is explained that on Monday there was rain and thaw as there had been for five or six days preceding it. On Tuesday there seemed to come a change which any rational human being fit to appreciate the fact and to be in the service of the city in charge of a large part of its streets ought to have recognized immediately a freezing temperature which in all human probability, following the rain of Monday and preceding days, would render the sidewalks in Ottawa on Wednesday morning what the witnesses have referred to as a "glare of ice."

The evidence of the foreman and other witnesses seems to put beyond doubt the facts that whilst there nine men engaged on Monday and a corresponding team force for the district in which the sidewalk in question exists, there were assigned to the duty there to be done on the Wednesday on which the accident took place only five men and little, if any, team force.

Then it is to be observed that it is conclusively proven that it was raining very much on Monday, some of the respondent's witnesses going so far as to say that it had been raining all day on Monday, and others saying twenty-four hours rain on Monday, and others again that the sidewalks in some places were flooded. I incline to think some of the expressions relative to the extent of the amount of rain and

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thaw on Monday were possibly exaggerated, yet I cannot get rid of the impression that it was one of those days when the sanding process would result in little good by reason of the rain and thaw washing it away. Whether washed away or not, certainly the conditions of Monday and the preceding days were clearly likely to prepare for the condition of things that did happen, of a freezing up on Tuesday afternoon and night which demanded, instead of a relaxing of effort and reduction of the staff of men to half of those engaged on Monday, that there should have been an effort to increase them, or at all events keep the force going.

A perusal of the entire evidence in the case leaves my mind much puzzled with what the foreman in charge of the sidewalk in question really was about.

The assistant city engineer tells of the force over the city having been doubled for these three days including Wednesday.

The city's street superintendent gives the figures for the entire city shewing the employment of fifty-three men on Monday and a corresponding increase in team force, that on Tuesday there were fifty-one men and sixteen horses and sleighs, and that on Wednesday there were only forty-five men and seventeen horses and sleighs.

It would be obvious from the consideration of these figures that the reduction of man force over the entire city would seem to have come almost entirely out of the force employed for St. George's Ward. Why there should be this remarkable falling off under the circumstances when it did not seem to occur to other superintendents to do anything like that (but on the contrary practically to maintain their whole force) is not explained and is inexplicable upon any other

ground than that there was gross negligence on the part of those concerned in failing to appreciate the conditions they had to contend with on Wednesday morning.

The evidence is most unsatisfactory as to what they were doing on Wednesday and does not in any manner explain away the evidence of the appellant and Mr. Burns as to the condition of the street they had to travel on.

It is made clear by Mr. Burns that from the moment he stepped out of his house and took a survey of the street and the sidewalk, that he decided the centre of the road was the safest place to go on account of the ice on the sidewalk. I think evidence of that kind is of unquestionable force and worth a great many guesses on the part of civic employees as to what they thought they possibly did on that day, or some other day, or what they must have happened to be doing by reason of something else having happened.

Just by way of illustration of how that part of the city was being attended to I may refer to the evidence of Mr. Chapleau who was called for the defence. He tells us that he had phoned to the city hall to have some water removed from the street in order that he might get out of his house by other means than by laying down a plank to travel upon. His phoning brought no response in the way of service until the next day.

That incident, to my mind, illustrates what were the probable conditions permeating the force at the time in question. But not only that day but for eight years previously had Mr. Chapleau had occasion to make the like call, and yet in face of such experiences spread out upon the record in this case, counsel for the city sees fit to make it a ground of complaint against the appellant that neither he nor Mr. Burns

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had called the attention of the city authorities to the state of the sidewalk.

Perhaps this incident and Mr. Chapleau's experience illustrate better than anything else in the case how wretchedly in some parts of the city the business of taking charge of the sidewalks has been managed. And I think it is from incidents like that that inferences may be drawn as to the general condition of the service.

If that fairly illustrates the nature of the service that was being given, then so much more reason for finding that there was gross negligence. We are furnished by witnesses for the defence with evidence of the kind of energy that was expected to be applied when sanding the sidewalk would be of any avail. They would seem to have been required to get up at two o'clock in the morning and be on duty at five o'clock, as they swear they were on Sunday night and Monday morning.

The changed condition on Tuesday afternoon and night demanded something akin to the like energy on Wednesday morning if the people were to be permitted to use the sidewalks with safety.

No doubt many thousands have to tread the streets of Ottawa between six and seven o'clock in the morning, and so on at various times till the hour when men like the plaintiff and the civil service part of the population proceed to work. Yet we are told, and it is conclusively established, I think, that there was no sanding done upon the sidewalk in question before nine o'clock on the day of the accident, and I doubt if there ever was that day. If that does not constitute "gross negligence" under such circumstances what would? It certainly would not have been "gross negligence" for the pathmaster in a country district to have delayed that long, but for a city such as

Ottawa to be told that it is permitted by statute to neglect a service so obviously needed for the safety and comfort of those using its streets is, I most respectfully submit, to encourage that neglect of duty, only too obviously often apparent on the part of municipal authorities in our Canadian towns and cities.

Again, with great respect, I submit that Mr. Justice Lennox was under a misapprehension of fact when he speaks of what was done as follows:—

> It is shewn that a double force was employed, that the fires were lighted at two o'clock and the men and teams were at work on the streets by four o'clock on Monday morning and kept regularly on at work until the time of and after the accident, doing all that they could do, and as to ordinary level streets doing more, I venture to think, than the statute demands.

It was admitted in argument as already stated that this force which was applied on Monday was cut down on Wednesday morning to consist of five men instead of nine. I fear there has been a misapprehension in the court below of the actual facts as they appear when properly analyzed, and hence the reversal of the learned trial judge's judgment.

The conditions on Wednesday, I repeat, demanded more men, more sand and more energy. The battle on that morning was not the hopeless task that the men were sent to face on Monday, if the description of things that some give is correct, but it was a condition of things that required prompt energetic action with sand or harrowing or whatever might produce the best result most speedily, and enable the citizens to travel the streets at the time of day they needed them.

I think the judgment appealed from should be reversed, and that of the trial judge be restored with costs throughout.

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DUFF J.—The appeal should be dismissed with costs.

ANGLIN J.—Seriously injured by falling on an icy sidewalk on the south side of Besserer Street, east of Charlotte Street, in the City of Ottawa, "a trifle after 9 o'clock" on the morning of Wednesday the 2nd of February, 1916, the plaintiff recovered judgment against the municipal corporation for $2,250 damages after a trial before Mr. Justice Britton. That judgment was unanimously reversed, and the action dismissed by the Second Appellate Division. The plaintiff now appeals to this court. Our right and our duty to review the evidence, to form our own conclusions upon it, and to reverse the judgment of the provincial appellate court, if satisfied that upon the whole case the respondent should be held liable, is undoubted. But it must clearly appear that the judgment of the Appellate Division was erroneous before we can reverse it. *Demers* v. *Montreal Steam Laundry Co.*(1).

In Ottawa the municipal corporation does not, as is the case in many other Ontario cities, impose upon property owners the duty of dealing with snow and ice so that the sidewalks on which their property fronts shall be kept passable and reasonably safe for pedestrians. It undertakes to perform that work itself. The system adopted is to remove the snow by horse-drawn plows and to deal with danger from slippery surfaces by harrowing them or sanding them. As the learned trial judge said:

> The city has a difficult and expensive proposition, involving the expenditure of large sums of money to keep miles of streets in a reasonably safe condition.

As said in the Appellate Division by the learned Chief Justice of the Common Pleas, a judge of many years' experience:

(1) 27 Can. S.C.R. 537.

It was well proved and not denied that the appellants' methods and means for the performance of this duty were good. I should have no hesitation in saying, more than such as are ordinarily provided, and during this exceptional week, ending on the day of the accident, the usual road-gang had been doubled, and according to the testimony of those connected with it, testimony that is not questioned by other testimony or by any circumstances, there had been unusual vigilance and care during that trying weather.

As put by Mr. Justice Lennox:

It is not pretended that the appellants did not make reasonable and careful preparation in advance to meet winter conditions, or that their system was improper or inadequate. This was not a sidewalk of exceptional character nor was it a place of peculiar hazard. It was like other miles and miles of streets in Ottawa, a level, ordinary walk.

The plaintiff's complaint is not that the system was defective, but that there was gross negligence on the part of civic employees, as put by the learned trial judge:

in not doing what it was intended should be done.

That at the time of the unfortunate occurrence the sidewalk was in an extremely dangerous condition is not controverted. Whether the failure of the city employees to prevent that condition arising or to remove it before 9 a.m. on Wednesday the 2nd of February amounted to "gross negligence" (defined by this court as "very great negligence"; *Kingston* v. *Drennan*(1)); which is the statutory condition of the defendants' liability (R.S.O. ch. 192, sec. 460 (3)), is, therefore, the vital question involved in this appeal. Its solution must depend upon the notice of the existence of the dangerous condition which the city authorities actually had, or which should be imputed to them, and their opportunity of remedying it. It is obvious that the state of the weather immediately prior to the accident, and the relative situation of the place where it occurred must be taken into account in determining whether there was such a failure to

(1) 27 Can. S.C.R. 46, at page 60.

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take advantage of reasonable opportunity to prevent or remove the admitted danger, as amounted to gross negligence.

There is no direct evidence that the city's servants had any actual or specific notice of the existence of the danger at the locus of the accident. But it would be absurd to suggest that they should not have realized at least the probability, if not the certainty, of its existence from early on Wednesday morning. Having regard, however, to the preceding weather conditions, it is also practically certain that similar danger must have existed at a great number of other places upon the five hundred miles of sidewalks in the city—of which some forty or fifty miles were in St. George's Ward—many of them carrying much heavier traffic and therefore more urgently demanding attention than the part of Besserer Street in question, near the eastern limit of the city, upon which traffic is comparatively light. As stated, there is nothing in the record to suggest that this place was one of special hazard which called for preferential care or treatment. In view of these facts and assuming the adequacy of the city's system, which is not attacked, if the duty to remove the danger at the point in question arose only on the Wednesday, I should not be prepared to hold that failure to fufil it before 9 o'clock in the morning was such gross negligence as entailed liability to the plaintiff. As put by the ward street foreman, Hackland:

> St. George's Ward has a lot of hills and we have to sand them oftener than we sand the level streets. * * * We were looking for dangerous spots and probably had not reached that spot,

i.e., where the plaintiff fell.

I have not overlooked the fact that the nine men who had been employed on Monday and Tuesday

were reduced to five on Wednesday morning. This may have been a mistake. But there is no evidence that if the services of the nine had been retained the place in question would or should have been reached by the sanding men before 9 o'clock on Wednesday morning. I rather think it would not, as places where there is heavy traffic and hills where danger is to be expected demanded attention first. The reduction of the staff, if negligence at all, has not been shewn to have caused the accident, and I think that in any case it probably could not be designated "gross negligence." If, therefore, there was not gross negligence in the failure to sand or harrow the spot in question if the condition requiring it only arose on the Wednesday morning, it becomes material to consider the evidence of the conditions which prevailed on the preceding days, and especially on the Tuesday, in order to determine whether sanding or harrowing should have been done on that day.

The plaintiff himself says that for six days before he was injured there had been rain on and off, and his witness Burns says:

> It was raining for three or four days around that period * * * a very heavy downpour of rain.

Although the plaintiff and Burns both stated that there had been no attempt to sand the sidewalks on Besserer Street east of Charlotte Street for six or seven days before the accident, I am satisfied that they were mistaken. The positive and clear testimony of Lewis and Sauvé convinces me that they sanded these sidewalks on Monday the 31st of January. The evidence establishes that it rained heavily on that day, and it is quite possible that the sand had been washed away or, more likely still, that it had sunk to the bottom of the water lying on the sidewalks and had thus dis-

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appeared before the plaintiff and Mr. Burns, who presumably went down town early in the morning, returned later in the day—possibly after dark in the afternoon or evening—or that it escaped their attention for some other reason. I am equally satisfied that the sanding done on Monday, however efficient at the time, proved wholly ineffectual to prevent the condition of glare ice which undoubtedly existed on Wednesday morning. No doubt because he realized that if the duty to sand or to harrow arose only on the morning of the accident, it would be almost impossible to maintain that there had been any negligence on the part of the civic employees—still less gross negligence—Mr. Belcourt strenuously contended that sanding should have been done on Tuesday, and, in order to establish this, he insisted that on that day there was frost and that, at all events in the afternoon, the sidewalks were frozen up. The plaintiff's own statement is that it began to get colder on Monday or Tuesday. The great weight of evidence, however, is that the thaw continued on Tuesday. The official weather record from 8 p.m. Monday to 8 p.m. Tuesday is:—Night, overcast and mild; Day, cloudy, clearing, wind and a little colder—Temperature, maximum, 41°: minimum, 26° Fahrenheit. From 8 p.m. Tuesday to 8 p.m. Wednesday:—Temperature, maximum, 26°, minimum, 12°; and Thursday, Temperature, zero. This record of a steadily falling thermometer makes it clear that the frost began some time before 8 p.m. on Tuesday and warrants the inference, in my opinion, that it began about nightfall. This conclusion is borne out by the statement of the plaintiff's witness, Burns, that "it turned cold on Tuesday night." The foreman, Hackland, says, "it was tightening up a little that day." During Tuesday his men were en-

gaged in opening gully grates, digging trenches to let water off the sidewalks, picking bad spots and doing some sanding.

Mr. S. J. Chapleau, who resides on the north side of Besserer Street, about opposite where the plaintiff fell, tells us that there was "a lot of water" on the sidewalk opposite his house, and that on the Wednesday morning he had to procure a plank in order to cross this water when leaving his house. It was let off by a trench dug later on that day by city workmen in compliance with a request made by Mr. Chapleau at noon on the previous day.

While there is no evidence that it rained on Tuesday, it would seem not improbable that there was water on the sidewalks so that sanding or harrowing them would have been futile. The sand would have sunk to the bottom of the water and the grooves made by harrowing would have been filled up. As put by the learned Chief Justice of the Common Pleas:

> There is no evidence that sanding on Monday or on Tuesday would have prevented the condition existing at the time of the accident. So too, as to harrowing, the marks would be washed out or filled in by the rain or melted snow and ice each day and frozen over each night. * * * What (sand) was not washed off would have sunk in the water and be useless in the morning, if put there even the day before.

Referring to the sanding done on the Monday, the learned trial judge said:

> It may well be that water flowing from the south or following a rain froze over the sand so that none was in sight, and was not then of any use to render the walk more safe for persons walking on the street.

There is nothing to shew that sanding done on the Tuesday would not have been equally ineffectual. In my opinion the evidence rather indicates that it would.

Making due allowance for the exceptional weather conditions with which the civic employees had to contend, I am not convinced that the conclusion of the

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Appellate Division, that it was not established that the dangerous condition of the place where the plaintiff fell was attributable to gross negligence on the part of the defendants' servants, is so clearly erroneous that we should reverse it. On the contrary, an independent study of the evidence has led me to the same conclusion.

Appeal dismissed with costs.

Solicitors for the appellant: *German & Morwood.*
Solicitor for the respondent: *Frank B. Proctor.*

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS)..... APPELLANTS;

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*Nov. 12.
*Nov. 28.

AND

LOTTIE MAYNE (PLAINTIFF) ..... RESPONDENT.

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

Negligence—Railway company—Duty of conductor—Invitation to alight.

The conductor of a railway train, whose duty it is to see that passengers are carried "with due care and diligence" is entitled to assume that they will act with ordinary prudence and discretion.

The act of the conductor in opening the door guarding the steps at the end of a car and allowing a passenger to go down these steps from which he stepped off while the car was still moving at a high rate of speed and was killed is not negligence on his part which makes the company liable in damages under the "Fatal Accidents Act."

Per Davies and Idington JJ. dissenting.—As the passenger was not accustomed to travel, and had been told by the conductor, after he had called out the name of the station, "this is where you get off," the passenger had reason to believe that he could safely alight and the company was liable.

Judgment of the Appellate Division (39 Ont. L.R. 1) reversed, Davies and Idington JJ. dissenting.

APPEAL from the Appellate Division of the Supreme Court of Ontario(1), affirming by an equal division of opinion the judgment at the trial in favour of the plaintiff.

The material facts are stated in the above headnote.

D. L. McCarthy for the appellants referred to *Lewis* v. *London, Chatham and Dover Railway Co.*(2); *London*

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

(1) 39 Ont. L.R. 1.

(2) L.R. 9 Q.B. 66.

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and North Western Railway Co. v. *Hellawell*(1), and *England* v. *Boston and Maine Railroad Co.*(2).

Phelan for the respondent cited *Edgar* v. *Northern Railway Co.*(3) and *Rose* v. *North Eastern Railway Co.*(4).

THE CHIEF JUSTICE.—This is the case of a passenger on appellants' railway who, when approaching his destination, left the seat he occupied in the car and proceeding to the end platform either stepped off or fell off the train and was killed. The train was at the time running at a speed of about twenty miles an hour. The respondent is the widow, who was present at the accident with her children, and by her action she claims damages for her husband's death which, she says, was caused by the negligence of appellants' servant, the conductor of the train. The particular acts of negligence set forth in the statement of claim are: (a) the conductor indicated to the deceased that he had reached his station and could safely alight and did in fact invite the deceased to alight when he could not do so, and (b) the conductor should have prevented the deceased from going upon the platform while the train was in motion and he should have warned the deceased and neglected to do so.

The obligation of the company was without delay and with due care and diligence to carry the passenger to his destination. Sec. 284 (*c*) "Railway Act," R.S.C. [1906] ch. 37. The fact of the casualty once established, it was the duty of the company to give an explanation of the accident consistent with performance on their part of their statutory obligation to safeguard their

(1) 26 L.T. 557.
(2) 153 Mass. 490.
(3) 11 Ont. App. R. 452.
(4) 2 Ex.D. 248.

passengers with all practicable care and skill. The passenger, on his part, was obliged to use reasonable care.

The negligence found by the jury consisted in

> the conductor not remaining at the door of the car until the train stopped

and they also negatived all negligence on the part of the deceased.

The theory of the respondent at the argument here was that the conductor so conducted himself as to lead to the deceased getting off the train at the time he did; and the reply on behalf of the appellant was that, accepting the story told by the respondent, the accident was attributable directly to the negligence of the deceased and that the conductor was fairly entitled to assume that *primâ facie* the deceased would conduct himself with ordinary prudence and discretion.

It is somewhat difficult to connect the negligence found by the jury with either of the two causes of the accident alleged in the statement of claim. But the verdict must be reasonably construed; and I think that, read in the light of the pleadings, the evidence and the judge's charge, it means that the jury were of the opinion that it was the duty of the conductor, having notified the deceased that he was approaching his destination, to be careful to prevent him from going on to the platform, which was a dangerous place when the trap covering the steps which the deceased would use to alight from the car had been removed.

If I could agree with Ferguson J.A. who said:

> the deceased may have been misled by the conductor's action into the belief that the train was at its destination,

I would have less difficulty in accepting the verdict, because I assume the learned judge means that the conductor gave deceased the impression that the train

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had stopped and he could alight with safety. But I can find nothing in the evidence to justify that inference. To call out the name of a station, is merely an intimation that the train is approaching that station, and the speed at which the train was moving, which must have been apparent to any one exercising the slightest care, was in itself sufficient to destroy any impression that the train had reached the station and come to a standstill, and then only would the deceased be justified in attempting to leave the train. Further, the conductor was not under any obligation to assume that the passenger would be so void of common sense and prudence as to endanger his own safety as the deceased certainly did. According to the story of the respondent, the conductor was standing on the platform when the deceased passed by him to go down the steps with two bundles, one in each hand. The car was then going at a speed of twenty miles an hour and swaying from side to side under the pressure of the brakes, and it is said that the conductor in allowing the deceased to pass on down the steps did not exercise that vigilance and care for the safe conveyance of the company's passenger which, in the circumstances, the statute imposed upon him and that he should have stopped him at the door. But the conductor, as I have already said, might fairly assume that the passenger would act with ordinary prudence and discretion, and it was almost impossible for any one to imagine that a sane man with any regard for his own safety would have gone down the car steps having both hands fully occupied with the bundles he was carrying.

Of course the evidence, as in all similar cases, is conflicting. But the jury, who were absolute masters of their own determination in that respect, chose to

believe the story of the widow and her children, and I have accepted their conclusion although I would have felt disposed to believe the version of the facts given by the conductor as more consistent with all the other admitted circumstances. The respondent said that when the deceased came on board he asked the conductor to let him know when they reached Dunbarton, his station—which was only a flag station; but there is no evidence, as was assumed below, that he placed himself in the special care of the conductor. The latter gave the engine-driver the proper signal to stop at that station and subsequently called out: "Dunbarton is the next stop." Later on he came up to the deceased and touching him on the shoulder said: "Dunbarton is the next stop."

This cannot, in my opinion, be construed as an invitation to alight; at most it was an intimation to the passenger that he should prepare to get off. In a very few moments after, the deceased followed by his family moved towards the door of the car and there, according to the story of the respondent, stood the conductor on the platform. He had previously removed the trap in the platform floor which covered the steps leading off the car. It is a fair inference that the deceased—as I have already said—accepted this as some evidence that he might alight in safety. But was he justified in either attempting to alight or placing himself in a position of danger when the car was moving at a speed of twenty miles an hour and swaying backward and forward, as I have already described? To hold that it was the duty of the conductor to foresee that the passenger would be so imprudent and reckless as to attempt to alight from the car in such conditions is to impose a burden on railway officials greater than the law requires, and that is

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what the verdict means when the jurors say that the conductor should have prevented the deceased from coming out of the car, *i.e.*, should have treated him like an irrational being.

The appeal should be allowed with costs if the company deems it advisable, in the circumstances of this case, to collect them.

DAVIES J. (dissenting).—On the night of November 13, 1915, the deceased, William Mayne, respondent's husband, a passenger travelling on a train of the appellants with his wife and seven children, one of which was a baby in arms, came to his death by stepping off the car while it was still in motion and before it had reached the station where he was to get off.

The contention on the part of the plaintiff respondent was that the conductor having been informed by the deceased of the station Dunbarton, at which he desired to get off, had opened up the vestibule, had informed the deceased that, "this is Dunbarton where you get off" and had generally by his conduct actively created in the mind of the deceased the belief that the train had reached Dunbarton and that he and his family could safely alight, when as a fact the train was still moving at a rapid speed and had not then reached Dunbarton station.

The appellant contended that upon the evidence and upon the jury's findings there was not in law or in fact an invitation for the deceased to alight when he did, and that all that took place only amounted to an intimation by the conductor to the deceased that the next station was his station and an invitation to alight when the train stopped. They further contended that the deceased so regarded it as was clear from the

evidence, because when the conductor told the deceased "this is Dunbarton, this is where you get off" the children immediately made a move in anticipation of getting off, and the deceased told them to resume their seats, which they did until they were told to come along.

Though I do not attach very much importance to this latter contention, I think it only fair that the whole evidence on the point should be considered, in which case it would seem that a few moments after telling the children "not to move till the train stopped" he said to them "all right now come on" or "now come on" shewing that he believed that the train had then stopped.

The conductor did not immediately leave these passengers the moment he told the deceased "this is Dunbarton where you get off," but remained standing for some moments in the passageway three or four seats down and "looking at some people or something on the south side of the car." It was when the conductor, after so waiting in the aisle, started for the door that the deceased gave the children the order "all right, now come on," and the inference I draw from the evidence on this point is that the deceased inferred the conductor was waiting for the stoppage of the train, and when he started for the door the deceased assumed he did so because, as he thought, the train had either stopped or was about stopping. I do not think, however, this incident is a controlling one upon the real issue between the parties, but the jury were entitled to believe the plaintiff's evidence on the point of the conductor having waited in the aisle or gangway for some time after giving notice to the deceased as before mentioned, in preference to that of the conductor, and it explains the other evidence

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as to the deceased and his family closely following the conductor along the aisle or passageway out into the vestibule.

There was no specific finding by the jury in words that there was an "invitation to alight" nor did the respondent contend that there was. The invitation to alight was a reasonable inference to be drawn from the conductor's conduct and actions and is rather a question of law to be drawn from the question of fact found by the jury.

The jury found that the negligence of the conductor consisted

in not remaining at the door of the car until the train stopped.

They further found that the deceased was not guilty of any contributory negligence.

The question then arises as to what is the fair and necessary inference to be drawn from these findings under the proved facts.

The learned Chief Justice, who tried the case, upon the findings of the jury directed judgment to be entered for the plaintiff respondent for the damages found. The appeal court was equally divided in opinion, two of the learned judges being to dismiss the action on the ground, as I understand the judgment of Mr. Justice Riddell with whose reasons Mr. Justice Rose concurred, that there was no invitation to alight on the conductor's part and no negligence found for which the company could be held liable, and two, Lennox and Ferguson JJ., for sustaining the judgment of the trial judge on the jury's findings.

Owing to this judicial difference of opinion, I have found it necessary to give the evidence most careful attention, and have reached the conclusion that the finding of the jury as to the negligence of the conductor under the peculiar facts and circumstances detailed

in the evidence was justified and that on such finding the appellants are liable.

These findings of negligence on the conductor's part, and of no contributory negligence on the part of the deceased, must be read and construed in light of the facts.

I am inclined to think that one material fact proved, if the evidence of the widow and daughter is accepted, was overlooked by the learned judges who favoured the dismissal of the action, and that fact was that the conductor did not open the outer door of the vestibule until after he had notified the deceased the second time, touching him on the shoulder and saying, "this is Dunbarton. This is where you get off."

The importance I attach to this fact will be seen later on. I think the conclusion must be drawn from the jury's findings that they accepted the evidence of Mrs. Mayne and of her daughter in preference to that of the conductor on all points where such evidence differs or cannot be reconciled.

After reading the evidence carefully over and accepting that of Mrs. Mayne and her children when at variance with the conductor's, which the jury must have done to make the findings they did, I draw the following conclusions of fact: That after the conductor had first gone through the car and called out: "Dunbarton is the next stop," he went through the car door, lifted the trap door in the vestibule, but left the outer vestibule door closed. That he then returned into the car, touched the deceased on the shoulder, saying to him, "Dunbarton station. This is where you get off" and remained standing for a few moments in the passageway of the car near to or alongside of deceased, looking at something or some passenger on the other side of the car. That he then started for

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the door, and that when he so started the deceased believing the car had stopped said to the children, whom he had previously warned not to move till the car stopped, "all right now, come on."

He himself at once got up and followed the conductor carrying the baby in his arms. The wife and children started to follow him, and she, finding the parcels she had to carry too heavy, called him to give her the baby and take the parcels instead, which he at once did. With the parcels in hand described as "a big parcel tied with a piece of rope or string round it" and a valise, he immediately followed the conductor who was some few feet only ahead and who passed out of the car door into the vestibule and *then opened the outer vestibule door.* The widow in her evidence stated explicitly that she followed close after her husband and when she had just reached the car door heard the conductor then open the outside vestibule door and saw him, after doing so, step back into the vestibule right to the edge of the platform and that he did not step over on to the platform of the next car. He stood there and the deceased, as she stated, then

> went out of the car door and I followed him and he went down and stepped right off.

She adds:

> We thought we were to the station and the train had stopped.

The widow herself was in the act of descending the steps following her husband when the conductor stopped her.

Now if the jury believed, as they had a perfect right to do, these statements of fact, confirmed as they substantially were by the elder daughter Gertrude and in large measure by the boy Archie, they would amount to an invitation to the deceased to alight.

The first calling out by him "Dunbarton is the next station" was certainly not such an invitation, and was not contended to be such but the subsequent personal intimation to the deceased when the conductor touched him on the shoulder and said, "this is Dunbarton station, this is where you get off" followed by his conduct and actions in going down the aisle or gangway of the car just a few feet ahead of the procession of the deceased, his wife, and the children, who were following him, his entry into the vestibule and opening of the outer vestibule and then standing lantern in hand on the edge of the vestibule platform leaving room for the deceased to pass out was, it seems to me, a distinct invitation for the deceased man and his family to alight. They were persons unaccustomed to railroad travelling, as the deceased had informed the conductor, and the latter's action and conduct would reasonably be understood by these persons to be an invitation to alight.

In the light then of the facts as proved by the plaintiff and her witnesses, the jury's finding that the conductor's negligence was in not remaining by the door of the car until the train stopped is easily understood. It means: You should not have spoken and acted as you did, because you led these passengers astray, but you should have stood at the door of the car until the train stopped and so prevented their alighting.

If the conductor believed, as he says he did, that the car had not stopped, but was going at a rapid rate of speed, then his conduct and actions as sworn to are inexplicable on any other theory than that of carelessness and negligence.

The facts and circumstances, as I understand and appreciate them from the evidence, and which the findings of the jury shew they believed, were such as

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distinctly called for such an act of prudence on the conductor's part as the jury suggest, namely, his standing by the door of the car till the train stopped, or some equivalent action which would have prevented the calamity which occurred.

The controlling question is whether there was evidence from which the jury might fairly find that the conductor was guilty of negligence in not having prevented the deceased from attempting to alight when he did. The action which the jury say he should have taken so as to prevent him would certainly have been effective. There was no evidence that any other passengers desired either to alight at this flag station or to get on the train there, nor was there any evidence that the conductor's duties required his presence elsewhere. If they did and he could not remain in the doorway, then he was bound after opening the outer vestibule door and knowing that the train had not stopped, to give the family who were about to alight from the train, and as to whose ignorance of railway travelling, in my opinion, he had full knowledge, clear warning not to alight when they attempted to do so. He neither interposed his physical body before the deceased so as to prevent the deceased alighting, nor gave him any warning not to alight, nor was his presence required elsewhere. He simply stood by on the vestibule platform and allowed the man carrying a valise and a large parcel, to go down the steps with the outer door open, without any warning whatever. His suggestion, on cross-examination, as an explanation of his silence and inaction, that he thought the man might have been going into the first-class coach, was evidently not accepted seriously by the jury, and I must say that, looking at all the facts and circumstances, it was a most unreasonable if

not absurd one. I think this case must be decided on its special facts, and not upon the law which, it is contended, applies to the duties which, under ordinary circumstances and with respect to ordinary passengers, conductors owe to them with regard to alighting from trains.

My judgment is that this appeal should be dismissed with costs.

IDINGTON J. (dissenting).—When the somewhat confusing facts presented by the evidence herein, as dealt with in the conflicting opinion of the learned judges in the Appellate Division have been sifted and tested by the process of fair argument before us, there is found in them, I think, a case for the jury to try and in the result found such a judgment as appealed against.

They found the deceased came to his death through the negligence of the appellant.

They found further that the deceased had not been guilty of negligence which caused the accident or which so contributed to it that but for his negligence the accident would not have happened.

It seems quite clear from this latter finding that the jury must have accepted the version of the relevant facts as given by respondent and two of her children and rejected whatever the conductor said in evidence in conflict therewith.

On the evidence of the latter it would be difficult to acquit deceased of negligence.

On the evidence of and on behalf of the respondent it was easy to come to the honest conclusion that deceased had been misled by the words and acts of the conductor into the belief that the train was stopping, and the way clear to get out.

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Dunbarton was a mere flag station. The present tense used by the conductor speaking in relation to it must have meant, if anything, the station. It was not the case of a conductor coming into a large city or town, when the same expression used to a passenger could not reasonably be interpreted as an invitation to alight or do so in a few seconds. But spoken of, or relative to, a mere flag station or platform, they could only mean that the spot was at hand and the train stopping, and hence the only thing to do was to get ready and get off.

The every-day traveller might use his own sense of motion and use his own judgment of the fact, but the untravelled and quite inexperienced man would trust the words and acts of the conductor.

There can be little doubt that deceased as result thereof trusted himself thereto and stepped off relying thereon.

The respondent swears she thought the train had stopped and the jury quite evidently implicitly believed her. She was mistaken, but evidently that was the impression she had got from what the conductor had said and done till she realized that her husband was off.

I cannot understand why the conductor seeing such a man as deceased stepping out laden with packages and his hands thus tied, on a train going at the rate of twenty to twenty-five miles an hour, remained dumb so long.

Moreover there is no evidence of any one else than deceased and his wife and seven children wanting to get off at that station, or any one likely to get on the train there.

The night was very dark and feelings of common

humanity alone demanded a little attention on his part to such a party.

His sole duty to them and his employers demanded it. And if he had given the slightest heed thereto the accident never would have happened.

He should, if heeding that duty, have seen by a glance at the movement of the whole family that they must have misunderstood him or were pursuing a most dangerous course.

He says he crossed over to open the trap and vestibule door in the next car. There is not a vestige of evidence of any need therefor.

I much doubt him in that regard till he saw deceased had stepped off and the jury may have disbelieved him in that as they evidently did in regard to other things.

All these and other considerations of what the evidence discloses which it is needless to dwell upon in detail, must be borne in mind when we come to consider the only difficulty in the case.

What I refer to is the peculiar form of the answer defining the negligence the jury find the appellant answerable for.

I should be sorry to lay down as a rule of law that the conductor must always stand at the door of the car until the train is stopped.

I should be equally sorry to say that the finding was and is incomprehensible.

I think it stands for nothing more or less than that under all the attendant circumstances, including especially the misleading nature of his invitation to be ready instantly to alight and inducing a procession in obedience thereto, it was his duty to have guarded the door of the car from being used as it was used.

Many other forms of expression might have been

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used indicating, as this doubtless was intended to indicate, the neglect of that duty I have signified above as devolving upon him, under said circumtances.

I think the language used is quite capable of being understood as expressing that neglect of duty imposed on him to have due care of those in his charge, and that his neglect in that regard was in law the neglect of the appellant.

I am of course aware that the train was twelve minutes behind time, and had little time to waste on a flag station, and of the pressing anxiety to make haste, but that rendered it all the more incumbent on him in charge to see that no chance of harm should come to the helpless and inexperienced ones who were being hastened, possibly beyond their usual pace.

I agree with the opinion of the learned and long experienced trial judge and the learned judges of the Appellate Division supporting his judgment.

I think the appeal should be dismissed with costs.

DUFF J.—The appeal should be allowed and the action dismissed with costs.

ANGLIN J.—The plaintiff's husband, Wm. J. Mayne, was fatally injured, as a result of stepping off a car of a vestibuled railway train at night, while it was moving at a speed of from twenty to twenty-five miles an hour, a quarter of a mile before it reached his stopping place. A jury negatived contributory negligence and held the railway company liable on the ground that the conductor should have prevented what had occurred by remaining at the door of the car until the train stopped.

Upon an even division of opinion the Appellate

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Division upheld the judgment entered by the learned trial judge for the plaintiff(1).

The facts are deposed to by the plaintiff and her two children and the railway conductor. Without imputing deliberate perjury to the conductor, the inaccuracy of several of his answers, and the flippancy of one of them may well have led the jury to reject his version of what occurred where it differed materially from that of the plaintiff, and I think we must, for the purposes of this appeal, assume that the story of the plaintiff and her children is correct. It should, however, be noted that, although the unfortunate Mayne was not accustomed to travelling, there is no evidence that the conductor had been apprised of that fact. The contrary view taken by one of the learned judges of the Appellate Division(2), probably to some extent influenced his judgment in favour of the plaintiff.

Mr. Justice Ferguson, who reached the same conclusion, very succinctly, and, upon the assumption that the plaintiff's story is correct, I think accurately, states the material facts as follows:—

> The deceased, his wife and seven children, entered the train at Whitby destined for a flag station called Dunbarton. The deceased requested the conductor to let him know when they were at that station; accordingly, as the train approached Dunbarton the conductor came through the car and called out: "Dunbarton is the next stop." Shortly afterwards the conductor returned and touching the deceased on the shoulder said, "this is Dunbarton, this is where you get off." The deceased was entitled to conclude from these words that he had arrived, but he appears to have construed them only as a notice to get ready at once to get off, because, on the children rising to go, the father told them to "sit still till the train is stopped" but almost immediately afterwards he said, "now, come on," and all started for the door. As the wife and husband reached the car door the conductor stepped out and in the hearing of the husband and wife and perhaps in the sight of the husband, who was ahead, opened the trap door in the vestibule and the outside door, and there in sight of both stepped back, whereupon the deceased walked down the steps.

(1) 39 Ont. L.R. 1.

(2) 39 Ont. L.R. 12.

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Two difficulties in the plaintiff's way are that it is almost incredible that a man in possession of his faculties, however inexperienced in travelling, could, when on the platform of a car running twenty to twenty five miles an hour, have been under the impression that it was stationary; and that the finding of the jury, if taken literally, would impose upon the conductor a duty which certainly did not exist.

A suggestion that Mayne did not intentionally step off the car, but that, laden with a valise in one hand and a bulky bundle in the other, he lost his balance and fell off, is excluded by the evidence of the plaintiff and of the conductor, who both aver that they saw him step off.

The improbability that a man in possession of his faculties when on the platform of a car in a train running twenty or twenty-five miles an hour, with the accompanying noise and motion, would not have realized that it had not stopped is perhaps little, if any, greater than that of such a man, if aware that the train was moving, stepping off it on a dark night into space. Yet one or other of these improbable theories must be accepted. The jury, in negativing contributory negligence, evidently preferred the former. The plaintiff and her two children who followed the deceased—the wife according to her story having actually begun to descend the steps after him—say that they were under the belief that the train had stopped. It is possible that the father's preparations for alighting and his concern for his wife and children and the parcels under his charge so absorbed his attention that he actually failed to realize that the train was still in rapid motion. It may be, as put by Mr. Justice Ferguson, that by the conductor's action in raising the vestibule trap, opening the outer door, placing the

hand-bar in position, and then stepping back to the edge of the platform, Mayne was misled, notwithstanding the evidence of his senses, into a belief that the train was at its destination and stopped. Difficult as it is to conceive of this having been his state of mind, having regard to the testimony of the wife and children as to their own belief and to the unlikelihood of his having knowingly stepped off a rapidly moving train, it seems to me impossible to say that the jury was clearly wrong in assuming that in fact it was. If so, it was for them to determine whether Mayne's failure to appreciate the actual conditions amounted to negligence. They have found that it did not and I am not prepared to set that finding aside.

But the finding of negligence on the part of the conductor involves greater difficulties. In the first place, it is perfectly clear upon all the evidence that it was his duty before reaching the station to prepare for his passengers alighting by raising the trap, opening the vestibule door and putting the hand-bar in place. To do this work after the train had stopped is quite impracticable. It should, however, be done as late as possible before the actual stop in order that the safeguard of the closed trap and vestibule door may not be taken away earlier than is necessary. The conductor, therefore, could not, consistently with his duty, after notifying Mayne that the station then being approached was his stopping place, have "remained at the car door until the train stopped." If that be the necessary meaning of the jury's finding it cannot be supported.

The findings of the jury must, no doubt, be read in the light of the plaintiff's allegations, the evidence and the judge's charge, and should be given any interpretation of which they are reasonably susceptible

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and will enable the court to support them. The relevant allegation of negligence is that

> the conductor should have prevented the deceased going upon the platform while the train was in motion

and

> should, under the circumstances, have warned him

of his danger. The learned trial judge, paraphrasing this allegation, said:—

> The plaintiff claims that there was on the part of the conductor a failure * * * to warn the man when it must have been manifest to the conductor that he was in a position of danger, that the conductor should have realized and recognized that danger, and done all he could to avert it by shouting, by springing and stopping the man.

I think the jury's finding may—and, if necessary to sustain it, probably should—be taken to mean that after raising the trap and opening the vestibule door the conductor should have placed himself in the car door to prevent passengers coming out on the platform before the train had stopped.

It may be that, if strictly discharging his duty, a conductor should, if it be practicable to do so, prevent passengers coming on the platform of a car until the train has actually stopped. Had Mayne been thrown from the platform, or had he fallen from it as a result of his losing his balance while standing there, allowing him to come upon the platform might possibly be said to have been negligence *dans locum injuriæ*. But that is not at all this case. Allowing Mayne to come upon the platform was not the proximate cause of his injury; it was at most a remote cause or cause *sine qua non*. But for his proceeding to alight his coming on the platform would have been harmless, and, having regard to the custom of travellers on this continent (disclosed by the evidence and a matter of common knowledge, as was pointed out by the learned trial judge) when a train is approaching a station, to move

to the car door and to pass out to the vestibule platform with their hand luggage before the train has stopped, even had the unfortunate passenger fallen or been thrown from the platform, I am not at present prepared to say that failure to prevent his coming out upon it would have amounted to actionable negligence. But this remote cause need not now be further considered.

If the jury intended to find that the conductor's fault consisted in having failed to prevent Mayne proceeding to alight from the vestibule platform, they certainly have not said so, and I think their finding is not reasonably open to that interpretation. But, if it is, it involves the idea that the conductor realized or should have realized that it was Mayne's intention to attempt to alight, notwithstanding that the train was in rapid motion, in time to have interfered to prevent his doing so. The conductor had properly notified him, as requested, that he was nearing his station. That is all his notification amounted to and the evidence makes it clear that it was so understood. He, no doubt, had reason to expect that Mayne and his family would thereupon prepare to alight and, having regard to the custom to which I have alluded, that they would probably move to the door of the car and come out upon the vestibule platform with their luggage before the train had stopped. The opening of the trap and vestibule door were not meant as an intimation that the train had stopped, and that it was safe to alight immediately, and, while Mayne may have so regarded them, it by no means follows that the conductor knew or should have known that such an erroneous and extremely improbable impression would be thus created. I am unable to follow counsel for the plaintiff in his contention that the

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mere fact that Mayne came out on the platform and turned to the car steps should have made it apparent to the conductor that it was his intention to proceed forthwith to alight. The moment that intention became apparent to him it would, I think, have been the conductor's duty, having regard to the statutory obligation of the company to "carry and deliver all traffic with due care and diligence," to have endeavoured to prevent its being carried out. It is to me unthinkable, that if he had even a suspicion of the intention of the deceased to alight, this conductor of thirty years' experience would have stood idly by and allowed him to step off to almost certain death. It is, I think, clear that the conductor failed to realize the deceased's intention until too late to prevent him stepping off, though he succeeded in stopping the wife who was following him. The question therefore is, should the conductor have realized sooner than he did and in time, by a shout of warning or by physical intervention, to have prevented its execution, that it was Mayne's intention, under the impression that the train had stopped, to attempt to alight from it while actually moving at a rate of twenty or twenty-five miles an hour—or rather, is there any evidence upon which a reasonable jury could so find? After giving to this, for me, vital question a great deal of anxious consideration, I find myself unable to say that there is. Why should the conductor have anticipated anything so utterly improbable?

On the ground, therefore, that there is no evidence to warrant a finding of negligence on the part of the conductor, I would allow this appeal.

Appeal allowed with costs.

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

Solicitors for the respondent: *Robinette, Godfrey & Phelan.*

THE CITY OF CALGARY (PLAINTIFF) ..... } APPELLANT;

AND

THE CANADIAN WESTERN NATURAL GAS COMPANY AND ANOTHER (DEFENDANTS) ..... } RESPONDENTS.

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*May 14-15.
*Nov. 28.

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

Contract—Municipal law—Interpretation—Extension of city limits—Added area—Exclusive rights.

An agreement was made in 1905 between the city appellant and one D. the assignor of the company respondent, whereby D. was given the privilege of supplying natural gas "throughout the said city." In another agreement, made in 1911, amending the above, it was provided that the respondent should be permitted to charge certain prices for gas supplied "to the inhabitants of the city."

Held, Davies and Idington JJ. dissenting, that the privilege granted to D. was not limited to the area of the city appellant as it existed at the date of the agreement, but extended to the various extensions of the city's boundaries which were subsequently made.

City of Toronto v. *Toronto Railway Company* (1907), A.C. 315; 37 Can. S.C.R. 430, distinguished.

The agreement contained a provision that "the city shall not grant to any person, firm or corporation" a privilege similar to that granted to D. and referred also to the "exclusive rights and privileges hereby granted."

Held, Fitzpatrick C.J. dissenting, that the grant to D. was not exclusive as against the city appellant itself.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), reversing in part the judgment of Ives J. at the trial(2).

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

(1) 10 Alta. L.R. 180.

(2) 25 D.L.R. 807; 9 W.W.R. 252; 32 W.L.R. 558.

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CITY OF CALGARY v. CANADIAN WESTERN NATURAL GAS CO.

The respondent is the assignee of a certain agreement dated August 14, 1905, between the appellant and one Dingman, entered into by authority of a city by-law duly submitted to a vote of the ratepayers, and passed by the council. At that date, the area comprised within the municipal boundaries of the city appellant was approximately 1,800 acres. These boundaries were extended from time to time by Acts of the Legislature, and, at the date of the institution of the present action, the city area had been increased to approximately 25,000 acres. One clause of the agreement contained the following words:

> that the exclusive right and privileges hereby granted to the said company shall continue subject to the terms and conditions herein expressed * * * and the said city shall not * * * grant to any person, firm or corporation the right to construct or lay mains or pipes or connections on, in or through the streets of the said city for the supply of natural gas * * *.

The contention of the company respondent was that the franchise, rights and privileges conferred under the agreement extended to the new territory added since the date of the agreement, and that the said franchise, rights and principles were exclusive as against the city.

The trial judge found against the company repondent on both grounds, and maintained the action of the city appellant. But on appeal to the Appellate Division of the Supreme Court of Alberta, the appeal was allowed in part, the court reversing the judgment of the trial court on the first ground, and maintaining it on the second ground. Both parties appealed to the Supreme Court of Canada.

Lafleur K.C. and *C. J. Ford* for the appellant.

R. B. Bennett K.C. and *Sinclair* for the respondent, The Canadian Western Natural Gas Company.

Anglin K.C. for the respondent, The British Empire Trust Company.

THE CHIEF JUSTICE.—As to the first question on which a declaration is sought, viz.: whether or not the respondents' franchise, rights and privileges are limited to and do not extend beyond the area of the city as shown on the plans filed in the Land Titles Office on the 14th August, 1905, the learned judge, who tried the action, gave judgment for the appellant, because he thought the question precluded by the authority of the decision of the Privy Council in *City of Toronto* v. *Toronto Railway Co.*(1). That decision was upon the particular contract which the court was asked to construe, and I do not think it attempted to lay down any principle which could govern in the present case.

The agreement under consideration in that case, provided for a right to the city to require the company to lay street railway tracks on streets to be designated by the city. It was a question not of a right granted to the company, but an obligation imposed upon it. That this feature of the nature of the subject matter of the contract in dispute was what mainly motived the judgment of the Privy Council is clear. Beyond saying that their Lordships agreed with the reasons for judgment of the majority of the judges of the Supreme Court of Canada it was only added that

> the injustice involved in the contrary view, which would enable the corporation to compel the railway company to extend their lines at an indefinite expense, and for indefinite distances where the maximum fare chargeable for any distance is five cents seems to their Lordships insuperable.

I have gone through, and very carefully considered all the cases between the corporation and the company

(1) [1907] A.C. 315.

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which are referred to in the judgment of Chief Justice Harvey, but I am unable to appreciate the difficulty he finds in reconciling them. In my opinion nothing is gained by any attempted comparison between them.

I do not underrate the weight of Mr. Justice Stuart's argument when he says:

> Even without precedent or authority I should have come to the conclusion that Dingman did not by virtue of his original contract enter into any obligation to supply gas outside of the original limits of the city and that therefore as a necessary corollary they acquired no right to do so by virtue of the mere original contract itself.

I cannot, however, agree that this is a necessary corollary. It may be a question in view of the provision of clause 18 how far the obligation extends but nothing is to be gained by a consideration of that here.

I think the grant in this case is of a right within the limits of the city as now determined.

As regards the second question, whether or not the franchise, rights and privileges granted to the defendant are exclusive as against the plaintiff, I was at first disposed to agree with the view taken by the majority of the judges in the Appellate Division, that they were not exclusive. But whilst I fully appreciate the force of the contention that the city has in terms only debarred itself from granting similar rights to any other person, firm or corporation than the defendant, I think we must again look to the whole of the contract for the purpose of ascertaining the extent of the rights thereby granted. It seems to me that, considering the circumstances in which the contract was entered into, and the whole tenor of the clauses referring to the exclusive rights, intended to be granted to the company, it is impossible to suppose that either party contemplated the reservation to the city of a right of entering into competition with the company whilst undertaking to grant to it an exclusive privilege

as against all others. The competition by the city might well be more powerful and injurious to the rights of the company than that of any private commercial body. On this point, therefore, I agree with the conclusion of Mr. Justice Beck in the Appellate Division.

The appeal should be dismissed and the cross-appeal should be allowed to the extent that it asks that the judgment appealed from should be varied in so far as it affirms the judgment of the Honourable Mr. Justice Ives, that the provisions of the statute of the Province of Alberta, being chapter 64 of 1911-12, and the by-laws and agreements therein referred to, do not exclude the plaintiff from itself exercising within the area included in the city of Calgary on the said 14th day of August, 1905, rights, powers and privileges similar to those by the provisions of the said statute, by-laws and agreements vested in the said defendants, by reversing the said judgment, and the judgment of Mr. Justice Ives to the extent aforesaid.

DAVIES J. (dissenting).—The defendant respondent company is the assignee of an agreement made between the City of Calgary and one Dingman, under the authority of a by-law duly passed and approved by the ratepayers, dated 14th day of August, 1905. This action was brought by the city to obtain declarations: First, that the rights and privileges granted by the city under this Dingman agreement did not extend to the several extensions of the city boundaries which were made after the agreement was entered into, but was confined to the area of the city within the municipal boundaries at the date the agreement was entered into, and, secondly, that such rights and

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privileges were not exclusive as against the city itself but only as against grantees of the city.

The trial judge decided both points in favour of the city.

From his judgment an appeal was taken to the Supreme Court of Alberta, which reversed the decision of the trial judge on the first question, and held that the franchise (so called), granted to Dingman by the agreement of 1905, was not limited to the area of the city of Calgary as it existed at the date of the agreement, but extended to and covered the various extensions of the city's boundaries which were subsequently made. The Appeal Court confirmed the trial judge's finding as to the exclusive character of the franchise, and as to this there is a cross-appeal.

Two of the learned judges of the Appellate Division, Stuart and Scott JJ., based their judgment that the Dingman franchise must be held to extend to the extensions of the city's area solely upon the construction placed by them upon an agreement made in January, 1911, between the city and the Calgary Natural Gas Co., Dingman's assignee, permitting the gas company to charge a higher price for the gas they supplied than that fixed by the Dingman agreement.

These learned judges were of the opinion that certain words and phrases of that agreement refer to the city in a "territorial sense" and must be held to be so used with reference to the then existing conditions, at a time when the various extensions of the city's area had been made. Mr. Justice Stuart says:

> Upon this narrow ground, as I have said with some hesitation on account of the extreme narrowness of it, I think the first question should be answered in favour of the defendant.

I mention this because I am quite in accord with the general reasoning of Mr. Justice Stuart as to the

construction of the Dingman agreement when entered into in 1905, and the effect of the subsequent conduct and action of the officials of the city upon that agreement.

I am of opinion that the Dingman agreement of 1905, when entered into by the parties, had reference solely to the territorial area of the city as it then existed and that it was not then contemplated by either party to it that it should extend to and cover any extensions of that territorial area which might subsequently be made. I do not think the language of the agreement was ambiguous. The City of Calgary at the time that agreement was made had clearly defined territorial limits which must be held to have been known to all parties to the agreement.

I am also of the opinion that the subsequent action and conduct of the city officials cannot be held to have enlarged or extended the scope of such an agreement granting a franchise over the streets of the city, or bind the corporation on any ground of estoppel or acquiescence to such enlargement or extension.

I was a party to the judgment of this court in the appeal of *The Toronto Railway Co.* v. *The City of Toronto*(1), in which appeal we decided that the right to determine, decide upon and direct the establishment of new lines of tracks and tramway service in the manner therein prescribed applied only within the territorial limit of the city as constituted at the date of the contract.

In that case there had been an agreement of sale and purchase between the Toronto City Corporation and the Toronto Railway Company, confirmed by an Act of the Ontario legislature, under which the railway company acquired not merely the material of

(1) 37 Can. S.C.R. 430.

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the railway undertaking in suit, but also, as was clearly provided, the exclusive right "to operate surface street railways in the city of Toronto" in the fullest possible way within the period of the agreement. On appeal to the Judicial Committee of the Privy Council, that learned Board held that on its true construction territorial additions to the city made during the term of the agreement were not within its scope.

In delivering the judgment of their Lordships, Lord Collins says (1):

> The reasons given in the judgments of Sedgewick and Idington JJ., with whom Davies J. concurred, seem to their Lordships so full and satisfactory as to make it unnecessary to say more than that they adopt and agree with them. The injustice involved in the contrary view which would enable the corporation to compel the railway company to extend their lines at an indefinite expense, and for indefinite distances, where the maximum fare chargeable for any distance is 5 cents, seems to their Lordships insuperable. Their Lordships are of opinion, therefore, that on this point the corporation fails.

I confess myself quite unable to discover any difference in principle between that case and the present appeal.

It does seem to me that if parties seek for and obtain from a city corporation an exclusive franchise, right and privilege for many years over the streets of the city, and the granting of which franchise depends upon a majority vote of the municipal voters being first obtained, such franchise will not be construed as extending to territorial additions to the city made during the term of the franchise, even assuming the power of the city to make any such agreement with such possible extensions unless there are either express words shewing an intention that the franchise granted shall be so extended or other language used from which such an intention must fairly and reasonably be drawn.

(1) [1907] A.C., at p. 320.

Their Lordships in the quotation I have above made from their reasons for judgment in the *Toronto Corporation* v. *Toronto Railway* (1), approving of the judgment of this court for the reasons given by it, point out that the holding of a contrary view to the one they gave effect to in that case involved an injustice to the railway company.

And so in the case before us, the construction of the Dingman franchise agreement contended for by the respondents might have resulted in grievous injustice to Dingman and his assignee. We must put ourselves in the place of the parties at the time the agreement was entered into, and construe the agreement in the light of the facts and circumstances then known or ascertained by both parties. If the agreement is construed to cover extensions of the city then the benefits to and obligations of both parties must be reciprocally so extended.

It must be remembered that when the Dingman agreement was entered into the discovery of natural gas in enormous quantities such as was subsequently discovered had not been made.

The whole franchise to be granted is predicated in the 4th paragraph of the agreement upon the finding by Dingman within a fixed period "of a sufficient and paying supply of natural gas which can be utilized in the said city."

The "said city" there referred to is no doubt the Calgary of that day covering an area of 1800 acres with a population of about 12,500, as compared with its subsequent extension and enlargement to approximately 25,000 acres with a population of some 80,000 or 90,000.

What if Dingman, within the term fixed, had

(1) [1907] A.C. 315.

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found a sufficient supply of gas for the city, as it was in area and population when he entered into his agreement, and had gone on under his franchise rights incurring large expenditures to carry out his contract? Could he with each rapid extension of the area and population of the city have been forced to supply gas to these extended areas, or, the quantity discovered not being sufficient, forfeit his charter or pay damages?

It seems hardly conceivable that in the light of the knowledge then possessed, he so intended to bind himself or the city to bind itself with respect to further possible extensions of the area and population of the city. The obligations of the parties under the Dingman contract must be construed as mutual and reciprocal, and cannot be extended as far as one is concerned and confined as regards the other party.

The words in question, "the City of Calgary," were not ambiguous at the time the Dingman agreement was entered into. On the contrary, they at that time had a clear, definite, well understood meaning and only one. Subsequently changes in the territorial area by the addition of new territory may have created conditions which, if they were to control in the construction of the agreement, might make the words ambiguous. But, in my judgment, these words must be construed and interpreted as they would have been the day after the agreement was entered into had any dispute as to their meaning then arisen. *Wallis* v. *Pratt*(1) *North Eastern Railway Co.* v. *Hastings*(2).

If I am right in my construction of the agreement when made, then the question arises whether any subsequent action of the city or its officials operated to create such extension.

The agreement of January, 1911, on the language

(1) [1911] A.C. 394. (2) [1900] A.C. 260.

of which two of the judges of the Appellate Division held that the franchise agreement had been extended to the enlarged territorial area of the city, had for its sole object and purpose as recited in its preamble the change in the limitation on the price to be charged for gas supplied from not exceeding 25 cents per 1,000 feet for domestic purposes to 35 cents and from not exceeding 15 cents for power purposes to 20 cents. It was made in response to an application on behalf of Dingman for the increased price on the ground of increased costs incurred and to be incurred by him in his search for gas at further points from the city than any contemplated when he entered into the agreement and agreed to the maximum prices he could charge for the gas.

I am quite unable to understand how such an agreement as this, having one only object, namely, a change in the price chargeable for the gas supplied provided for in the original agreement of 1905, could be construed as operating to effect such an important and radical change as the extension of the latter agreement to areas and populations it did not originally extend to or contemplate. I not only think it, as called by the learned judge who depended upon it, a "narrow ground," but, with great respect, an unsafe and untenable one. No reference whatever is made to the area covered by the agreement, or to any extension of that area.

I have read with great care the several by-laws passed by the city after the agreement of 14th August, 1905, was entered into, and which are relied upon together with other official or *quasi* official acts and conduct as operating to create an extension of the territorial area covered by the original scope of that

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agreement, but find myself unable to reach a conclusion that, taken together, they had that effect.

An agreement such as that of August, 1905, granting such a franchise as that agreement did on its streets, requiring as it did to make it binding on the city the safeguards provided of a by-law of the City Council authorizing it and an approving vote by the ratepayers cannot, it seems to me, be altered and extended in such material ways as it is contended this agreement has been, except by equally solemn steps.

The ratepayers of the city approved of the by-law ratifying the original agreement, but there never was any by-law enacted enlarging or extending the territorial area covered or any vote submitted to the ratepayers for that object.

After the agreement of 1905 was completed, there were many by-laws passed having reference to that agreement and altering and extending its minor terms. By-law 646 extended the time within which active drilling operations might commence to 21st May, 1906. By-law 863 extended the time within which the company might demonstrate the character of gas fields contiguous to Calgary until 14th August, 1910, and continued the exclusive term of the agreement for 15 years from August, 1905. By-law 1097 authorized further extended development works for six years from 14th August, 1910, but confirmed and continued the agreement in other respects. By-law 1114, which I have already commented upon, permitted an increased price for gas to be charged. By-law 1212 gave the city's assent to certain assignments of the Dingman franchise and agreement.

None of these by-laws, in my opinion, affect the question of the territorial area over which the agreement extended, or attempted to enlarge or extend that

area, and the question whether the original agreement extended to new territory added from time to time must depend upon the construction given to its language.

I have already expressed my opinion on that point to the effect that the agreement does not so extend, and I am of the opinion that the by-laws passed, the letters written by the mayor and the controllers, and the action taken by the engineer and other officers of the city, cannot alone or collectively operate to create that extension.

I agree with the contention of counsel that all the evidence as to acts and statements of officials of the city could not enlarge the franchise granted, and that it was quite incompetent for city officials or employees by negligence, laches, or personal acts and conduct to change the construction which the franchise agreement originally bore or to extend that franchise over a larger territorial area than it originally covered, by any negligent administration of the affairs of the city. I am unable to find any evidence that any plans as required by sec. 5 of the agreement were ever furnished to or approved of by the City Council with respect to these enlarged areas or that any action was ever taken by the Council with respect to the extension of the operations under the franchise agreement into the new or added territory.

No plans seem to have been officially fyled with the clerk of the council, but certain plans (two) were left, it was stated by counsel, with the city commissioners and engineer. None, however, were approved by the council shewing that the company contemplated operating beyond or outside of the original city limits.

So far as the commissioners were concerned,

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their powers and duties seem to have been solely of an executive and administrative character, as defined by sec. 182 of the city charter. Nothing in the prescribed powers and duties of these commissioners would enable them to extend the limited character of the franchise granted Dingman. As to these powers and duties see sec. 16, c. 36, statutes of Alberta, 1908.

Nothing less than an act done by the corporation itself acting within its powers, under the authority of its municipal council, could extend the franchise of 1905 to the added territory. There is, of course, no pretence that such an act was done or attempted.

On the other branch of the case, I am of the opinion that the exclusive character of the franchise granted to Dingman is exclusive of any similar grant which otherwise might be made by the city to some other company or person, and not exclusive as against the city itself.

If exclusive as against the city it must be under the words in sec. 9

> the city shall not grant to any person, firm or corporation the right to construct or lay mains, etc.

The words granting the franchise to Dingman do not contain the word "exclusive," but the term is used in a subsequent part of the agreement as the

> exclusive rights and privileges hereby granted.

The terms of the grant itself are,

> doth hereby grant to the said company full power, licence and authority, etc.

I think the meaning of the term "exclusive" as used in the agreement may well be determined to be those rights which might be acquired by a grant from the city, and which the city agreed it would not during the period mentioned in sec. 9 "grant to any person,

firm or corporation;" I do not think they included the city itself if it then had or subsequently obtained the power of operating natural gas works.

The rule of construction of exclusive grants is that they should be construed most strongly against the grantee, and I do not find appropriate words used in the agreement which would exclude the city itself. A proper and reasonable construction of the word "exclusive" in the sense used here is the one I adopt and which I think must be held to express the intention of the parties. The grant itself in the 4th section of the agreement gives to the grantee "full power, licence and authority * * * to open up and lay mains." Nothing in that section is said about the grant being an exclusive one.

In paragraph 9, the grant is spoken of as the "exclusive rights and privileges hereby granted to the company," &c, and the same paragraph goes on to provide that the city shall not "grant to any person, firm or corporation the right to construct," &c.

That seems to me, in the absence of any express words excluding the city itself to limit and define the extent of the exclusive grant—that it is exclusive as against any grantee of the city.

I would for these reasons allow the appeal, and dismiss the cross-appeal with costs.

IDINGTON J. (dissenting).—I am of the opinion that the franchise granted by the agreement of 6th September, 1905, between appellant and Dingman, was limited to the area that the then boundaries of the city included, and that the same has not, as regards its territorial limits, been extended by anything which has since transpired.

If a manufacturer possessed of a large factory or

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a merchant of a large shop or warehouse had contracted with some one to supply for a fixed term of years the lighting or heating necessary for the efficient carrying on of his business in such premises, and then added thereto as the necessities of a growing business demanded, what would be thought of either party to such contract insisting that inasmuch as it was self-evident the business would grow, and it must require more light and heat, therefore that was within the contemplation of the parties, and the contract was binding in relation to the added buildings and business or work therein?

Yet, stripped of all verbiage and confusing collateral matters, needed only to be had regard to as part of the history which brought the parties concerned herein into contractual relations with each other, when we bear in mind the express definition of the word "street" in the first paragraph of the said agreement, wherein does the supposed assertion of right to apply the contract in the cases I submit to the extension differ from that set up by the respondents herein?

To carry the illustration out fairly, it may be said we must assume that in either of the given cases, the lighting or heating, without a word of agreement, had in fact been supplied and accepted for a year or two and then rejected.

Would any one contend that then either party was bound to continue it for the remainder of the fixed term of years? I cannot think so. I can see how the original contract might by inference be applied to determine the measure of remuneration or other liability in relation to that extended, but how such contract could be held as a matter to be considered in the construction of the original contract is past my com-

prehension. I can conceive also in such a given case something transpiring between the parties to constitute a new contract.

But here there is the limited power of the appellant, which is only able to contract in such ways as the statute enables it, as an impassable barrier, and hence the respondents are driven to argue that what was done must be looked to as aiding in the construction of an ambiguous contract.

Wherein is the contract which relates to certain streets as defined in the contract at the date thereof ambiguous?

It seems to me the unambiguous thing in the case. And the conduct relied upon is something taking place years after the contract had been made.

Again that conduct is not that of the appellant, but of some of its servants, who could not be held as entitled to furnish anything a court should rely upon as the conduct of the appellant.

Then it is said there was an amendment of the contract by which the rate of remuneration was changed and increased six years later, and thereby a new contract made which must be held as an interpretation of the original contract. As it speaks of "the inhabitants of the city" which had been increased in fact, both in area and population, it is said it must be taken to have amended the contract. Unfortunately for the argument the express terms of the new agreement ratified by the legislature limit it to the substitution of prices named for those in the contract "as though the said prices were mentioned therein instead of the said prices mentioned in paragraph 17 thereof."

The term "street" is defined in the original contract of 1905 as follows:

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That wherever the word "street" occurs in this agreement, it shall be held to mean any street, avenue or lane shewn as such on the plans of the said city registered in the Land Titles Office for the South Alberta Land Registration District.

I am unable to see how the parties could have more carefully restricted the terms of the amendment, unless they had, from abundant caution, needlessly used words limiting the inhabitants to those concerned under the contract.

I cannot find in this either a new contract or an interpretation of the old one.

Again it is said the original contract might not be so in an ordinary case but that this is a contract with a growing city, and it must be presumed to have contemplated such growth, and hence intended to contract despite the express words of the contract limited to streets as defined.

Any one conversant with how cities in Canada have grown by the annexation of suburban villages or towns which usually have some lighting system of their own, dependent often upon contracts for long terms of years, would be tempted to say that the men making such a contract as here in question extend to future annexation were unfit for such positions of trust, not only as in excess of their powers but as raising a needless barrier in the way of annexing suburban villages and towns.

The obviously prudent course for such men in all such cases would be not to create such a conflict of interests, but to keep their city free to deal with the suburban village or town as little untrammelled as possible either by lighting or waterworks contracts or other public utilities.

I should not but for the force with which this argument was pressed have thought it worth considering.

Moreover, it is to be observed that the only exercise of any right or authority within the bounds of any city or town conferred upon the company are conditional upon a consent expressed by by-law on such terms and conditions as the by-law may provide for the exercise of such power within some prescribed area. Such I take it is the meaning of the ordinance respecting water, gas, electric and telephone companies enacted in 1901, before anything in question herein. There has never been any clear assent of the character required enabling the company or those under whom it claims to operate anywhere within the city of Calgary, except in that specifically described.

As to the argument founded upon by-laws having been voted upon in the course of years after the city boundaries were extended, and final ratification by the validating Act of the Legislature, I fail to see how any of these transactions can change a line or letter of the contract, except so far as specified. And the streets as originally specified remained unchanged. As to by-laws having been voted upon where the law was duly observed and resort was had to the proper and usual form of authorization, how can all that affect the contract? Whether the subject matter directly concerned all those voting or not, or such voting was validated by the legislature matters little.

It frequently happens that a whole city is called upon to sanction what only in truth concerns a small part of it. And it is quite usual to get legislative sanction to overcome the doubts and fears of those having financial dealings based on such actions.

The fact that the contract in question was tested so often, and in so many ways as these votings and enactments shew, and that no one ever suggested

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amending it, demonstrates to my mind that the parties concerned felt they dared not venture to propose so radical a change of what was plain and clear lest their whole scheme should fall to pieces if public attention were drawn to it. Sometimes the promoter sees it wiser to trust to future development, including perhaps a lawsuit, than risk losing everything. Be that as it may, I see nothing in it all to justify our reading into all these transactions what is not there. The legislature is the proper place to go to if there has been an error.

There is, I respectfully submit, a confusion of thought in importing into the case such arguments as founded upon the primary powers and duties of a municipal corporation relative to public order, and cases decided thereon with the modern additions thereto of power to carry on certain classes of business commonly referred to as public utilities. In exercising the latter functions the municipal corporation and its contracts must be treated as any other business corporation.

I still think *Toronto* v. *Toronto Street Railway Co.*(1), was decided correctly on the question which has been referred to so much in argument herein, though I purposely abstained from reading our opinions thereon till I had formed my conclusion in this case.

I think Mr. Justice Ives was right, and that his judgment in this regard should be restored.

The respondent has cross-appealed on the question of its exclusive right barring the city itself from using its new power.

If I am right in the conclusion I have reached, this is not of much consequence.

But as the question is submitted, I may say that,

(1) [1907] A.C. 315.

in my opinion, the terms of the contract do not seem to anticipate or provide against the city doing its own work, but only, if at all, against its granting to others the like powers conferred on respondent's assignor, and hence the cross-appeal should be dismissed.

The appeal should be allowed with costs throughout and the cross-appeal dismissed with costs.

DUFF J.—The appeal and the cross-appeal should be dismissed with costs.

ANGLIN J.—On at least two occasions the municipal corporation of Calgary formally and deliberately dealt with the franchise granted by it to A. W. Dingman in 1905 as covering territory subsequently annexed to the city. After the annexations of 1906, 1907 and 1908, it modified the terms of the franchise by an agreement authorized by a by-law submitted by the council to the vote of all the ratepayers of the city, including those in the annexed territory. After the further annexation of 1910 it again, in January 1911, modified the original agreement in most important particulars by a further agreement, authorized by a by-law likewise submitted to the vote of all the ratepayers of the city as then constituted, including those resident in the annexed area. Legislation confirmatory of these agreements and by-laws was obtained on the joint application of the city and the respondent gas company. I am satisfied that whatever may have been the proper construction of the Dingman franchise at the date of its execution, as to the area of its operation, the subsequent acts to which I have alluded have made it impossible for the appellant successfully to maintain that that area is now restricted to the limits of the city as it existed in 1905. Mr. Justice

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Stuart has pointed to language of the agreement of 1911, which makes it clear that the parties to it were then dealing with the franchise as covering the entire area of the city at that time. I would, if necessary, be prepared to support that learned judge's conclusion that

> this constitutes an agreement—an implied one, no doubt, but none the less potent—that in the original contract with which they were dealing and which they were amending those words ("the city"—"the city of Calgary") should thereafter be given a new and wider meaning.

By another act, the significance of which cannot be met by the suggestion that it was that of a mere official acting without authority, the city again recognized that annexed territory was within the franchise. By a resolution passed in January, 1914, which recited the franchise conferred on Dingman by agreement of August, 1905, and subsequently assigned to the Canadian Western Natural Gas, Light, Heat and Power Company, the City Council, exercising a right conferred by s. 155 of Ordinance 33 of the North-West Territories, requested the Hon. Mr. Justice Stuart to investigate certain interruptions in the services of the respondent gas company in territory annexed to the city after 1905.

Throughout the entire period from 1906 to 1914, when the present contest arose, everybody interested appears to have regarded and acted upon the Dingman franchise as applicable to the subsequently annexed territory equally with that comprised within the city limits in 1905. Every official of the city who was called upon from time to time to act under the contract —the mayor, the commissioners, the engineer—so dealt with it on innumerable occasions.

I think there is a presumption that these acts were duly authorized, and that in the absence of proof to the contrary they should be taken as amounting to

an acquiescence by the city in the construction placed on the Dingman franchise by the respondent gas company. The responsible officials of the city knew that under permits issued by them large sums of money were being expended by the company in the construction of works in annexed territory, on the assumption that they were covered by the Dingman franchise. Indeed, this must have been known to every citizen. The carrying out of these works was facilitated in every way possible by the civic authorities. It would be so inequitable to permit the municipality now to set up that the operation of the franchise is confined to the area of the city as it existed in 1905 that, in my opinion, it cannot be allowed to do so. Some observations of Lord Shaw of Dunfermline, in delivering the judgment of the Judicial Committee in *Winnipeg Electric Railway* v. *City of Winnipeg*(1), seem to be very closely in point. In the present case there is the added circumstance that rights of innocent third parties have intervened which would be seriously jeopardized were the contention of the city to prevail.

Without expressing any view as to what construction should have been placed upon the agreement of 1905, but for the subsequent matters to which I have referred, or as to the applicability to it of the decision in the *Toronto Railway Case*(2), I am, for the reasons I have indicated, of the opinion that the judgment *a quo* on this branch of the case should be affirmed.

On the question raised by the cross-appeal, I have failed to find in the agreement of 1905 anything which binds the city not to exercise in competition with the defendants any powers to supply its in-

(1) [1912] A.C. 355, at pp. 372-3. (2) [1907] A.C. 315.

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habitants with natural gas which it then had or might afterwards acquire. On this branch of the case, I agree with the views expressed by the learned Chief Justice of Alberta and Mr. Justice Stuart.

The case of *Knoxville Water Co.* v. *Knoxville*(1), cited by the learned trial judge, is very closely in point. Better authority than a decision of the United States Supreme Court on such a question it would be difficult to find.

I would dismiss, with costs, both the appeal and the cross-appeal.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellant: *C. J. Ford.*

Solicitors for the respondent: The Canadian Western Natural Gas Company: *Lougheed, Bennett, McLaws & Co.*

Solicitors for the respondent, The British Empire Trust Company: *Woods, Sherry, Collison & Field.*

(1) 200 U.S.R. 22.

THE CITY OF CALGARY (DEFENDANT) ..... APPELLANT;

AND

THE DOMINION RADIATOR COMPANY (PLAINTIFF) ..... RESPONDENT.

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*Oct. 18.
*Nov. 28.

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

Mechanic's lien—Notice in writing—Verbal notice—Registration—"Alberta Mechanics' Lien Act," s. 32, as amended in 1908.

Held, Fitzpatrick C.J. and Idington J. dissenting, that, to enforce the mechanics' or the material man's lien, under the "Alberta Mechanics' Lien Act," a "notice in writing of such lien and of the amount thereof" must be given to "the owner or person having superintendence of the work on behalf of the owner," according to section 32 of the Act, as amended in 1908.

Per Fitzpatrick C.J. dissenting.—Such notice in writing is not intended to affect the validity of the lien, but merely to determine the extent of the owner's liability.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), reversing the judgment of Harvey C.J. at the trial, and maintaining the plaintiff's action.

The respondent's action was brought against the appellant to enforce a lien under the "Mechanics' Lien Act" of Alberta, recorded against property owned by the appellant on which a building known as the "Children's Shelter" had been constructed. The respondent had supplied for this building the steam boiler and radiators necessary for a heating system and a pumping equipment.

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

(1) 11 Alta. L.R. 532 *sub nom. Dominion Radiator Co.* v. *Payne.*

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The principal issue submitted by the appellant is that respondent's claim was barred by failure to give written notice as required by section 32 (as amended in 1908), of the "Mechanics' Lien Act" of Alberta. The respondent contends that section 32 is merely a provision made to protect an innocent owner from having to pay money a second time; that the lien given by sec. 4 of the Act has its commencement as soon as the material is furnished, and that, when fyled, such lien is an encumbrance upon the land.

The trial judge held against the respondent, and dismissed the action; but, on appeal, the Supreme Court of Alberta unanimously reversed this decision.

F. E. Meredith K.C. and *C. F. Adams* for the appellant.

R. S. Robertson for the respondent.

THE CHIEF JUSTICE (dissenting).—Under the terms of the "Mechanics' Lien Act," as I read it, the material men and labourers acquire, from the moment that the material is furnished or the labour performed (section 4), an interest in the contract price limited to the sum actually owing to the person entitled to the lien (section 8), which interest cannot be for any greater sum than the owner has agreed to pay by his contract (section 19). The lien to secure that interest becomes effective upon registration under section 2 (*g*) and (*k*) and section 41 of the "Land Titles Act."

But the appellants contend: 1st, that the claim of lien was filed too late: and 2nd, that the claim was barred by reason of the failure to give written notice. Section 32, as amended.

Dealing with the first point. I find that section 13 of the Act, fixing the time within which the material

man's lien must be filed, provides that the lien shall cease to exist on the expiration of 35 days after the claimant has ceased from any cause to place or furnish the material. In other words, the date from which the delay runs is not that from which the purchase price becomes due and exigible but from the date at which the material man has ceased to place or furnish the material, and that, of course, depends on the facts of each case.

There can be no dispute about the facts here. When the city authorities gave the order to supply the heating system for the Children's Shelter in July, 1914, they had then in contemplation the installation of a pumping system to supply the water without which the heating system could not be operated. A well was then dug, and the subject of a pumping system was discussed with the company before they supplied the radiator for the heating. As a matter of fact, the pump was actually ordered about the 14th of November (1914), at which date the radiator and boiler were being installed. The one system was necessarily complementary of the other: the heating system could not be operated without the pumping system. As one witness observes,

it is difficult to use radiators and boilers without water.

Although the material required was ordered at different times, the parties had in contemplation from the outset the purchase and supply of a complete set of pumps, boilers and radiators to heat the building by hot water. This explains why a price for the pump was obtained from the respondent at the outset. It is difficult to read the evidence without coming to the conclusion that, as found below, there was what Chancellor Boyd calls in *Morris* v. *Tharle*(1):

(1) 24 O.R. 159, at p. 164.

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one entire prevenient governing contract of which the respective deliveries are merely the execution.

Once that conclusion was reached by the Appellate Division, then, I think, there can be no doubt that, as found, the claim was filed within the delay (*en temps utile*). The pump was delivered in December, 1914 but when tested it was found to be defective; and in February the shaft and wheel were returned to the manufacturer. In a letter written in February, 1915, by the contractor, he says:

> It (the pump) was running about five minutes, when the pinion became jammed and when they stopped the machine it was all chewed up the way it was mailed to you.

It was not until March, 1915, that a complete pump was furnished and the lien was filed on April 1st, 1915, well within the statutory delay. Idington J. in the case of *Day* v. *The Crown Grain Co.*(1), says:

> The test question here is whether or not the appellant could in law have sued on the 20th April and recovered from Cleveland as for a complete contract. I am of opinion he could not. Trifling as the parts unfinished were, the party paying, in such a case, was entitled to insist on the utmost fulfilment of the contract and to have these parts so supplied that the machine would do its work.

Now, dealing with the second objection to the effect that the claim is barred by reason of failure on the part of the material man to give notice in writing. By supplying the material, an interest or lien on the money in the hands of the owner is acquired by the furnisher, and by registration that lien becomes, under the "Land Titles Act," an incumbrance on the owner's title to the land so that under the provisions of the two statutes the furnisher of material acquires, by registration in the Land Titles Office, an incumbrance on the owner's land for the price of his material.

(1) 39 Can. S.C.R. 258, at p. 263.

Anglin J. said in *Travis* v. *Brakenbridge* (unreported):

> Registration may be deemed notice to the owner.

In this case, the material man not only registered his claim, but also gave actual notice to the owners through Sylvester, their representative on the work, that he looked directly to the fund for the payment of his claim. There is nothing in the statute that requires him to do more than to register his lien to acquire this incumbrance; and, as Mr. Robertson argued here, there is nothing in the statute which states that the interest in the fund so secured by an incumbrance on the land ceases to exist or that the incumbrance on the land is discharged, if a notice in writing is not given under section 32. That section, as it formerly stood, read as follows:

> No lien * * * shall attach so as to make the owner liable for a greater sum than the sum owing and payable by the owner to the contractor.

As amended it now reads:

> No lien * * * shall attach so as to make the owner liable for a greater sum than the sum owing by the owner to the contractor at the time of the receipt by the owner or person having the superintendence of the work on behalf of the owner of notice in writing of such lien and of the amount thereof or which may become owing by the owner to the contractor at any time subsequent thereto while such lien is in effect.

The section was amended in 1908, I strongly suspect, because of the judgment of the Alberta appeal court in *Travis* v. *Brackenbridge*, which condemned the owner to pay twice over.

Those amendments, especially in view of the conditions in the various sub-sections, were intended not to effect the lien, but to determine the amount for which the owner would be liable. His liability is limited to the amount due at the moment the notice

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was served; taken literally, that is all the language means. The Act does not say when the notice should be served to be effective. It does not in terms make the validity of the lien depend upon the service of a notice in writing upon the owner, nor does it say that failure to give notice discharges the encumbrance on the land. The Act says merely (sec. 32):

> No lien * * * shall attach so as to make *the owner liable for a greater sum than the sum owing by the owner to the contractor.*

The notice is not intended to affect the validity of the lien, but merely to determine the extent of the owner's liability, and for his interest only.

Whatever may have been the purpose of the legislature in enacting the amendments to clause 32 as it originally stood, it seems to me obvious that the notice in writing was not intended to protect the contractor or his assignee. The construction contended for by the bank would, in the circumstances of this case, give to a general contractor a preference over the material man who had a lien under the statute for the price of his material, and of which lien the owner had particular notice, as is evidenced from the terms in which the receipt taken from the bank is drawn.

The appeal should be dismissed with costs.

DAVIES J.—I concur in the the opinion stated by Mr Justice Anglin.

IDINGTON J. (dissenting):—This is an appeal from a judgment maintaining a claim of respondent to enforce a lien for material, under the "Alberta Mechanics' Lien Act."

The only serious difficulty I find in the case turns upon the question of whether or not a transaction between appellant and the Bank of British North America (which, as assignee of the contractors with

the city, admittedly stands in the same position as the contractor), represented by an instrument which reads as follows,

EXHIBIT 13.

The Bank of British North America hereby acknowledges to have received from the City of Calgary $1,457.98, the balance due as certified by the city engineer on the contract between Grant Brothers, Limited, and the city for plumbing, heating and water supply in connection with the Children's Shelter; and the bank hereby undertakes and agrees with the City of Calgary that if any claim shall be made and established against the city under the "Mechanics' Lien Act" under said contract not exceeding the said sum of $1,457.98, the same shall be paid by the said bank, and if any action is brought against the city to establish any such lien the bank will either pay the amount claimed, or, at its own costs and charges, contest said claim and indemnify the city against the same and any costs occasioned thereby not exceeding the amount hereinbefore mentioned—the city on receipt of said claim, or on being served with any proceedings in Court, to notify the bank thereof.

Dated the fifth day of May, A.D. 1915,

is clear evidence of payment absolving appellant from all liability under the Act.

There is no evidence, unless it be the admitted fact that the said sum of money was paid to the bank, of how or why the appellant should be held to have so paid, in face of the clearest evidence that both the appellant and the bank knew, at the time of said payment that the respondent had duly registered the lien, under the Act, now sought to be enforced.

There were two fairly arguable points of law which may have been present to the minds of those concerned relative to the right of the respondent to maintain the lien so registered as to any part, or at all events as to the larger item, of the claim.

It has been stoutly contended throughout, first, that the lien was registered too late to be effective, and secondly, in any event, that the first item of the account had been delivered and for a short time in use, two months or so before registration of the lien.

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I agree for the reasons assigned in the judgment of Mr. Justice Beck in the court below, that the account was, under the circumstances in question, of that continuous nature and in relation to the same work as to render the lien under section 4 of the Act valid if registered within thirty-five days from the completion of the entire work and that by reason of the inefficiency of the machine which constituted the second item thereby needing a substitution of one of its parts, that the time for registration only began to run from a date clearly within thirty-five days preceding registration.

Were these the only questions which confronted the appellant and the bank and were present to the minds of those concerned in framing the above mentioned instrument? If so, then there is an end of the appeal.

But in the absence of any evidence, we are left to conjecture or to draw such inferences as we may relative to the intention and meaning of the transaction.

However that may be, it is now claimed that under section 32 which reads thus:

> Sec. 32:—No lien, except for not more than six weeks' wages in favour of labourers, shall attach so as to make the owner liable for a greater sum than the sum owing by the owner or the contractor at the time of the receipt by the owner or person having superintendence of the work on behalf of the owner, of notice in writing of such lien and of the amount thereof; or which may become owing by the owner to the contractor at any time subsequent thereto while such lien is in effect,

inasmuch as there was no written notice to the appellant, the lien never attached.

That has been answered by holding the statement of claim was a written notice and so it would be literally within the language of the Act.

That is answered again by saying that no lien attaches so as to

make the owner liable for a greater sum than the sum owing by the owner or the contractor at the time of the receipt by the owner or person having superintendence of the work * * * of notice in writing of the lien, etc.

What does this mean? Clearly the contractor owed, and still owes, the entire sum. And just as clearly under the statute, a lien did attach unless we are to hold that in the case of a contractor paid in advance by the owner, no lien is intended by the statute to attach under section 4 by virtue of the respondent's furnishing the material.

It is not the registration that makes it attach. That is only a requirement for its continuation beyond thirty-five days after completion.

It may be said this is hypercritical, and that the intention of the statute must be looked to in order to make it workable. I incline to agree therewith, but I submit that those relying upon such a doubtfully worded instrument as that now in question ought, in the same spirit, to have made plain what they intended.

It can, in every word of it, be made operative by referring the questions of what it, negatively as it were, provided should nullify the operation of the lien, to the obvious questions I have referred to, as all the document had in contemplation under the circumstances.

To insist upon more renders it necessary to impute to the appellant, having full knowledge of the fact that the lien existed, the most unworthy motive of resorting to a trick for the purpose of unjustly depriving respondent of its money.

For my part, I will not put that construction (which will wear the appearance of an intent akin to fraud) upon the document, and short of that, in my view, the appeal fails.

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It comes to this that despite all the growing tendency of public corporations, like the appellant, to promote honesty and fair dealing with those serving the city, as we had illustrated in the contract we had before us in the recent case of *Union Bank of Canada* v. *Ritchie Contracting & Supply Co.*, which specifically provided (and we upheld its doing so) that such claims must be paid, there is room to argue that material men may be beaten out of their rights under the "Mechanics' Lien Act" if the contractor can induce such corporation to aid them.

Leaving aside the broad question of whether or not it is possible to so contract that the lien may be prevented by an agreement providing for advance payments to the contractor, suppose we found such an attempt to take the form of this document being incorporated into and made part of the agreement for any public work, how should a court look at it?

Suppose a bank at the back of a contractor in such a case at the very outset willing to indemnify upon receiving the money, would such a transaction fall within the meaning of section 32 and be held payment?

This question I put to counsel and am yet without an answer.

I cannot assent to such a repeal of the Act.

I agree with Mr. Justice Walsh that such a transaction of suspensive holding of money, as evidenced by this receipt, is not a payment within the meaning of the Act.

I think the appeal should be dismissed with costs.

DUFF J.—The appeal should be allowed, and the action dismissed with costs.

ANGLIN J.—Reversing the judgment of Harvey C.J., who had dismissed the action, the Appellate Division of the Supreme Court of Alberta held the plaintiffs, the Dominion Radiator Co., entitled to a mechanics' lien in respect of the price of a hot water heating system ($1,019.27) and a water pumping system ($438.71) furnished by them as sub-contractors for Grant Bros. Limited to the defendants, the City of Calgary, for a children's shelter. From that judgment the city appeals on three distinct grounds:—

(*a*). That the lien in respect of the whole claim had expired before it was registered;

(*b*). That the contract for the heating system was entirely distinct and separate from that for the water system and that the lien in respect of the former, at all events, had expired;

(*c*). That when the city first received a "notice in writing" of the plaintiffs' lien no sum was owing by it to the contractors.

In view of my opinion on the third ground of appeal, I have found it unnecessary to pass upon the other two grounds.

Sec. 32, s.s. 1, of the "Alberta Mechanics' Lien Act" is as follows:—

> Sec. 32.—No lien, except for not more than six weeks' wages in favour of labourers, shall attach so as to make the owner liable for a greater sum than the sum owing by the owner to the contractor (at the time of the receipt by the owner or person having superintendence of the work on behalf of the owner, of notice in writing of such lien and of the amount thereof; or which may become owing by the owner to the contractor at any time subsequent thereto while such lien is in effect).

The words in brackets were added by an amendment of 1908.

The lien is created by section 4 of the Act, and is thereby declared to be

limited in amount as hereinafter mentioned.

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By section 8, it is

limited in amount to the sum actually owing to the person entitled to the lien.

By section 19 it is provided that

the owner complying with the provisions of the Act shall not be liable for any greater sum than he had agreed to pay by contract.

By section 32, above quoted, a further limitation is imposed, with the result that the lien attaches only to the extent of any moneys owing to the contractor by the owner when the latter receives notice in writing of the lien, or which may subsequently become owing to the contractor.

Admittedly the first notice in writing of the appellant's lien received by the city was the statement of claim in this action delivered on the fourth of November, 1915. At that time the city had in hand no moneys owing to the contractor, Grant Bros. Limited. It had paid the last of such moneys in its hands ($1,457.98), to the Bank of British North America on the 19th of May, 1915, upon a claim made by the bank under an assignment from Grant Bros., of which it had received formal notice on the 25th Feb., 1915. The appellants' lien was registered on the first of April, 1915, and there is evidence of verbal notice of their claim having been given to the city's building superintendent shortly before its registration and again shortly afterwards. On making the payment to the bank the city took from it the following receipt:

The Bank of British North America hereby acknowledges to have received from the City of Calgary $1,457.98, the balance due as certified by the city engineer on the contract between Grant Bros. Limited and the city for plumbing, heating and water supply in connection with the Children's Shelter; and the bank hereby undertakes and agrees with the City of Calgary that if any claim shall be made and established against the city under the "Mechanics' Lien Act" under said contract not exceeding the sum of $1,457.98, the same shall be paid by the said

bank, and if any action is brought against the city to establish any such lien the bank will either pay the amount claimed, or, at its own costs and charges, contest said claim and indemnify the city against the same and any costs occasioned thereby not exceeding the amount hereinbefore mentioned—the city, on receipt of said claim, or on being served with any proceedings in court, to notify the bank thereof.

Dated the fifth day of May, A.D. 1915.

Upon the foregoing facts, the respondent urges that the payment by the city to the bank after registration and verbal notice of the lien was a fraudulent attempt to defeat it, and should therefore be held void as against the lien holder, and that the terms of the receipt taken by the city confirm this view and also shew that the payment to the bank was not intended to be a genuine and absolute payment, and should therefore be disregarded in considering whether there was any sum owing by the city to the contractors when it received notice in writing of the lien—that it was in fact merely a conditional payment of money to be returned to the extent to which the city might be held liable to meet the plaintiffs' lien.

There is no evidence of any collusion or of fraudulent intent on the part of either the city or the bank. No indirect or improper motive has been suggested for the city or its officials preferring the bank's claim under its assignment to that of the plaintiffs. For aught that appears the civic authorities may have acted in the *bonâ fide* belief that the plaintiffs' lien had expired before its registration, and that the city was bound to make payment under the assignment of which it had received notice on the 25th of February. Fraud is not to be presumed in this case more than in any other.

The effect of section 32 as it now stands, is, in my opinion, to make the giving of notice in writing to the owner a condition of the mechanic's or the mat-

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erial man's lien attaching so as to make the owner liable, just as other sections of the Act make registration and the institution of an action within defined periods conditions of its preservation. There can be no more justification for holding verbal notice to be a sufficient ground for dispensing with the fulfilment of one condition than for treating it as a valid excuse for non-compliance with the others. To hold that the extent of the owner's liability is fixed either by actual verbal notice or by registration would be contrary to the explicit terms of section 32 and would involve either reading out of that section the words "in writing" or inserting a declaration that registration shall be deemed "notice in writing." Such an alteration of the statute the legislature alone is competent to make.

There is nothing inherently unfair or extraordinary in a provision imposing the giving of notice in writing to the owner as a condition of the existence of such a special privilege as the right to a lien conferred on vendors of labour and material for work upon lands. It may be that in endeavouring to protect the owner from the difficulties of a situation that might arise from the absence of some such provision (illustrated in the cases of *Breckenridge & Lund* v. *Short*(1) and *Travis* v. *The Breckenridge-Lund Company* (2) the legislature went farther in 1908 than was necessary or desirable. But, if so, the responsibility is with it and the remedy in its hands.

Much was made in argument for the respondent of the provision of the "Land Titles Act" which declares a mechanics' lien when registered to be an encumbrance on the lands. But the existence of the

(1) 2 Alta. L.R. 71.

(2) 43 Can. S.C.R. 59.

lien itself and its extent depend upon the provisions of the "Mechanic's Lien Act." The two statutes must be read together, and registration under the "Land Titles Act" cannot be taken to create an encumbrance where there is no valid lien under the "Mechanics' Lien Act" or to neutralize or modify the limitation upon its extent which the "Mechanics' Lien Act" explicitly imposes.

As to the receipt taken by the city it does not establish that the payment to the bank was conditional. It merely shews that, having some knowledge of a claim of lien which they may have deemed quite unfounded, the civic officials, *ex majori cautela*, sought and obtained from the bank an indemnity against the possibility of that claim turning out to be enforceable. Failure to have done so in reliance upon their own belief, however firm, that no lien in fact existed, or that the assignment to the bank, operating from the date when the city had notice of it, gave its claim priority over that of the plaintiffs, of which it received verbal notice only subsequently, might have been deemed culpable remissness by those to whom the officials were accountable. However mistaken that belief may have been, after the city had paid over to the bank all the moneys in its hands owing to the contractor, there was, in my opinion, no "sum owing by the owner to the contractor" within the meaning of section 32.

With great respect for the learned judges who take the contrary view, I am of the opinion that the judgment *a quo* involves a repeal of the amendment of 1908 to section 32 which the legislature alone can effect. On this branch of the case I agree with the learned Chief Justice of Alberta, whose judgment,

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I think, should be restored. The appellant should have its costs here and in the Appellate Division.

Appeal allowed with costs.

Solicitors for the appellant: *Muir, Jephson, Adams & Brownlee.*

Solicitors for the respondent: *Savary, Fenerty & Chadwick.*

LA CORPORATION DE LA PAROISSE DE ST. PROSPER (DEFENDANT) ..... APPELLANT;

1917
*Nov. 6
*Nov. 13.

AND

LOUIS RODRIGUE (PLAINTIFF) ... RESPONDENT.

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

Constitutional law—Municipal by-law—Sunday observance—Prohibiting opening of restaurants—"Lord's Day Act," R.S.C., 1906, c. 153.

A municipal by-law, forbidding the opening of restaurants and the sale therein of any merchandise on Sundays, is *ultra vires*, as it deals with the observance of Sunday or the Lord's Day. *Ouimet* v. *Bazin*, 46 Can. S.C.R. 502, followed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of Belleau J. in the Superior Court for the district of Beauce(2).

The respondent is a restaurant-keeper, doing business in the municipality appellant, and took an action to set aside a by-law passed by the appellant, by which were prohibited the opening of the restaurants on Sunday, and the sale therein of any merchandise. The principal grounds invoked by the respondent were that such by-law was regulating the Sunday observance, which was a matter of federal jurisdiction only, and *ultra vires* of the powers of municipalities. The trial judge dismissed the action, and held that the by-law was only in relation with public peace, good order and good morals, and was within the police

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

(1) Q.R. 26 K.B. 396.

(2) Q.R. 51 S.C. 109.

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power of the corporation appellant. But this judgment was reversed and the by-law quashed by the majority of the Court of King's Bench, which found that they had to follow the ruling in *Ouimet* v. *Bazin*(1).

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

Louis Morin K.C. for the appellant cited *Ouimet* v. *Bazin*(1), *Tremblay* v. *Cité de Québec*(2) and *City of Montreal* v. *Beauvais* (3).

Belcourt K.C. for the respondent, cited also the above cases and *Association St. Jean Baptiste de Montréal* v. *Brault*(4).

THE CHIEF JUSTICE.—I am of opinion that this appeal should, on the merits, be dismissed with costs for the reasons given by Mr. Justice Anglin; on the question of jurisdiction, I am bound by the judgment of the majority in *Shawinigan Hydro-Electric Company* v. *Shawinigan Water and Power Company*(5). The motion should be dismissed without costs, having been heard on the merits.

DAVIES J.—In this case a motion has been made to quash the appeal for want of jurisdiction, but as there was some question raised as to the constitutionality of the provincial law, under which the by-law in question was said to have been passed, the motion was allowed to stand over, and the argument on the merits took place.

I have no doubt that the appeal should be dismissed. The by-law in question is a prohibitive one, and deals with the observance of Sunday or the Lord's Day. That is a subject matter which it has been determined

(1) 46 Can. S.C.R. 502.
(2) Q.R. 38 S.C. 82.
(3) 42 Can. S.C.R. 211.
(4) 30 Can. S.C.R. 598.
(5) 43 Can. S.C.R. 650.

is within the legislative powers of the Dominion Parliament. That Parliament has already dealt with the subject matter and the Privy Council has decided in favour of the validity of the Act.

In the case of *Ouimet* v. *Bazin*(1), at page 504, I stated my view as to the construction of this Federal Act, namely, that while it enacted prohibitive legislation for the whole of Canada, it also delegated to the several Provincial Legislatures the power to declare that any act or thing prohibited by the Dominion Act might be exempted from the operation of the Act, and permitted to be done by Provincial legislation either existing at the time the Federal Act came into force or subsequently enacted.

The question raised in this case was not as to the validity of any such permissive legislation, for none such was invoked, but as to the validity of a by-law forbidding the opening of restaurants and the sale therein of any merchandise on Sundays.

Such a by-law is a direct dealing with Sunday observance, and therefore *ultra vires*. Provincial legislation attempting to authorize it would itself be *ultra vires*.

I concur, therefore, in dismissing the appeal.

IDINGTON J.—This appeal involves only the question of the validity of a by-law of the appellant.

The judgment from which appeal is taken rests upon the view that there is a constitutional question raised within the meaning of section 46, sub-section (*a*) of the "Supreme Court Act."

Unless there is such a question involved in the appeal, we have no right to hear it for we have no jurisdiction to review the work of the Court of King's

(1) 46 Can. S.C.R. 502.

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Idington J.

Bench relative to the validity of municipal by-laws, unless incidentally something else is in controversy between the litigant parties to an appeal.

So far as the constitutional question, if any, involved in this appeal is concerned, the decision in the case of *Ouimet* v. *Bazin*(1), as I understand it, is conclusive against the appeal.

In that case I thought, and still think, it was possible to reduce all that was involved therein to the single question of the power to prohibit a theatre from carrying on its business on a Sunday, for which offence the appellant had been condemned.

This court held it was not possible to maintain the distinction between a single item of the numerous prohibitions in the Act there in question giving rise to the issue involved in that case, and the general scope of the Act upon which the prosecution therein was founded.

Be that as it may, I cannot read the several opinions which led to the decision without feeling that it was founded in truth upon the common notion of a peculiar sanctity found in the religious obligations to observe the day as one devoted to religious observances, which leads to viewing its desecration with such abhorrence as to constitute that something criminal in its nature and hence legislation relative thereto as criminal legislation.

If we analyze the history of legislation, designed to secure the observance of what is commonly called the Lord's Day and the judicial decisions thereupon, which ostensibly founded the opinions I refer to as leading to the decision in *Ouimet* v. *Bazin*(1), it is hard to escape the conclusion that it is impossible, in face of

(1) 46 Can. S.C.R. 502.

the general conception I have tried to express, to frame the most moderate attempt at legislation relative to what men may be prohibited from doing on that day without being met by the objection that it is of the class falling within what has been thus judicially declared criminal legislation.

If we could imagine the Legislature of Quebec taking up each item at a time of what was prohibited in the Act in question in said case, and thus by half a dozen or more Acts covering the same ground as that Act, could such Acts, or any of them, now be upheld in face of such a decision? I think not. In my own judgment in that case I tried an analogous experiment. My attempt was fruitless. I must now observe the law as laid down therein.

It seems idle now to say that in the case of *The City of Montreal* v. *Beauvais*(1), we upheld similar legislation relative to prohibiting certain work or business on weekdays within specified hours. No one questions that power when duly exercised as to weekdays.

There is no reason for denying it in relation to Sunday, except the distinction judicially made between that and other days.

Hence, so far as the judgment appealed from rests upon *Ouimet* v. *Bazin*(2) it seems well founded, and leaves no escape from dismissing the appeal.

If, as suggested in course of the argument, the by-law is not within the scope of the Municipal Act, no harm has been done.

But upon that I express no opinion. We have no jurisdiction to deal with it from that point of view.

In any way I can look at the appeal it should be dismissed with costs.

(1) 42 Can. S.C.R. 211.

(2) 46 Can. S.C.R. 502.

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Idington J.

The motion to quash failed, because effect could not properly be given to it without hearing the appeal, and hence should be dismissed, but I think without costs under the very peculiar circumstances which seemed to invite it lest the court might complain of its not having been made.

DUFF J.—I am of the opinion that this appeal should be dismissed with costs.

ANGLIN J.—The appellant, a municipal corporation, seeks the reversal of the judgment of the Court of King's Bench of the Province of Quebec, which quashed one of its by-laws, whereby the opening of restaurants and the sale therein of any merchandise on Sundays is forbidden, on the ground that this by-law deals with Sunday observance, and is, therefore, beyond the jurisdiction of a municipal council.

If the purpose and purview of the by-law are what they have been held to be (as I think correctly) by the Court of King's Bench, its invalidity as an invasion of the domain of criminal law, assigned exclusively to the Dominion Parliament, is not open to question in this court. *Ouimet* v. *Bazin*(1). No provision of the Quebec statutes warranting the enactment of any such by-law has been referred to, and it is in conflict with the spirit, if not with the letter, of s. 4466 of the R.S.Q. 1909.

On the other hand, if this be not the true character and object of the by-law—if it be merely a local police regulation passed for the maintenance of peace, order and good government in the Parish of St. Prosper—nobody would dream of questioning the validity of the provisions of the Quebec Municipal Code empower-

(1) 46 Can. S.C.R. 502.

ing the municipality to enact it. The proper construction of the impugned by-law does not "involve the question of the validity of an Act of the Parliament of Canada or of the Legislature," "Supreme Court Act," s. 46 (*a*). On no other ground can the appeal be brought within any of the several clauses, (*a*), (*b*) or (*c*) of s. 46 of the "Supreme Court Act," and, as held in the *Bell Telephone Co.* v. *City of Québec*(1), accepted as binding by the majority of this Court in the recent case of *Shawinigan Hydro Elec. Co.* v. *Shawinigan Water & Power Co.*(2), the judgment in an action brought to set aside a municipal by-law is not appealable to this Court under the special provision of s. 39 (*e*), which is excepted by s. 47 from the operation of s. 46. In other words, the right of appeal in such an action must depend upon the general jurisdiction of the court conferred by s. 36, which is subject, in appeals from the Province of Quebec, to the limitation imposed by s. 46. It therefore does not exist where the case does not fall within one or other of the negatively permissive clauses of the latter section.

Either the impeached by-law is an enactment dealing with Sunday observance and, as such, has rightly been held *ultra vires*—and there is no suggestion that any provincial legislation purports to sanction it if that be its character—or it is merely a local police regulation, and, as such, its enactment would be warranted by provincial legislation of unquestioned validity. In neither aspect of the case is it within s. 46 (*a*) of the "Supreme Court Act" and we are, in my opinion, without jurisdiction to entertain the appeal.

I understand, however, that the majority of the court is of the opinion that the appeal should be

(1) 20 Can. S.C.R. 230. (2) 43 Can. S.C.R. 650.

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dismissed on the merits. If the court has jurisdiction, I would concur in that result.

Although the respondent moved to quash, he did so only after the costs of printing had been incurred, and a few days before the appeal was due for hearing upon the merits. Moreover, he failed to make it apparent, upon the presentation of his motion, that the appeal did not involve a question of the validity of an Act of the Provincial Legislature, and, without disposing of the motion, the court accordingly directed that the appeal should be heard on the merits. Under these circumstances, while now satisfied that the motion to quash should succeed, I do not dissent from the order refusing costs of it.

Appeal dismissed with costs.

Solicitors for the appellant: *Pacaud & Morin.*
Solicitors for the respondent: *Bouffard & Godbout.*

A. C. ROGERS (DEFENDANT) ..... APPELLANT;

AND

CALGARY BREWING & MALTING COMPANY (PLAINTIFF)..... } RESPONDENT.

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*Oct. 15-16.
*Nov. 28.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Bank and banking—Bill of exchange—Cheque—Payment—Presentment—Delay.

The appellant sent to the respondent a cheque drawn on the Estevan Security Company, and the Bank of Montreal, acting as agent for the respondent, sent the cheque direct to the drawee by post. Instead of insisting upon prompt payment of the cheque out of the funds which the appellant then had available with the Security Company, the Bank of Montreal gave to the latter almost one month's delay, and then accepted a draft of that company on another bank which was dishonoured; and immediately after the Security Company went into insolvency.

Held, that the appellant was discharged of his liability to the respondent for the amount of the cheque.

Davies J. though not dissenting formally was of the opinion that the case should be sent back for a new trial, so that the cause of the delay might be explained and the responsibility thus determined.

APPEAL from the judgment of the Supreme Court of Saskatchewan(1), affirming the judgment of Haultain C.J. at the trial(2), in favour of the plaintiff respondent.

A bill of exchange, drawn by the appellant on the Estevan Security Company, (where he had funds sufficient to meet it), payable on demand at Bienfait, Manitoba, was deposited by the respondent with the Bank of Montreal, at Calgary, on the 14th of November, 1914. The Bank of Montreal sent the appellant's

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

(1) 34 D.L.R. 252, 2 W.W.R. 344.

(2) 9 Sask. L.R. 440, 33 D.L.R. 173, 1 W.W.R. 670.

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bill by post directly to the Estevan Security Company, presumably on the day the bill was received. Until the 10th of December, 1914, nothing is known about the bill as far as the record shews, and, on that date, the Estevan Security Company sent to the Bank of Montreal a draft upon the Union Bank at Winnipeg for the amount of the bill, which draft the Union Bank refused to honour. The Estevan Security Company suspended payment on the 16th of December, 1914; and the respondent took action against the appellant for the amount of the bill.

J. A. Ritchie for the appellant.
P. M. Anderson for the respondent.

THE CHIEF JUSTICE.—The Bank of Montreal, acting as agent for the respondent to collect the amount of appellant's cheque or draft on the Estevan Security Company, sent that cheque direct to the drawee by post, and, instead of insisting upon prompt payment out of the funds which the appellant then had available with that company for the payment of his cheque, chose to give the company almost one month's delay, and at the end accepted a worthless draft of the company which immediately after went into insolvency. On these facts, I do not entertain any doubt that the appellant was discharged of his liability to the respondent for the amount of the cheque or draft, and that the appeal ought to be allowed. I am inclined also to doubt that there was a good presentment, and in any event notice of non-payment was not given in a reasonable time.

Suppose the Estevan Company had had sufficient funds with the Union Bank on which the draft was made, but the Bank of Montreal, in place of taking

cash, had again accepted the draft of the Union Bank on some other bank. The process might have gone on indefinitely. Could it be suggested that the liability of the appellant would always have continued, and that he could have been held responsible for the failure of the Union Bank or any subsequent bank whose draft the Bank of Montreal might have taken? It would be just as true as in the present case that the respondents had never received cash.

It is no use for the manager of the Bank of Montreal to say that it did not appoint the Estevan Security Company their agent, because the bank does not appoint private bankers its agents if that is what it in fact did. Suppose, as counsel for the appellant suggested, it had sent the cheque to the express company for collection, and it had taken the worthless draft instead of cash, what answer could the Bank of Montreal have had in face of this action of its agent? Why should it be allowed to repudiate the agency, because it sent it direct to the company on whom it was drawn? Further, the Bank of Montreal did not repudiate the discharge by the draft, did not send back the draft, but accepted and presented it in due course.

I observe that Mr. Justice Brown says that he does not think the case of *Donogh* v. *Gillespie*(1), is applicable to the case at bar. If it could be held to be so, I should not be able to accept it as a binding authority. If an agent presents a cheque and accepts a banker's draft in place of cash, I cannot think the principal can claim that in so doing he was not acting within the scope of his agency. In a sense, every blunder or improper action on the part of an agent is unauthorized by his principal. Such a limitation on

(1) 21 Ont. App. R. 292.

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the liability of the principal for the acts of his agent would, however, render impossible any dealing with an agent; parties so dealing cannot always know the precise instructions he has received with reference to carrying out the transaction in which he is authorized to act.

As a matter of fact, I should suppose the transaction was carried out in accordance with common banking practice and the intention of the Bank of Montreal.

The appeal should be allowed with costs.

DAVIES J.—In this appeal, I would very much have preferred to refer the case back for a new trial, so that the cause of the long delay on the part of the Estevan Security Company in remitting to the Bank of Montreal its draft on the Union Bank of Winnipeg which was dishonoured, in payment of the cheque or bill of exchange of the appellant Rogers in favour of the respondent which the bank had forwarded to the Estevan Company for payment, might be explained and the responsibility for that delay determined.

As, however, this view is not shared by my colleagues, I cannot see that any useful purpose will be served by my dissenting formally from the judgment allowing the appeal proposed to be delivered.

So far as my personal assent to that judgment is concerned, I simply desire to say that it is given with very grave doubt, arising out of the absence of any evidence on the material fact of delay above referred to.

The only plea placed upon the record by the appellant was one of payment, and that did not call for any explanation of this delay, and that was, I assume, the reason why no evidence on the point was given.

IDINGTON J.—The appellant owed respondent and gave it a cheque on the Estevan Security Company, a private bank in Bienfait in Saskatchewan, for $700, dated 11th November, 1914, for which due credit was given in an account rendered on the 30th of the said month, by respondent to appellant. Respondent then, on the 14th of the same month, indorsed it over to the Bank of Montreal (at Calgary) where respondent carried on business, as I infer from the date of credit given in said account, and the stamp marking of that bank on face of the document.

The learned trial judge says this was done for collection, but I cannot so find from the evidence. That is barren of a good many details relative to the dealings with this cheque regarding which we might have been informed.

In law, however, I cannot say that there is any substantial difference in the result so far as appellant is directly concerned, whether it was left for collection or discounted, and placed to the credit of respondent.

In either event it was the act of the respondent that entrusted it to the Bank of Montreal, which must be held the agent of respondent, unless treated as holder of the cheque.

The bank sent it direct to the Estevan Security Company. But when it did so does not appear.

It does appear that the said banking company sent as its payment of it, a cheque dated 10th December, 1915, in favour of the Bank of Montreal on the Union Bank at Winnipeg, which seems to have been accepted by said Bank of Montreal without objection, and in turn sent by it to Winnipeg for presentation.

The Union Bank refused payment of that cheque, and the Bank of Montreal had it protested on the 14th of the said December.

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On the 16th December, 1914, the respondent telegraphed appellant as follows:—

December 16th, 1914.

To A. C. Rogers, Bienfait.

Bank advise draft seven hundred Estevan Security on Union Bank unpaid. See Security Company at once.

C. B. & M. Co., LTD.

The Estevan Security Company had closed business that day by reason of its insolvency.

The appellant had money in that private bank sufficient to meet the cheque which was handed over to him with his bank book, marked by a stamp of that company, as paid on the 10th December.

I am of the opinion that upon the foregoing facts, the judgment of the learned trial judge and of the majority in appeal upholding it, cannot be sustained and should be reversed.

I have chosen to call the document now in question a cheque, though on a private bank, and thus not a cheque within the meaning of our "Banking Act"—but under that properly called a "bill of exchange."

There was a time when that distinction could not properly have been made, and when it would have been called as I have called it, a "cheque."

I have done so designedly for the reason that there are some considerations which I need not dwell upon, which shew that the position of the respondent holder would be worse if in relation to a bill of exchange than a cheque.

The curious may find in the case of *Robinson* v. *Hawksford*(1), many cases and authorities referred to where the law is discussed at a time when the distinction between a cheque on a private banker and a chartered bank did not seem to exist.

(1) 9 Q.B. 52.

And though it was urged then that the original consideration could have been sued upon, Patterson J. remarked that he thought not when the holder had vitiated the cheque by unreasonable delay.

Be that as it may, I am clearly of the opinion that the respondent cannot recover herein; if for no other reason than the credit given coupled with the most unreasonable delay which clearly led to the loss of apparently the entire sum through the bank accepting another cheque or bill in its stead, upon the principle laid down in the cases of *Smith* v. *Ferrand*(1), *Strong* v. *Hart*(2), *Lichfield Union* v. *Greene*(3), and by the late Mr. Justice Street (no mean authority) upheld in appeal, in *Boyd* v. *Nasmith*(4), and that the appeal should be allowed throughout, and the action be dismissed with costs.

DUFF J.—I am of the opinion that this appeal should be allowed with costs.

ANGLIN J.—I am, with respect for the learned judges who have taken the contrary view, of the opinion that this appeal should be allowed.

The material facts are as follows:

An inland bill of exchange drawn by the appellant on the Estevan Security Company payable on demand at Bienfait, Manitoba, was deposited by the payee (respondent) with its bankers at Calgary on the 14th November, 1914, for the present I assume for presentment and collection. These bankers had no agency at Bienfait. Instead of employing the Bank of Hamilton, which had a branch office there, to execute their mandate, the bankers sent the appellant's bill

(1) 7 B. & C. 19.
(2) 6 B. & C. 160.
(3) 26 L.J. Ex. 140.
(4) 17 O.R. 40.

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by post directly to the Estevan Security Company, presumably on the day they received it. From that time until the 10th of December, nothing further is known of the bill so far as is disclosed by the record. On the 10th of December the Estevan Security Company (with which from the 11th of November the appellant had funds on deposit sufficient to meet his bill) sent to the respondent's bankers a draft on the Union Bank at Winnipeg for the amount of the bill and on the same day stamped the latter "Paid." On presentment at Winnipeg, the Union Bank refused to honour the Security Company's draft. The latter company suspended payment on the 16th of December, and on the following day, the appellant received a telegram, sent on the 16th, informing him that his cheque (bill) had not been paid. Owing to the hopeless insolvency of the Estevan Security Company, any claim the respondent might have to rank in its liquidation in respect of his deposit with it is of little, if any, value.

Assuming that the respondent's bankers adopted a usual and proper course in sending the bill drawn by the appellant by the post to the drawees ("Bills of Exchange Act," R.S.C. c. 119, s. 78 (*d*); s. 90 (2)), they thereby constituted the latter their agents to present to themselves. If so, they must be accountable for the conduct of those agents in regard to the presentment for payment and a like accountability rests on the respondent. If there was a presentment, either it was grossly dilatory if not made until the 10th of December or, if it was made in due course after the receipt of the bill by the Security Company, there was what must, in the absence of any explanation, be deemed an inexcusable delay in giving notice that payment had been withheld. Unless the bankers received the money

by return of post, the absence of an answer should have been considered as a dishonour and notice thereof should have been given promptly. At all events, at least some inquiry should at once have been made, and that should have been followed up by steps to enable the appellant to protect his interest. So far as is disclosed by the evidence, nothing whatever was done. I am, therefore, of the opinion that, assuming there was a presentment of the bill, because there was undue and unaccounted for delay either in that presentment or in giving notice of dishonour by the agents of the holder, for which it cannot escape responsibility, the drawer is discharged. If authority for this view be needed, the case of *Bailey* v. *Bodenham*(1), supplies it.

It is a fair inference from the facts in evidence, that if the bill had been presented across the counter, as it might have been, it would have been paid. That the drawer was damnified to the extent of the face value of the bill by the failure of the bankers to discharge their duty, is therefore apparent. It follows that it is immaterial whether the instrument should be regarded as a cheque or as an inland bill of exchange. For reasons concisely stated by Winter D.C.J. in *Revelstoke Saw Mill Co.* v. *Fawcett*(2), I think it is not a cheque but a bill payable on demand, with the result, accurately stated by that learned judge, that, without proof of actual damage (which, however, exists in this case), the drawer was discharged not merely in respect of the bill, but also from his liability on the original transaction for which it was given.

Although the only plea of the defendant is payment, the defence of negligence in regard to presentment and notice of dishonour was fully investigated at the trial,

(1) 16 C.B.N.S. 288.

(2) 8 West. W.R. 477.

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and the issue upon one or both of these defaults was clearly before the court. Moreover, the defence based on the bankers' default is tantamount to a plea alleging that the plaintiff is thereby estopped from denying payment. No injustice to the plaintiff on grounds of surprise or otherwise can result from allowing the defendant to take advantage of any legal defence disclosed by the facts in evidence. Under these circumstances it would savour of extreme technicality to deprive him of the benefit of any such defence because not explicitly raised in his plea.

If, as is by no means improbable, the respondent's bankers, when they received the appellant's bill, placed the amount of it to the customer's credit, they would, under the circumstances in evidence, find great difficulty in maintaining a right to debit its account with the amount of the bill when eventually returned to them as unpaid. If they had not that right, the plea of payment might well be regarded as actually established. Moreover, there is not a little to be said for the view that the defendant, if then still liable, was discharged when the bankers took the Security Company's draft on the Union Bank instead of insisting on payment of his bill in cash. No doubt when that draft was issued the amount of the defendant's bill was charged against his account with the Estevan Security Company, and, as Mr. Justice Brown points out, he would thereafter have been to that extent unable to obtain payment from it of his deposit. It may be that after so charging up the bill to appellant's account, the Security Company should be regarded as having held the amount thereof, as agents for the respondent's bankers and therefore for the respondent.

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I prefer to rest my judgment, however, upon the effect of the negligence of the respondent through its agents in regard either to presentment or to notice of dishonour.

The appellant is entitled to his costs in this Court and in the Supreme Court of Saskatchewan *en banc* and judgment should be entered dismissing the action with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Willoughby, Craig & Co.*
Solicitors for the respondent: *Anderson, Bagshaw, McNiven & Fraser.*

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*Nov. 8, 9.
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*March 5.

EMMA E. GAUTHIER (SUPPLIANT) APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Constitutional law—Provincial statute—Application to Crown in right of Dominion—Arbitration—Revocation of submission—"Ontario Arbitration Act" R.S.O. [1914] c. 65, ss. 3 and 5.

A reference to the Crown, without more, in a provincial statute means the Crown in right of the province only.

Sec. 5 of the "Ontario Arbitration Act" making a submission to arbitration irrevocable except by leave of the court does not apply to a submission by the Crown in right of the Dominion notwithstanding sec. 3 provides that the Act shall apply to an arbitration to which His Majesty is a party.

Per Fitzpatrick C.J., Where a liability is imposed on the Crown in right of the Dominion it must be ascertained according to the laws of the province in which the cause of action arose in force at the time it was so imposed and cannot be added to by subsequent provincial legislation.

Judgment of the Exchequer Court of Canada (15 Ex. C.R. 444) affirmed.

APPEAL from a judgment of the Exchequer Court of Canada(1), in favour of respondent on the claim to enforce an award of arbitrators, but allowing the suppliant's claim for damages.

The suppliant is a licensee of fishing rights in the Detroit River which the Dominion Government agreed to purchase, the price to be settled by arbitration. Each party appointed an arbitrator and the two chose a third but before any proceedings were taken the Government gave notice revoking the

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

(1)15 Ex. C.R. 444

submission and announcing its intention to abandon the purchase. The Government arbitrator having withdrawn the other two proceeded to arbitrate and made an award in favour of the suppliant for a large amount and a petition of right was filed by the suppliant to enforce the award or, in the alternative, for damages. The judge of the Exchequer Court refused enforcement but gave judgment for damages with a reference. The suppliant appealed against the refusal to enforce the award. The Crown did not cross-appeal.

McGregor Young K.C. for the appellant. The liability of the Crown must be determined by the law of Ontario. *City of Quebec* v. *The Queen*(1), *The Queen* v. *Filion*(2), *The King* v. *Armstrong*(3), *The King* v. *Desrosiers*(4), And section 10 of the "Dominion Interpretation Act" makes the law to be applied that in force when the cause of action arose.

The "Arbitration Act" applies to cases in which His Majesty is a party to an arbitration and in applying this provision there is no distinction between the Crown in right of the province and in right of the Dominion. *Exchange Bank of Canada* v. *The Queen*(5), *Attorney-General of Canada* v. *Attorneys-General of Ontario Etc.* (6).

Hogg K.C. for the respondent. No provincial legislation can bind the Crown in right of the Dominion. See *Powell* v. *The King*(7); *Burrard Power Co.* v. *The King*(8). And the Ontario Act could not take away the Crown's common law right to revoke the submission in this case. *Attorney-Gen-*

(1) 24 Can. S.C.R. 420.
(2) 24 Can. S.C.R. 482.
(3) 40 Can. S.C.R. 229.
(4) 41 Can. S.C.R. 71.
(5) 11 App. Cas. 157.
(6) [1898] A.C. 700.
(7) 9 Ex. C.R. 364 at p. 374.
(8) [1911] A.C. 87.

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eral of Canada v. *Attorney-General of Ontario*(1), *Maritime Bank of Canada* v. *Receiver-General of New Brunswick*(2). And see *Attorney-General of British Columbia* v. *Attorney-General of Canada*(3), per Fournier J. at page 363.

The appellant is seeking to enforce an award but no such remedy is open to him against the Crown. See *McQueen* v. *The Queen*(4), *Dominion Atlantic Railway Co.* v. *The Queen*(5).

THE CHIEF JUSTICE. — The only question that falls to be decided on this appeal is the contention of the appellant that the Crown in right of the Dominion of Canada is bound by the Ontario statute, "The Arbitration Act," R.S.O. [1914] ch. 65.

The learned judge of the Exchequer Court holds against the view that in dealing with rights arising in any province regard must be had to the laws of the province as they were in force at the time of the passing of the "Exchequer Court Act," 50 & 51 Vict. 1887. He quotes section 10 of the "Interpretation Act," R.S.C. [1906] ch. 1.

> The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof, according to its spirit, true intent and meaning.

And continues:

> I do not think the view put forward can be upheld. If such a construction were placed on the "Exchequer Court Act" innumerable absurdities might arise, as the statute laws of the various provinces are from time to time repealed or varied.

So that but for other reasons which I shall presently discuss the learned judge would apparently hold that

(1) 19 Ont. App. R. 31; 23 Can. S.C.R. 458.
(2) [1892] A.C. 437.
(3) 14 Can. S.C.R. 345.
(4) 16 Can. S.C.R. 1.
(5) 5 Ex. C.R. 420.

the Dominion Crown would be bound by the "Ontario Arbitration Act."

It may be well to clear up at once an obvious error in the suggestion that it is always the laws in force at the time of the passing of the "Exchequer Court Act" to which regard must be had. The error has probably arisen from judicial decisions upon clause (*c*) of section 16 (now sec. 20) of that Act, by which it was determined that it imposed a liability upon the Crown which did not previously exist. The Crown, however, was of course liable in many cases, as of contract for instance, before the passing of the "Exchequer Court Act." *Thomas* v. *The Queen*(1). The principle is the same however, viz., that the liability is such as existed under the laws in force in the province at the time when the Crown became liable.

The learned judge's holding seems rather inconsistent with his subsequent statement that

> the local Legislature could not enact laws making the Crown, represented by the Dominion, liable.

I think too that difficulties, not to say absurdities, may arise whether the view is taken that the liability of the Dominion Crown is to be ascertained with reference to the laws of each province as they were in force when the Crown first came under liability, or as they may be from time to time varied by the statutes of the province. The question, however, has already been settled so far as this court is concerned by judicial decision.

In the case of *Armstrong* v. *The King*(2), in which the cause of action arose under section 16 (*c*), Mr. Justice Burbidge, after referring to the case of the *City of Quebec* v. *The Queen*(3), *The Queen* v. *Filion*(4),

(1) L.R. 10 Q.B. 31.
(2) 11 Ex. C.R. 119.
(3) 2 Ex. C.R. 252 at p. 269; 24 Can. S.C.R. 420.
(4) 24 Can. S.C.R. 482.

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Ryder v. *The King*(1), and *Paul* v. *The King*(2), added:

I think, too, that it may be taken to be settled by the general concurrence of judicial opinion in the cases referred to that it was the intention of Parliament that the liability of the Crown should be determined by the general laws of each province in force at the time when such liability was imposed.

On the appeal of the same case(3), Mr. Justice Davies said:—

I think our previous decisions have settled, as far as we are concerned, the construction of the clause (*c*) of the 16th section of the "Exchequer Court Act" and determined that it not only gave jurisdiction to the Exchequer Court, but imposed a liability upon the Crown which did not previously exist and also that such liability was to be determined by the general laws of the several provinces in force at the time such liability was imposed.

Although this was a case under section 16 (*c*) of the "Exchequer Court Act" by which a particular liability was for the first time imposed upon the Crown, the same principle, as I have said, must apply to all cases and the liability in each be ascertained according to the laws in force in the province at the time when the Crown first became liable in respect of such cause of action as is sued on. In other words, the local Legislature cannot subsequently vary the liability of the Dominion Crown, or at any rate, cannot add to its burden.

This was the opinion expressed by Mr. Justice Burbidge in *Powell* v. *The King*(4), at p. 374, where he said:

The question is whether an assignment of a claim against the Government of Canada, made in the Province of Ontario, gives the assignee a right to bring his petition therefor in his own name; or, in other words, whether the Crown as represented by that Government is bound by the statutes that have from time to time been passed by the Legislature of that Province to enable the assignee of a *chose in action* to bring an action thereon in his own name. * * * There is,

(1) 9 Ex. C.R. 333; 36 Can. S.C.R. 462.
(2) 38 Can. S.C.R. 126.
(3) 40 Can. S.C.R. 229.
(4) 9 Ex. C.R. 364.

I think, no reason to think that these statutes were or are binding upon the Crown; but even if it were conceded that the Crown, as represented by the Government of the Province of Ontario, was bound thereby, I should be of opinion that the Crown as represented by the Government of Canada is not bound. The only Legislature in Canada that would have power in that respect to bind the Crown, as represented by the Dominion Government, would, it seems to me, be the Parliament of Canada.

If I have rightly appreciated the reasoning of the learned judge of the Exchequer Court (Cassels J.), he holds that, whilst in an ordinary case the Dominion Crown would be bound by a provincial statute, the present case may be distinguished on the ground that the statute affects a prerogative right of the Crown. I find it very difficult to discover any principle on which such a conclusion could be arrived at.

The right to revoke a submission to arbitration was, prior to its curtailment by the Ontario statutes, one common to all subjects within that province. I do not understand how such a right as this can be considered as one of the prerogatives of the Crown, so as to base on this a conclusion that it could not be legislated against by the Provincial Legislature. It seems to me that the argument must involve any right of the Crown.

I do not derive any assistance from the authorities referred to in the judgment. The case of *Burrard Power Co.* v. *The King*(1), involved a question of Dominion property and the "B.N.A. Act, 1867," reserves to the Dominion Parliament the exclusive legislative authority over such property. The quotation from M. Chitty's book on "The Prerogatives of the Crown" to the effect that:—

> Acts of Parliament which would divert or abridge the King of his prerogatives, his interests or his remedies in the slightest degree, do not in general extend to, or bind the King, unless there are express words to that effect,

(1) 43 Can. S.C.R. 27.

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seems rather pointless, since the statute now in question does expressly purport to bind the King.

It is, however, unnecessary for me to comment further on the judgment. I agree with Anglin J. that the provincial Act, read as a whole, cannot be interpreted as applicable, for the reasons he gives, to bind the Dominion Crown.

And, in any event, the provinces have, in my opinion, neither executive, legislative nor judicial power to bind the Dominion Government. Provincial statutes which were in existence at the time when the Dominion accepted a liability form part of the law of the province by reference to which the Dominion has consented that such liability shall be ascertained and regulated, but any statutory modification of such law can only be enacted by Parliament in order to bind the Dominion Government. That this may occasionally be productive of inconvenient results is one of the inevitable consequences of a divided authority inherent in every federal system such as provided by the constitution of this country.

I agree also with Mr. Justice Anglin that section 19 of the "Exchequer Court Act" merely recognizes pre-existing liabilities; and cases falling within it must be decided not according to the law applicable to the subject matter as between subject and subject, but to the general law of province in which the cause of action arises applicable to the Crown in right of the Dominion.

The respondent, in his factum, declares that he is content to abide by the judgment of the Exchequer Court and to pay to the appellant the damages assessed by the referee. I agree with the conclusion of the judgment, though basing my opinion upon different grounds from those of the learned judge.

The appeal should therefore, I think, be dismissed with costs.

DAVIES J.—I concur in the opinion of Mr. Justice Anglin.

IDINGTON J.—The appellant represents a suppliant who had sought by means of a petition of right to enforce an alleged award made pursuant to an alleged submission by him and the respondent to the determination of arbitrators.

The claim so made has been dismissed by Mr. Justice Cassels and hence this appeal.

It seems to me there are several rather formidable and indeed some insuperable obstacles in the way of the appellant.

In the first place, on the argument I asked counsel for the appellant what authority any one agreeing on behalf of respondent to the alleged submission had for doing so. He admitted he had not in fact considered that matter but said he would consider it. Since then he has been good enough to hand in a memorandum which first refers to the material in the case shewing that the object of the Minister was to serve the fish breeding establishment of the Dominion, and next refers to the "Appropriation Acts" of 1910, by which one appropriation of $241,725 "to salaries, building and maintenance of fish breeding establishments" and another for $80,575 alike thereto, had been made and then refers to the report of the Auditor-General for the fiscal year 1910-1911 ending 31st March, 1911, which shews, he says, that $101,572.34 of this appropriation was not used.

I assume this is all that can be found and it falls very far short of anything that by implications of the most liberal kind could extend to the purchase by the

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Minister of a property worth nearly two hundred thousand dollars if the award is right.

There is no express authority to be found anywhere in these statutes relative to anything of that magnitude.

The Act, ch. 44 of the R.S.C. 1906, defines the Minister's duties and powers and they neither expressly nor by implication authorize the acquisition of such a costly property.

What he proposed to buy was a licence of occupation for twenty-one years issued by the Province of Ontario to have the effect of a lease of certain parcels of land covered by water, for which fifty dollars a year was to be paid by the licensee.

I can easily see authority to the Minister implied in the Act I have referred to enabling him to deal with what looked like a routine transaction even assuming the licensee were given double or treble what was apparently involved and the personal property that it was proposed to buy.

But when in the mind of the licensee and some of the arbitrators it became apparent that for some reason or other the transaction was going to result in one of such magnitude as seemed to transcend anything the Minister could reasonably have anticipated, he found his way out by revoking the authority given and properly did so if not bound irrevocably by the submission.

It is quite true he did not expressly ground it on the want of authority, but upon mistake on the part of some of the arbitrators as to the scope of the submission and what was intended thereby, which is perhaps another way of saying so.

I have, however, no hesitation in coming to the conclusion that if the transaction involved in the

award was of the magnitude it indicates, there never was authority in any one on behalf of the respondent to bind him by a submission of that kind, the arbitrators presumed to find in it, and hence the proceeding null.

I am not overlooking the fact that Ministers every day rightly deal with what involves far more than in question herein. But the authority of some statute always has to be relied upon in the last analysis; or their conduct and contracts on behalf of respondent must be ratified by Parliament.

And when it comes to a question of routine transactions each case must stand on its own merits as to whether or not it falls within the scope of what may reasonably be held to be of that character. And it must be borne in mind that even as regards contracts made by a Minister in respondent's name or on his behalf in the course of the routine discharge of duty it rests, or should rest, upon the express provision of some statute, or in the necessary implications found therein.

That is recognized in the order for damages to be assessed which has been made herein by the learned trial judge.

Lest, however, this vulgar mode of looking at such things should be considered as an unwarrantable assumption of the limitations of or a repudiation of the existence of the Royal prerogative, a vital force in which in the eyes of some, in regard to affairs of state at least, we must be held to live and move and have our being, let us consider the legal aspects involved from that point of view.

Let it be observed that no one in argument impugned the doctrine of the common law, as laid down by the learned trial judge, that it was quite competent

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for respondent to have withdrawn from such a submission.

Reliance is placed upon the provisions of the "Ontario Arbitration Act." Indeed the appellant's counsel seemed to rest his entire case thereon and the implications in the provisions of the "Exchequer Court Act."

There seems to me to be assumed in that argument an interpretation of the provisions of the said "Arbitration Act," which is by no means obvious on close examination thereof, in relation to the old well established rule, generally speaking, in the construction of Acts of Parliament, that the King is not included unless there are words to that effect.

The "Arbitration Act" in itself does include the King in these terms:—

Section 3:—This Act shall apply to an arbitration to which His Majesty is a party.

If that had been passed in the like legislation enacted by the Dominion Parliament then there would have been an end of argument on the point.

But can we for a moment assume that the local Legislature intended thereby to include the Crown on behalf of the Dominion or, for that matter, on behalf of the Crown in England or elsewhere in many parts of the Empire where it stands for many varying shades of meaning in relation to the Royal prerogative?

I cannot think so or impute to the Legislature any intention to go beyond what it was entitled to enact in relation to, and to be acting only within its proper sphere of activity.

The inquiring mind may see how this distribution of the Royal prerogative in the federal system has been worked out in other regards by the Judicial Committee of the Privy Council in the case of the *Bonanza Creek Co.* v. *The King*(1), at pp. 578 *et seq.*

(1) [1916] 1 A.C. 566.

And when we turn to the "Interpretation Act" of the province 7 Edw. VII. ch. 2 we find the following in section 7, subsection 5:—

The words "His Majesty," "Her Majesty," "The King," "The Queen" or "The Crown," shall mean the Sovereign of the United Kingdom of Great Britain and Ireland for the time being.

Section 7, subsection 53 of that Act provides:—

No Act or enactment shall affect in any manner the rights of His Majesty, his Heirs or Successors, unless it is expressly stated therein that His Majesty shall be bound thereby.

Surely these provisions can only mean in relation to that which, as a whole, relative to its own powers the Legislature was entitled to speak. If so then the enactment relied upon can only have relation to submissions in which His Majesty on behalf of the province might happen to be an actor.

I had occasion in the recent case of *Hamilton* v. *The King*(1), to consider the possible application of Ontario Statutes of Limitation expressly made to bind the Crown, and formed a decided impression that they never could have been intended to extend to cover the case of a like question arising between the Crown and a subject relative to property held by the Crown on behalf of the Dominion and claimed to have been acquired by His Majesty's subjects by virtue of the Statutes of Limitation.

The more I have considered the matter the more I see nothing but confusion likely to arise in defining judicially the relative rights of the Dominion and the provinces by assuming legislation of either in this regard in attempting to fasten on the other its own view of the prerogative.

Again this "Arbitration Act" evidently was intended to work out the solution of litigious questions.

(1) 54 Can. S.C.R. 331.

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And to carry into effect the principle contended for in its widest possible extent, would produce some curious results which I venture to think were neither intended nor expected.

For example; why was it not followed up by this appellant with the legal machinery therein provided to enforce it?

I imagine it must have been because if ever relied upon it was concluded it would not stand such a strain.

I must conclude it never was intended to be and hence is not applicable to a submission between respondent on behalf of the Dominion and a subject.

Properly speaking this submission was only intended for an appraisement or valuation but unfortunately in law as laid down by Sir Alexander Cockburn in *In re Hopper*(1), at page 373, the terms of the submission having contemplated the examination of witnesses and a judicial investigation and determination it must be held to be a submission in arbitration. And again I am tempted to ask by what authority? Needless, however, in my view to pursue that inquiry.

The other ground taken by appellant as to the applicability of the Act by means of the "Exchequer Court Act" fall with that view I have expressed if sound.

The only possible part of the "Exchequer Court Act," section 20, applicable herein, is subsection (*d*), which is as follows:—

(*d*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council.

It will be observed that the first obstacle in appellant's way is the meaning of the ambiguous expression "any law of Canada" which I may say has never

(1) L.R. 2 Q.B. 367.

yet been determined though considered in the case of *Ryder* v. *The King*(1), and other cases but got in that case from the majority of this court an interpretation tending to narrow its operation and defeat such contentions as appellant sets up herein.

In the next place, if my view of the "Arbitration Act" be correct, it is not a law of "any part of Canada" in such way as to help appellant, being limited by its very terms to the possible cases of submission by the Crown on behalf of the province and not capable of extension to any other case where the Crown is concerned.

I think the appeal should be dismissed with costs.

DUFF J.—The appeal should be dismissed with costs.

ANGLIN J.—The Crown has not appealed against the decision of the Exchequer Court holding it answerable to the suppliant in damages for breach of a contract to purchase certain fishing rights held by him.

The suppliant, however, not content with this relief, seeks to have it determined that the Crown is bound by an alleged award as to the purchase price (which the agreement stipulated should be fixed by arbitration) made, after notice of revocation of the authority of the arbitrators had been given on its behalf, by two of the three arbitrators appointed to determine it.

The Crown maintains its right to revoke the authority of an arbitrator before the award has actually been made; the appellant denies that right.

He contends that the liability of the Crown under the "Exchequer Court Act" is to be determined according to the law of the province in which the cause

(1) 36 Can. S.C.R. 462.

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of action arises; that its liability is the same as would be that of a subject under like circumstances; and that the "Ontario Arbitration Act," (9 Edw. VII. ch. 35; R.S.O. 1914, ch. 65), which takes away the right of revocation and is made applicable in explicit terms to "His Majesty," defined by the "Interpretation Act" as meaning:—

> the Sovereign of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas, (7 Edw. VII. ch. 2, s. 7, s. s. 5)

applies to the Crown in right of the Dominion.

The cause of action arose and all the proceedings have taken place in Ontario, and, no doubt the construction and legal effect of a contract made and to be performed in any province of Canada must ordinarily be determined in the Exchequer Court according to the general law of that province.

There are, however, two fallacies in the appellant's contention—one the assumption that liability *ex contractu* of the Crown in right of the Dominion depends upon the "Exchequer Court Act;" the other, that a series of decisions, culminating in *The King* v. *Desrosiers*(1), holding that a liability of the Crown imposed by clauses of section 20 of that Act is the same as would be that of a subject under like circumstances in the province in which the cause of action arises, applies to cases falling within section 19. This latter provision (originally found in section 58 of 38 Vict. ch. 11) does not create or impose new liabilities. Recognizing liabilities (*in posse*) of the Crown already existing, it confers exclusive jurisdiction in respect of them upon the Exchequer Court and regulates the remedy and relief to be administered. In regard to the matters dealt with by this section there is no

(1) 41 Can. S.C.R. 71.

ground for holding that the Crown thereby renounced whatever prerogative privileges it had theretofore enjoyed and submitted its rights and obligations to be determined and disposed of by the Court according to the law applicable in like cases between subject and subject. The reasons for which it was so held in regard to liabilities imposed by section 20, are stated by Strong C.J. in the earlier part of his dissenting judgment in *The City of Quebec* v. *The Queen*(1), See, too, *The Queen* v. *Filion*(2), *The King* v. *Armstrong* (3), and *The King* v. *Desrosiers*(4). No other law than that applicable between subject and subject was indicated in the "Exchequer Court Act" as that by which these newly created liabilities should be determined. Placing upon that section a "wide and liberal" —a "beneficial construction"—"the construction calculated to advance the rights of the subject by giving him an extended remedy,"—it was the view of the former learned Chief Justice, and is now the established jurisprudence of this Court, that it was thereby

> not intended merely to give a new remedy in respect of some pre-existing liability of the Crown but that it was intended to impose a liability and confer a jurisdiction by which the remedy for such new liability might be administered in every case in which a claim was made against the Crown, which, according to the existing general law, applicable as between subject and subject, would be cognizable by the Courts.

But, since section 19 merely recognizes pre-existing liabilities, while responsibility in cases falling within it must, unless otherwise provided by contract or statute binding the Crown in right of the Dominion, be determined according to the law of the province in which the cause of action arises, it is not that law as applicable between subject and subject, but the

(1) 24 Can. S.C.R. 420.
(2) 24 Can. S.C.R. 482.
(3) 40 Can. S.C.R. 229.
(4) 41 Can. S.C.R. 71.

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general law relating to the subject-matter applicable to the Crown in right of the Dominion which governs. That law in the Province of Ontario is the English common law except in so far as it has been modified by statute binding the Crown in right of the Dominion.

By the English common law, while an agreement to submit any matter to arbitration has always been irrevocable like any other contract, and the breach of it entails liability for damages, the authority of the arbitrator, because in its nature revocable, might be withdrawn by any party to the submission at any time before the award was made, even though declared irrevocable by express words in the agreement. Legislative action alone could render it irrevocable. In England it was first sought to control this power of revocation by a statutory provision that every submission to arbitration might be made a rule of court (9 & 10 Wm. III., ch. 15), thus subjecting the party who might attempt to escape from carrying it out to the penalties of contempt, but still leaving him the actual power of revocation. By the Act 3 & 4 Wm. IV., ch. 42, s. 39, it was, however, expressly provided that the authority of an arbitrator under a submission containing a provision that it might be made a rule of court should not be revocable without the leave of the court. By 17 & 18 Vict. ch. 125, sec. 17, it was further enacted that every submission might be made a rule of court, unless a contrary intention should appear. It was not until 1889 that the term or condition of irrevocability, then declared to attach to every submission which did not provide otherwise, was also made applicable to the Crown (52 & 53 Vic., ch. 49, ss. 1 & 23).

There is no Dominion statute in point.

The introduction of English law into Upper Canada in 1792 carried with it the Imperial statute 9 & 10 Wm. III., ch. 15. None of the later Imperial legislation regarding arbitrations extends to Ontario. The provincial statute, 7 Wm. IV., ch. 3, sec. 29, however, is similar in its terms to the Imperial statute 3 & 4 Wm. IV., ch. 42, sec. 39, and, since 1859 (C.S.U.C., ch. 22, sec. 179), it has been substantially the law of Ontario, as is now provided by section 5 of the "Arbitration Act" (R.S.O. 1914, ch. 65), that the authority of an arbitrator appointed under a submission, which does not contain a stipulation to the contrary, is irrevocable, "except by leave of the court," and that every submission shall have "the same effect as if it had been made an order of the court."

The application of this section of the "Arbitration Act" was first extended to the Crown in 1897 by an amendment declaring that that statute "shall apply to any arbitration to which His Majesty is a party" (60 Vict., ch. 16, sec. 46; R.S.O. 1914, ch. 65, sec. 3).

Until that provision was enacted, although a subject could not do so, the Crown in right of the province was at liberty to revoke the authority of an arbitrator appointed under a submission to which it was a party. Of course the Crown in right of the Dominion had the same right and, unless it has been taken away by the provincial statute of 1897, it still exists.

Section 5 of the "Ontario Arbitration Act," were it applicable and *intra vires*, would compel the Crown in right of the Dominion, if it would preserve its right of revocation, to safeguard that right by explicit reservation in every submission by it to arbitration in respect of any difference in regard to property or rights in Ontario. If that were the purview of section 3 of

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the "Ontario Arbitration Act" it would, in my opinion, be *pro tanto ultra vires*. Provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in right of the Dominion. An interpretation that would render it *ultra vires* should, of course, be placed upon a statute only if unavoidable.

That it was never intended that section 5 of the "Ontario Arbitration Act" should apply to the Crown in right of the Dominion is reasonably clear from its provisions. Thus, if applicable, it would require the Crown in right of the Dominion, should it desire to withdraw from a submission, in the absence of an express reservation therein of that right, to seek the leave of the provincial Supreme Court, (section 2 (*a*); "Interpretation Act," section 20 (*dd*)), and it would purport, since the submission would "have the same effect as if it had been made an order of court" (*i.e.*, of the Supreme Court of Ontario), to subject the Crown in right of the Dominion to the jurisdiction of that court, although by section 19 of the "Exchequer Court Act" the Dominion Parliament has given to the Exchequer Court of Canada

> exclusive original jurisdiction in all cases * * * in which the claim arises out of a contract entered into by or on behalf of the Crown (in right of the Dominion).

The provincial Legislature never intended to attempt anything of the sort.

I think it may be accepted as a safe rule of construction that a reference to the Crown in a provincial statute shall be taken to be to the Crown in right of the province only, unless the statute in express terms or by necessary intendment makes it clear that the reference is to the Crown in some other sense. This would seem to be a corrollary of the rule that the Crown is not bound by a statute unless named in it.

It does not at all follow that, because the liability of the Crown in right of the Dominion is to be determined by the laws of the province where the cause of action arose, that liability is governed by a provincial statute made applicable to the Crown in right of the province, since it is by the provincial law only so far as applicable to it that the liability of the Crown in right of the Dominion is governed. Nor is it a reasonable or proper inference that by executing a submission to arbitration in regard to a matter arising in any province of Canada the Crown in right of the Dominion intended to become bound in respect thereof by a provincial statute otherwise not applicable to it.

I would dismiss the appeal.

Solicitors for the appellant: *Young & McEvoy.*

Solicitors for the respondent: *Hogg & Hogg.*

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*Nov. 13, 14.
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*March 5.

THE ACTON TANNING COMPANY AND OTHERS (DEFENDANTS). } APPELLANTS;

AND

THE TORONTO SUBURBAN RAILWAY COMPANY (PLAINTIFFS) ..... } RESPONDENTS.

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

Railway—Permission to enter land—Oral agreement—Statute of Frauds—Compensation—Company—Authority of president.

A railway company, without expropriating, ran its line through the yards of a tanning company and did work improving the yards and other work beyond the ordinary scope of a railway project. Four years later the tanning company applied to a judge for the appointment of arbitrators under the "Railway Act" to determine the compensation for the right of way which the railway company, opposing the application, claimed to be entitled to without payment under an oral agreement with the president of the tanning company since deceased. The judge ordered the trial of an issue, with the railway company as plaintiff, to determine the rights of the parties and on appeal from the judgment of the Appellate Division:—

Held, Idington J. dissenting, that the evidence established that such an agreement was entered into.

Held, also, Idington J. dissenting, that the agreement was binding on the tanning company, that said company was owned and controlled by a commercial firm of which the president was the head and the partnership articles and evidence at the trial shewed that he had authority to bind the company; and that the Statute of Frauds could not be relied on to defeat the action as it was not brought to charge the defendants on a contract for the sale of land or of an interest in land. If applicable it was taken out of the statute by part performance.

Duff J. also dissented from the judgment pronounced.

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

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

The facts are sufficiently stated in the above headnote.

H. J. Scott K.C. for the appellants. The president had no authority to bind the company by the agreement. See *Calloway* v. *Stobart Sons & Co.*(1).

The possession of the railway company may be referable to the compulsory powers under the "Railway Act" and not to the agreement which brings the case within the Statute of Frauds. See *Maddison* v. *Alderson*(2); *Mercer* v. *Liverpool Railway Co.*(3).

Nesbitt K.C. and *Christopher Robinson* for the respondents cited *McKnight Construction Co.* v. *Vansickler* (4); *McGregor* v. *Curry* (5), and *Wilson* v. *Cameron* (6).

THE CHIEF JUSTICE.—This appeal should be dismissed with costs.

DAVIES J.—I concur in the opinion of Mr. Justice Anglin.

IDINGTON J.—The respondent began to construct its railway through the yard of the Acton Tanning Company at Acton some time in 1913. And when the latter insisted upon being compensated and proceded to have an arbitrator named, under the "Railway Act" in question, to fix the compensation for such expropriation, the application was opposed by respondent on the pretension that the late Walter D. Beardmore, who was the president of the said Acton Tanning Company at the time of the entry upon its lands, had assented to what was done and agreed that there should be no compensation demanded.

(1) 35 Can. S.C.R. 301.
(2) 8 App. Cas. 467.
(3) [1903] 1 K.B. 652; [1904] A.C. 461.
(4) 51 Can. S.C.R. 374.
(5) 31 Ont. L.R. 261.
(6) 30 Ont. L.R. 486.

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Thereupon the application was directed to stand over until the respondent had had an opportunity to establish by means of this suit what it then alleged.

The learned trial judge entered judgment for the respondent and the Appellate Division of the Supreme Court of Ontario has upheld same. Hence this appeal.

The Acton Tanning Company had, prior to the existence of the respondent, expended some forty thousand dollars in order to have sidings constructed by the Grand Trunk Railway Company connecting the line of that railway with the tanning company's works, and that railway company had expended a considerable sum besides in such construction.

This had apparently been done under a written agreement between the companies which is not in evidence save indirectly by reference made to it as a possible obstacle to carrying out the project of respondent as it might desire. It was admitted in argument that it had provided for the Acton Tanning Company agreeing to give the Grand Trunk Railway Company the exclusive right to the carriage of its freight. An opinion was got from the respondents' solicitors that this provision being against public policy was not binding.

The question of the business policy of thus ignoring an important agreement certainly was deserving of consideration on the part of others as deeply concerned in the management of the appellant company's business as the late Mr. Beardmore.

The further questions of discarding or at all events meddling with the works so constructed thereunder and substituting thereby the new line or rearranging the tracks to provide for that new line and the old, each having suitable access to appellant's company's business premises, also seem to be of a character that

demanded they should be brought under the notice of the company's directors and shareholders.

The annual freight expenditure for shipment over the Grand Trunk amounted to about a hundred thousand dollars. This fact alone helps to realize the magnitude of the problems presented to appellant company by the incoming of the new line.

The question of the location of such a line when it was proposed to bring it through the yard of the appellant company's business premises, must necessarily have raised grave matters for the consideration of its directors if at all a matter of bargaining, as it is claimed to have been.

Of course the respondent could probably expropriate such a route without regard to consideration thereof by any one.

It is said that the future extensions of the buildings had been mentioned as a possible necessity of the appellant company, but in relation thereto the selection between coming through on the north instead of the south side of said buildings was decided by the late Mr. Beardmore and that was acted on accordingly without reference to the other directors.

Three or four different lines had been surveyed by respondent's engineers for the purpose of going through the village of Acton. It is said by the respondent that of these the most expensive was chosen by the late Mr. Beardmore. Again nobody else was consulted. For a corporate company giving away or agreeing to sell any of its lands used in and for its business premises, I venture to think no president thereof has any authority in law unless formally conferred upon him by the by-laws of the company, or at all events by the board of directors, and possibly also the majority of the shareholders.

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When these several extraordinary powers relative to matters involving the future of the company alleged to have been exercised by the late Mr. Beardmore were dealt with in argument, counsel for respondent did not seem to rely much upon the inherent authority of a president, but upon that contained in articles of a partnership which he referred to as a holding company.

I shall presently advert to the provisions so relied upon, but meantime I think it well to set forth exactly what the appellant company was, and how constituted and governed.

The company was incorporated in the year 1889, under and by virtue of an "Act respecting the incorporation of Joint Stock Companies by Letters Patent," being chapter 157 R.S.O. 1887. The majority of the shares were held by members of an unincorporated firm known as Beardmore & Company, which was composed of Walter D., George, Alfred and Frederick Beardmore. These gentlemen held shares in other companies, incorporated in like manner, I presume, to the Acton Tanning Company, and had divers establishments carried on by such like corporations or otherwise by unincorporated management.

The by-laws of the company provided for a board consisting of three directors to be elected annually by the shareholders of the company, of whom two should form a quorum and the majority of the members of the board should govern in all matters.

The president was to have a casting vote in the event of a tie. He was to call meetings of the board whenever he might deem it necessary and also at the request of two directors, each member having one day's notice of the meeting.

He was bound to call a meeting of the stockholders at the written request of two or more shareholders

holding at least one-quarter of the capital stock of the company.

Such being the tenor of the by-laws there seems little ground for the implication of there being a right inherent in the president to exercise such autocratic powers as it is alleged he exercised in this instance.

Then let us turn to the articles of partnership and see what, if any, authority they conferred on him for exercising the corporate powers of the company in such regards as involved in the momentous questions presented to him as president.

Walter D. Beardmore was not only to the eyes of the world apparently the most active man managing these various concerns above referred to, but also, by an agreement entered into on the 31st December, 1904, between them, was constituted, it is said, the manager of the whole.

So much turns, in my opinion, upon the powers conferred upon the said Walter D. Beardmore by virtue of the said agreement that I think it well to get accurately seized of a fairly correct understanding thereof. I think that may be accomplished by a careful consideration of the first three sections of the said agreement, and section 11, much relied upon, and the latter part of section 7 thereof.

There is nothing unusual in the agreement save in the magnitude of the business if we look at it as articles of partnership. The articles provide for the continuance thereof for a period of five years from the 1st day of January, 1905; that the head office of the firm should be at the city of Toronto; that the said partnership was intended to comprise and include:—

(a) The business of the present firm of Beardmore & Co. of Toronto and Montreal.

(b) The business of the present firm of Beardmore & Co. of Acton.

(c) All shares of the capital stock in the Muskoka Leather Company

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Limited, the Acton Tanning Company Limited and the Beardmore Belting Company Limited owned by the said parties including the stock in any of the said Companies standing in the name of the wife of the first party as to which the first party undertakes to secure transfers or declarations of trust in favour of the firm forthwith on the execution of these presents.

And the capital of the said partnership shall be the interest of the parties in the said premises valued as hereinafter provided, estimated to amount approximately to $1,275,000 to be contributed by the said partners approximately in the following proportions—$500,000; $400,000; $250,000 and $125,000 by the first, second, third and fourth parties respectively. Said shares of stock in said companies shall continue to be held in the name of said partners individually but shall be so held in trust for the firm.

Section 11, which I have referred to, was as follows:

11. Each partner shall at all times give such supervision and attention to the partnership business as may be necessary for the efficient management thereof but the first party shall have the general oversight and direction of the business.

and is really the most important in the whole document, when we come to consider what turns upon it.

Now the proposition of law which we are gravely urged by counsel arguing for the respondent company to adopt, that the president of such a company as the tanning company, armed only with the powers conferred upon him as its president, and the clause 11 quoted above in the partnership agreement, was entitled to ignore his fellow shareholders, his partners in business, and make such a bargain conceding not only the right of way, but all that was involved in determining where the right of way was to be exercised, is to my mind not only startling but absolutely unfounded.

But when we find that counsel taking that stand relies upon parapraph 11 of the partnership agreement, it is necessary to consider that. I have done so, and read same many times and I fail to find therein anything but a general oversight and direction of the business.

It is to be observed that it was the business that was being conducted there, and not the disposition of the property or a radical changing of its application that was being dealt with by this partnership agreement.

And when we find further that the partners who executed this agreement were not the only persons concerned, but that Mr. Clark, who had for years acted as superintendent of the carrying on of the business of the company in question, held thirteen shares which had not yet become the property of any one of the partners, but which we find referred to in the following language in paragraph 7 of the agreement:—

> And in case stock in the Acton Tanning Company Limited, now standing in the name of James E. Dunn and John Clark shall revert to said third party same shall be deemed the property of the firm,

we may ask how he came to be ignored.

We also find in the agreement when it was executed that there seems to have been a large block of stock held by the wife of the said Walter D. Beardmore. He bound himself by these articles of agreement, as appears in the passage quoted above, to procure the transfer thereof to the firm.

I am not sure whether that ever was obtained or not but in argument it was admitted that there were thirteen shares held by Mr. Clark which had not ceased to be his property at the time in question. We find also that Walter D. Beardmore only held 35% of the entire assets at the time of the said articles, and at the time in question by a renewal thereof which was in force then, a slight fraction less than that proportion of the entire interest in these amalgamated businesses.

I submit it is rather an untenable argument which in one breath emphatically holds that the majority of the shareholders in an incorporated company were,

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without any meeting, without consultation with the minority shareholders, simply because they constituted the majority, entitled to disregard the minority without going through the form of calling a meeting of the shareholders, and then in the next breath try to maintain the position that Walter D. Beardmore, who himself was only the holder of a minority of the shares, could by such slender authority as contained in paragraph 11 of the agreement, ignore the majority and deal with such an important piece of business as that in question in the way he is alleged to have done.

It looks very much as if either argument was only supposed to be good for the purposes of this case and that we are asked to adopt one or other of them to maintain the respondents' contention.

I am unable to accept either proposition. I think there was no authority in Walter D. Beardmore, by virtue of his position under the articles of agreement, to make such a bargain as it is claimed he did.

I am further of the opinion that if the majority of the shareholders had actually authorized such a transaction and ignored entirely in doing so the minority shareholder, or shareholders, in sanctioning such an agreement, they were doing so without authority in law.

In any way I can look at the transaction it was of such an important character that it is hard to suppose that any man of experience in business would venture upon a binding contract such as the late Walter D. Beardmore is alleged to have made without consulting his partners and fellow shareholders.

I can understand a man in his position tentatively taking the position that it would be a wise thing for his company to consider, and on that supposition was

entirely within his rights in submitting to Sir William Mackenzie the proposition for his assent.

That, however, is very far from the contention that is set up by the respondents. It must involve a binding bargain or amount to nothing so far as the disposition of this case is concerned. Unless there was a definite conclusive bargain made which would entitle the court to stay proceedings for arbitration under the "Railway Act," this action must fail.

What transpired may be very cogent evidence, if admissible at all, in the way of minimizing compensation to be awarded in such an arbitration, but with that we have nothing to do.

The other members of the firm, holding nearly two-thirds of the entire capital invested in the business and profits to be derived from carrying it on, had never been consulted.

It seems a most remarkable thing that the late Mr. Beardmore, who felt such a delicacy in acting without consulting his brothers in relation to a matter which was but a fractional part of what was involved in the very execution of the contract now set up, should write as follows:—

The Marlborough-Blenheim,
Atlantic City, N.J.,
October 28th, 1912.

Dear Sir William:

I have been in Boston, New York and Philadelphia, for a few days, and returning here find Ansell's (Annesley's) note (your secretary) enclosing consent to Acton crossing. Up till now I have not thought it well to mention the matter to my brothers. I am not sure that it would be policy to do so now, but you will agree with me that under the present circumstances it would hardly do for me to sign the consent without their concurrence. I expect to be home on Saturday or Sunday at the latest and will see Mr. Royce. I may tell you that a short time since when Mr. Hewson, the Grand Trunk Railway resident engineer, spoke to me about the matter, I told him at once that the G.T.R. must not look to me for any help as I would not oppose the crossing.

Very sincerely yours,
W. D. Beardmore.

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and yet he readily presumed not only to have absolute power, but to be taken as having asserted it.

I cannot see why, and still less when we realize the relations that existed between Sir William Mackenzie and himself, and the manner in which the subject was approached and handled throughout.

In the course of their social intercourse, Walter D. Beardmore and the said president, Sir William Mackenzie, are said to have got into conversation on the subject of freight from the Acton company's premises, and the desirability of greater facilities of shipment therefrom. This sort of conversation had taken place more than once, but it is alleged that on an occasion shortly after the trial lines had been run, it had become apparent that one of the favourite schemes of the engineers would, if executed, come too close to the home of Willie Beardmore, son of Walter D. and a son-in-law of Sir William Mackenzie. This feature of the project led to something more definite than had previously taken place.

A good deal, in fact a great deal, has been argued both before us and in the courts below, as to the exact nature of the final conversation on the subject.

Walter D. Beardmore is dead and the only direct evidence of the conversation is that given by Sir William Mackenzie. Much has been said about the exact nature of the conversation and whether there was any necessity for having it corroborated by some material evidence.

In my view of the case I do not think I need reach a very definite opinion on many of the issues thus raised. I need only to apprehend accurately what it is that is involved in that which Sir William Mackenzie states. His statement is alleged to maintain the proposition that the company of which he is the head

was to have the right to pass through the yard of the appellant, the Acton Tanning Company, in the course of constructing their road.

Indeed he expresses the matter in somewhat different terms in the course of his evidence, but what he tried to make definite was that there was to be no cost of right of way to his company. He says:—

> We were going in there and he was not paying us to go in and we were not paying. We were not to pay anything to go in to give them the service.

It is quite clear that there was no definite location finally decided upon in these conversations. It is tolerably clear that they were to go through the yard but the exact spot that they were to pass over was even changed in the course of carrying out the instructions given pursuant to what the engineer, Mr. Wilkie, says in his evidence he supposed to be based upon what was a tentative agreement between Sir William Mackenzie and Mr. Beardmore.

There was no doubt in the service of the respondent someone as solicitor to prepare and have executed conveyances of the right of way as soon as agreed upon, and all the more likely to have that speedily completed if it was to be got for nothing. Why was that not done reif a definite and completed bargain had been ached?

There were accounts rendered respondents and paid, which had plainly as possible emphatically intimated that the appellants recognized no such bargain as now set up, and were waiving no claim to the usual compensation for right of way.

These explicit statements never were reported or denied or challenged in any way until Walter D. Beardmore had died.

I have already intimated my decided opinion that there existed no authority in Mr. Beardmore to make

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such a bargain and hence it is not necessary I should enter into an elaborate examination of the question of the right to specific performance if he had.

I venture, however, to suggest that the principles upon which courts of equity have uniformly acted in such cases of doubt and difficulty and possible injustice being done by the decree of specific performance, form an unsurmountable barrier in the way of any one seeking to enforce against those not actually parties to it, such an indefinite and incomplete arrangement resting only upon alleged conversations had with a man dead before it was sought to have it fulfilled and founded on such doubtful authority on the part of him so dead, and so inconsistent with his conduct in relation thereto in his lifetime and described by as intelligent a witness as the engineer who located the line where it is because he had been told there was a tentative agreement being made.

It is urged that the definite claim to compensation was not made until the road had been constructed.

That is no unusual occurrence in railway building or execution of works under municipal authority if the records of this court are taken as a guide.

I think the appeal should be allowed and the action dismissed with costs throughout.

DUFF J.—The appeal should be allowed with costs.

ANGLIN J.—This litigation is attributable to the neglect, too common in transactions between persons intimately connected by ties of friendship, marriage or blood, to apply business methods to business matters. Assuming the plaintiff's contention to be right, the most ordinary precaution for its officials to take would

have been to have had a memorandum of its agreement with the defendants prepared, or a deed of the right of way executed. If, on the other hand, the defendants' position is correct, their allowing the railway company to enter and occupy a right of way through their property without opposition or protest and their subsequent inaction for at least three years evinces such neglect of most obvious business precautions that, coupled with other attendant circumstances, if affords evidence of no little cogency against the claim which they now prefer.

The material facts appear in the judgments delivered by the learned trial judge and in the Appellate Division.

To the plaintiffs' demand for a declaration that it is in possession of the right of way which it occupies through the defendants' yards under an agreement whereby, in consideration of its locating its railway where the defendants desired and paying the cost of removing certain buildings, sheds, piles of tan bark, etc., making certain improvements in the defendants' yards by filling, grading and otherwise, and providing for necessary changes in the location of Grand Trunk Railway spurs, it should obtain its right of way through the yards without other or further cost, whether for value of land taken or for injurious affection of adjacent property of the defendants, three defences are raised—denial of the making of the alleged agreement; a plea of the Statute of Frauds; and a repudiation of the authority of the late Walter D. Beardmore, its president and managing director, to bind the defendant company by such an agreement if made.

The first question is so purely one of fact that the finding of a trial judge, unanimously affirmed on appeal, would ordinarily be conclusive upon it. What-

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ever agreement there was was made between Sir William Mackenzie, the president of the plaintiff railway company, and the late Walter D. Beardmore. An alleged absence of corroboration of Sir William's evidence is chiefly relied upon by appellant. After giving the circumstances that led up to the arrangement being made, Sir William's evidence was:

Mr. Nesbitt: I understood Mr. Henderson (the railway company's solicitor) to say that he had gone to see you and had told you of the southerly line? A. Yes, I was informed of the other lines and lines that it would cost less money to build.

Q. And that Mr. Beardmore was asking you to go through there, and that they would not go there unless you said so, and I think he said something about the Davies arbitration? A. I don't remember anything about that coming up particularly, but the Beardmores were very anxious to have this accommodation, and were willing that there would be no expense to them or to us, no more than building the line. Mr Walter Beardmore is the one that talked to me about it most I think nearly all the time, but I did mention it to George at one time in my office, and he said, oh, it was all right as far as he was concerned, that Walter attended to that business. Matters went on and we went through there.

Q. Did you have any arrangement or bargain with Mr. Walter Beardmore as to the terms on which you were going through? A. As I said this moment, there was to be no cost; we were going in there and he was not paying us to go in and we were not paying. We were not to pay anything to go in to give them the service.

Q. It was free of cost both ways? A. Yes.

Again on cross-examination he said:

When you were discussing the matter with Walter Beardmore, and you said he could have all this without it costing anything, had you anything in mind as the right of way? A. Why, of course, we could not give them the service without getting into the yard.

Q. The point is that if he could get it in there without costing him anything, what arrangement was made with the Grand Trunk? The question is how you and he, at that time, understood that the right of way was to be paid for? A. We were to have free right of way, and we were to do all our own work, anything done in the yard, like re-arranging, or getting rid of any buildings, or anything of that kind.

Mr. Mowat:

It is suggested that you and Walter Beardmore thought it was mutually advantageous to you to have the railway close to their shops and it is suggested that Walter did this without authority, and without

consultation with his brothers? A. I don't know anything about that; but I did mention it to George.

Q. And he said, "Walter is attending to that?" A. He said it was all right as far as he was concerned.

The anxiety of the Beardmores to have the railway go through their yards is deposed to by Mrs. W. D. Beardmore and her daughter. The objection of the right of way men and engineers to this route as more costly and difficult, and its ultimate selection solely because of an explicit direction of Sir Wm. Mackenzie, and upon the understanding that he had arranged with the Beardmores for the right of way through their yards is also well established. Moreover, it is undisputed that the railway company did work of filling swamps, and holes, cutting down side hills, grading, making roads, etc., thus improving the Beardmore yards, and paid for the cost of re-arranging shipping facilities and removing tan bark and cement blocks—all quite outside any obligations of a company merely carrying out a railway project in the ordinary way and attributable only to some special arrangement. But, apart from the corroboration afforded by these circumstances deposed to by several witnesses, explicit confirmation of Sir William Mackenzie's statement is given by Mr. Wicksteed, consulting engineer of the plaintiff company. He says:

Q. Did you have anything to do with any bargain between him (W. D. Beardmore) and Sir William, or is your knowledge merely hearsay? A. Hearsay and inference. I was present at several interviews and it was quite evident to me that there was an understanding between them. That is as far as I can say.

Q. The conversation proceeded on that basis? A. Quite so.

Q. You were there when he was claiming that certain expenditures should be made? A. Yes.

Q. And apparently it was assumed that they should be made by reason of a previous arrangement to that effect? A. Quite so. Sir William deputed me to arrange the details in several instances.

Q. Where was the meeting with Mr. Beardmore held? A. In Mr. Beardmore's own office, on Front Street.

Q. The office of Beardmore & Co. A. Yes, on Front Street.

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And on cross-examination:

Q. What was your understanding as to the actual right of way on which the railway was? Who was to pay for that? A. The tenor of all the conversations that I heard between Sir William and Mr. Beardmore—amd I heard many—was that the right of way was free. The damage such as the removal of bark piles and such things as that were to be paid.

* * *

Mr. Mowat: You understood that the lands inside the yard were to be free? A. Yes.

Q. Where do you say the yards ended? Where was freedom to stop and payment to begin? A. The portion occupied by the work and bark piles.

Q. The area which would be occupied by buildings and bark piles? A. Yes.

Q. Roughly speaking, how much would that be? How far east of the easterly building? A. I would say about half a mile altogether.

Q. A half a mile from east to west? A. Yes, about 3½ acres.

Q. Your understanding was that outside of that the railway was to pay for the land taken at the average price in the district? A. I inferred that, at least I saw no reason to infer otherwise.

If corroboration were necessary I think we have more than enough here. I have not overlooked the adverse comment on Mr. Wicksteed's evidence based on a memorandum of the 18th November, 1913, in connection with voucher No. 851. Mr. Wicksteed was not confronted with that memorandum on cross-examination, as he should have been if it were proposed to rely upon it to impugn the credibility of his oral testimony. On the other hand, his letter of the 21st of October, 1913, which is in evidence, refers to the fact that running through the Beardmore property "has saved us a large sum in right of way." Both these documents were before the learned trial judge. He saw and heard both Sir William Mackenzie and Mr. Wicksteed and he appears to have fully credited their testimony. The verisimilitude given it by the probabilities arising upon the surrounding circumstances no doubt weighed with the learned judge. To overturn in this court a finding thus supported

and unanimouly affirmed by the court of last resort in the province is practically impossible. It must be assumed to be correct.

For the reasons given by the learned Chief Justice in the Common Pleas, delivering the judgment of the Appellate Division, the Statute of Frauds probably has no application. The action is not brought

to charge (the defendants) upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them.

That the respondent is rightly in possession of the right of way is not questioned. There is no suggestion that it is a trespasser. It has admittedly given some consideration therefor—whether the whole or only a part is the matter in issue. The real plaintiffs are the appellants, who seek to recover an alleged balance of that consideration; the real defendant, the respondent, who resists their claim.

If the statute otherwise had application the case would appear to be taken out of it by part performance, The taking possession of the right of way and the construction of the railway without any proceedings having been taken under the expropriation clauses of the Railway Act, and without protest of any kind, the improvements made by the railway company in the defendants' yards and its expenditures for them on new buildings and the removal of piles of tan bark, etc.,

must be referred to some contract and may be referred to the alleged one; they prove the existence of some contract and are consistent with the contract alleged. Fry on Specific Performance, 5th ed., par. 582; 27 Halsbury, No. 49; Wilson v. Cameron, (1).

These facts

are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced. *Maddison* v. *Alderson*(2).

(1) 30 Ont. L.R. 486.

(2) 8 App. Cas. 467, 485.

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There remains the defence of alleged lack of authority on the part of the late Walter D. Beardmore to bind the Acton Tanning Company by the agreement to which Sir Wm. Mackenzie has deposed. The evidence puts it beyond doubt that the Acton Tanning Company was merely one of several subsidiary instrumentalities of the firm of Beardmore & Company. It was owned and controlled by, and carried on for and in the interest of that partnership. All the shares of its capital stock, except thirteen shares held by one Clark, an employee, were owned by the Beardmore partners. All its earnings, except the insignificant fraction representing the dividend on Clark's thirteen shares, passed for distribution into the partnership funds of Beardmore & Company. So negligible was Clark's position as a shareholder considered—so much were he and his shares regarded as under Beardmore control, that, as Mr. Alfred Beardmore tells us, in the adjustment made when Walter D. Beardmore retired in 1915, these thirteen shares were included in the assets of Beardmore & Company.

Walter D. Beardmore was the senior member of the partnership composed of himself and his three brothers, George, Alfred and Frederick. His interest in the firm was four-tenths. His son, Walter Williams Beardmore, speaking of his late father's position in the business, says:—

Q. Who composed the firm of Beardmore & Company? A. My father, Walter D. Beardmore, G. W. Beardmore, A.O. Beardmore and F. W. Beardmore.

Q. Four brothers? A. Yes.

Q. Who was the active manager? A. W. D. was. He was the head of the firm and always took the initiative in the business.

Q. Would you say the leading part? A. Yes.

Q. Known to the public as Beardmore & Company? A. Yes.

* * *

Q. What form did his activity take? A. He took part in every

detail of the business, Muskoka Leather, Acton Tanning Company, Montreal and Toronto.

Q. Would you say that he was the governing mind? A. He certainly was, and recognized by all the managers in the different departments as the one.

Q. As the directing mind? A. Yes, as the directing mind.

* * *

Q. Just to follow that: I notice that in all this correspondence the name of Beardmore and Company is signed even when apparently it was the business of the Acton Company? A. Yes.

Q. Was that common? A. Yes, quite common.

Q. Would you say that the whole of the business for all varieties of leather so far as the public was concerned was carried on under the name of Beardmore & Company? A. Absolutely.

Mr. Alfred Beardmore says:

Q. Your brother is the person who had the direction and control of the business? A. Yes, Walter.

Q. He was the head of the family and the head of the business? A. Oh, yes, decidedly.

Q. So far as the public was concerned? A. Yes.

Q. Frederick, George and yourself were of a retiring disposition? A. Sometimes.

Mr. George Beardmore says:

Q. Your brother Walter was very active in business prior to the time when he had the stroke? A. He always was, yes.

Q. And so far as the public was concerned he was the outstanding figure of Beardmore & Company? A. Oh, yes, naturally, he was the head of the firm.

Mr. Frederick Beardmore was not a witness.

The partnership articles of Beardmore and Company include in its assets all the shares of the capital stock of, *inter alia*, the Acton Tanning Company, owned by the partners. They provide specifically for the manner in which the balance sheet of the Acton Tanning Company shall be prepared and they contemplate the reversion of the Clark shares to the firm. They contain this clause:

11. Each partner shall at all times give such supervision and attention to the partnership business as may be necessary for the efficient management thereof but the first party (Walter D.) shall have the general oversight and direction of the business.

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A short time previously, as managing director and in the course of his "general oversight and direction," Walter D. Beardmore had secured the entrance of the Grand Trunk Railway into the Beardmore yards by an expenditure of from $40,000 to $60,000, so important was it to the business to have direct shipping facilities by rail. That Walter Beardmore made, and was regarded as having full authority to make, this arrangement with the Grand Trunk Railway Company is the evidence of his son and is the only reasonable inference from the testimony of Alfred O. Beardmore. There is no suggestion that any resolution, formal or informal, of the directors of the Acton Tanning Company was deemed necessary for this purpose.

Sir William Mackenzie tells us that when he spoke to Mr. George Beardmore about the plaintiff company giving the Beardmores' Acton business a connection and freight service, George Beardmore told him

> It was all right as far as he was concerned—that Walter attended to that business.

Mr. George Beardmore, called as a witness, does not contradict this statement, and from his somewhat indefinite evidence, I would infer that he had known that his brother Walter was making an arrangement for bringing in the plaintiff's railway. He says:

> Q. All you can say is that he (Walter) did not talk to you about the bargain about the road coming in? A. He did not talk a great deal about it. Really I have forgotten what the conversations were. I can not fix the exact conversations that we had, but he has always consulted me upon any decisions, and in fact sometimes left them to me to decide.

Of course it is not denied that the partners were fully aware of the advent of the plaintiff railway company and of the construction of its line and also of the work done in levelling and making roads and of the payments for removing bark piles, buildings, etc. It

is equally impossible to suggest that they did not know that the railway had come in without any expropriation proceedings under some friendly arrangement, though not informed of its precise terms, or that they were ignorant that whatever arrangement was made had been entered into by the late Walter D. Beardmore on their behalf and on behalf of the company they controlled.

Having regard to the position he occupied and to his relations with his brothers and the Acton Tanning Company as disclosed by the evidence, I am satisfied that it was, in fact, within the authority of the late Walter D. Beardmore in the course of his management of the business of Beardmore & Company to negotiate and settle the terms on which "the advantage"—as Mr. Alfred Beardmore says it is—of having the plaintiff's railway pass through the Beardmore yards should be secured. Their freight business with the Grand Trunk Railway amounted to $100,000 a year. A recent strike on that railway had made the desirability of a second connection very plain and the benefit to the shipper of competition in carriage is obvious. It seems to me to be quite within the scope of the authority of the president of such a company as the Acton company, entrusted with "the general oversight and direction of the business," to arrange and settle the terms on which it should obtain railway connection and shipping facilities.

That authority to make an agreement such as that under consideration might have been conferred by its directors on the president and managing director of a company such as the Acton Tanning Company will scarcely be questioned. That Walter D. Beardmore was held out to the world as having full authority to act for all the interests controlled by

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Beardmore and Company, and that Sir William Mackenzie dealt with him as clothed with that authority is the only fair conclusion from the evidence. This aspect of the case is covered by the judgment of this court in *McKnight Construction Co.* v. *Vansickler*(1).

There was no notice to the plaintiff or to Sir William Mackenzie of any limitation on Walter Beardmore's ostensible authority. The letter from Atlantic City of the 28th Oct., 1912, relied on by the appellants, had reference not to the terms on which the plaintiffs' railway should enter the Beardmore yards but to its crossing of the Grand Trunk Railway. Having regard to the tenor of that letter, Mr. Walter Beardmore's subsequent formal consent to that crossing would rather strongly suggest that he had consulted his partners and fellow-directors, and had secured their approval and concurrence.

But if that were not the case and if the other partners, who knew what had occurred in connection with the bringing in of the Grand Trunk and were aware that the only arrangement for the entrance of the plaintiff railway had been made with Walter Beardmore, did not mean to acquiesce in his authority to make a binding agreement on their behalf and on behalf of the Acton Tanning Company, their conduct in allowing it to enter their yards and to build its line of railway through them without any suggestion of opposition or of protest—in demanding and accepting as having been promised by Sir William Mackenzie, benefits not usually incidental to railway construction, unless under special agreement, and in failing to institute any proceedings to recover compensation until some months after Walter Beardmore's death,

(1) 51 Can. S.C.R. 374.

four years after the railway had first come in, is to me inexplicable.

On the grounds, therefore, that the late Walter D. Beardmore had actual authority to make the arrangement deposed to by Sir William Mackenzie—that, if not, he had ostensible authority to do so—and that that arrangement has been so far acted upon and acquiesced in by the defendants that they should not now he heard to question his authority to enter into it, I conclude that the agreement, which it has been found was in fact made, is binding upon the defendants and cannot be repudiated by them.

Appeal dismissed with costs.

Solicitors for the appellants: *Mowat, Maclennan, Hunter & Parkinson.*

Solicitors for the respondents: *Boyce, Henderson & Boyd.*

1917
*Oct. 10.
1918
*March 5.

H. A. McKILLOP AND COMPANY AND OTHERS (PLAINTIFFS)..... } APPELLANTS;

AND

THE ROYAL BANK OF CANADA (DEFENDANT)..... } RESPONDENT.

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

Debtor and creditor—Security on crop—Lease of homestead—Family arrangement—Bills of Sale Ordinance, Cons. Ord. N.W.T. c. 43. s. 15.

G., an insolvent owing a considerable sum to the Royal Bank, leased his homestead to his son, a minor, at a rental of half the crop to be grown thereon. The son took a lease of a neighbouring farm on similar terms and assigned both leases and his interest in the crops to the bank which agreed to advance money for putting in and harvesting the crops, the father and son undertaking that the proceeds from their sale would be applied first to payment of the advances and next of the father's original debt. Later, under a covenant for further assurances in the assignments, bills of sale of the severed crops were given the bank as additional security. Under executions against G. which, to the knowledge of the bank, were in his hands when the lease was given to the son, the sheriff seized the two crops. On appeal from the judgment of the Appellate Division in favour of the bank in an interpleader issue:

Held, per Fitzpatrick C.J., that the transactions with the bank were not fraudulent as against the creditors of G.; that as the bank had notice, before entering into these transactions, of the executions out against G. the creditors were entitled to his share of the crop grown on the homestead; but the rest of the grain, in which G. had no interest, remained as security to the bank under the above mentioned agreements.

Per Idington and Anglin JJ.—That the son, to the knowledge of the bank, was acting throughout for his father with whom the bank was really dealing in taking security for its debt; that so far as the bills of sale of the crops were intended to secure the past debt to the bank they were fraudulent as against creditors and void; and the assignments to the bank were void under sec. 15 of the Bills of Sale Ordinance (Cons. Ord. N.W.T. ch. 43) which makes invalid any security not given for the purchase price of seed grain, which assumes to bind or affect a crop. There was a lawful seizure, therefore, of all the grain grown on the two farms.

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

Per Idington J.—The security taken by the bank was a violation of the provisions of sec. 76, s.s. 2 (*e*) of the Bank Act.
Per Davies and Duff JJ. dissenting.—The appeal should be dismissed.
Judgment of the Appellate Division (10 Alta. L.R. 304) reversed in part.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta(1), reversing the judgment at the trial in favour of the plaintiffs.

The facts are fully stated in the head-note.

Nesbitt K.C. for the appellants referred to *Kidd* v. *Docherty*(2); *Campbell* v. *McKinnon*(3).

Geo. H. Montgomery K.C. and *R. A. Smith* for the respondent cited *Fredericks* v. *North West Thresher Co.*(4); *Cotton* v. *Boyd*(5); and *Maskelyne and Cooke* v. *Smith*(6).

THE CHIEF JUSTICE.—I agree with the finding of Mr. Justice Beck, delivering the judgment of the Appellate Division, that there was nothing fraudulent about the transaction in question in this case. It was, however, a complicated one and as conflicting interests are involved it becomes necessary to decide the strict legal rights of the parties concerned.

The record before the court is not satisfactory as it contains merely a schedule of the principal exhibits; for such important documents as the assignments of the leases to the respondent we have nothing but an extract contained in one of the factums.

The position of the matter is this: J. T. C. Gwillim made a lease of his homestead farm to his son Wilfred Gwillim for one year reserving rents of $1 and one-half of the crop to be raised that year. The lessee

(1) 10 Alta. L.R. 304.
(2) 7 Sask. L.R. 137.
(3) 14 Man. R. 421.
(4) 3 Sask. L.R. 280; 44 Can. S.C.R. 318.
(5) 31 West. L. R. 797; 24 D.L.R. 896.
(6) [1902] 2 K.B. 158; [1903] 1 K.B. 671.

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assigned the term by way of security to the respondent. Except to receive his rent J. T. C. Gwillim had formally nothing further to do with the matter. That he may have remained on the farm and with his son raised the crop is not a fact that can have any effect on the legal rights of any parties concerned. It is said in the appellants' factum that he assigned his interest in the lease, and in the crop to be grown on the land, to the bank, but I cannot find that he ever purported to do so.

As to the McClure lease taken by Wilfred Gwillim and similarly assigned to the bank as security, J. T. C. Gwillim had nothing to do with this.

Now if there were nothing else in the case, it would be clear that after harvesting the crops Wilfred Gwillim would have to hand over to his lessors the respective proportions of the crops agreed on by way of rental and the rest in each case would be his own property or to be disposed of in accordance with his arrangements with the bank.

It is claimed that the assignments which in terms included his right and interest in the crops to be raised during the term of the leases are invalid under the provisions of section 15 of the Bill of Sale Ordinance, chapter 43 of the Consolidated Ordinances of the North West Territories, which is as follows:—

> 15. No mortgage, bill of sale, lien, charge, encumbrance, conveyance, transfer or assignment hereinafter made, executed or created, and which is intended to operate and have effect as a security, shall in so far as the same assumes to bind, comprise, apply to or affect any growing crop or crop to be grown in future in whole or in part, be valid except the same shall be made, executed or created as a security for the purchase price and interest thereon of seed grain.

Even if the assignment were invalid it would not help the appellants if the only result were to leave the property in the balances of the crops, after handing over the rentals, vested in Wilfred Gwillim.

In my opinion, however, that is not the effect of the section. It has application, I think, only in the case of an attempted assignment of the crop, not in that of an assignment of the land including the crops growing or to be grown upon it. In the case of an ordinary mortgage, the crops, before severance, are of course available to the mortgagee as part of his security.

After the severance of the crops, the bank, for greater security, took from J. T. C. Gwillim and Wilfred Gwillim a bill of sale of the grain on the homestead farm, and a bill of sale from Wilfred Gwillim for that on the McClure farm. The objections offered to these bills of sale are, 1st, that at the time the bank had notice of the writs of execution, and, 2nd, that they were not duly registered as required by sections 6 and 11 of the Bills of Sale Ordinance, ch. 43, Con. Or. N. W. T.

I think the first objection ought to prevail against the claim of the bank to J. T. C. Gwillim's one-half share of the crop on the homestead farm, not certainly on account of Rule 609 of the Alberta Rules of Court, for no rule of court could have any such effect if it were not otherwise the law. The provision has its origin in the Statute of Frauds, 29 Car. II. c. 3, s. 16, and now appears in the English Sale of Goods Act, 1893, 56 & 57 Vict. ch. 71, s. 26. It is unquestionable law.

But as against the rest of the grain, which I have been assuming was the property of Wilfred Gwillim, neither objection could be of any avail for he had no execution creditors and under the Bills of Sale Ordinance it is only as against creditors that bills of sale are void.

I now come to the consideration which on the above

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facts and their normal consequences have led the trial judge and the Appellate Court to come to opposite conclusions. The trial judge thought that the whole transaction was a sham designed to afford an unfair preference to the bank, one amongst a number of J. T. C. Gwillim's creditors. Mr Justice Beck in the Appellate Division, on the other hand, found no evidence of fraud in the transaction which he thought was a legitimate attempt to create with the assistance of the bank a valuable asset in the hands of the debtor who in return for such assistance was to allow it to be used after liquidating the advances required for its production in discharge of the bank's existing claim, the balance, if any, being available as an asset in the hands of the then insolvent debtor for his other creditors.

There were certainly underlying motives which do not appear on the face of the transaction, but I think Mr. Justice Beck has taken the correct view and as I have already said, I can see nothing fraudulent in the proceeding which did not remove any property of the debtor out of the reach of his creditors, and by which they could not possibly be damaged. I do not see how they can legitimately object to the respondent having the benefit of property which but for its intervention and the arrangement effected, would never have come into existence.

At first sight it undoubtedly appears to be a ground of suspicion that the son Wilfred should admit the existence of a debt due by himself to the bank which he did not owe. This, however, was a family arrangement. The connection between the father of a family living on and working a farm with the aid of his minor sons is a very close one. The incapacity of the father for want of means to work his farm would mean want

of work for the son as well and destitution for the whole family. I do not think it is fair under such circumstances to say that the son had nothing to gain by the transaction. The interest of the family was a matter of concern to him and one in which his own interest was bound up. He, of course, adventuring nothing, had nothing to lose by the transaction. If the father, owing to his insolvency, was unable to obtain the necessary advances to work his homestead farm, I do not see why the son should not undertake it and in return for the assistance afforded by the bank accept a liability for his father's debt limited to being discharged out of property to be produced as the result of his operations.

I may add that I think we should strive as far as possible to uphold the transaction. It is a matter of public policy that crops should be raised on the land rather than that it should lie idle. The legislature has recognized this by providing in the "Act respecting seed, grain, fodder and other relief" being ch. 14 of the Statutes of Alberta, 1915, that a charge representing money and interest agreed to be paid in consideration of the advance of seed, grain and fodder for animals shall take priority over all other liens, taxes, charges or other encumbrances.

In the result the appeal should be allowed to the extent of one-half of the crop grown on the homestead farm and judgment entered on the issue that so much of the goods being part of the goods seized under the execution were at the time of the said seizure the property of the said J. T. C. Gwillim.

There will be no costs to either party. The half share of J. T. C. Gwillim of the crop as rental had not been delivered, and was not strictly liable to be taken in execution, and the appellants will therefore pay the sheriff's costs.

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DAVIES J. (dissenting)—I would dismiss this appeal with costs.

IDINGTON J.—This is an appeal from the Supreme Court of Alberta holding in an interpleader issue between appellants as execution creditors of J. T. C. Gwillim and the respondent, that the latter was entitled to the crops grown upon a homestead quarter section owned by said Gwillim and upon a half section leased by the infant son of said Gwillim from a third party.

The learned trial judge found, as a fact, that said infant son was but the *alter ego* of the debtor who was insolvent at the time of the making of said lease.

This finding of fact can hardly be disputed under all the surrounding facts and circumstances unless we discard common sense in dealing with the matter. I, therefore, throughout accept the finding as determining so far as it goes the relations and rights of the parties.

The executions against Gwillim had been placed in the sheriff's hands at various times from the year 1910, to the year 1915, and had been kept renewed and in force until the trial in 1916, covering thus the periods in question when the several transactions took place upon which the respondent's claim is founded, and the seizure by the sheriff.

It is somewhat difficult to understand how a judgment debtor could enter into any transaction whereby he could transfer property as if free from encumbrance within the bailiwick of a sheriff holding such executions.

Yet by reason of some discussion of points of law which I respectfully submit are more or less irrelevant to the business in hand, such seems to have been the

result of the judgment appealed from, that it is held possible to so transfer. A solution of the problem of whether or not a bargain for the transfer of non-existent property falls within the Statute of Elizabeth surely has little relation to the real question presented by the facts found herein.

That question is whether or not there can be upheld as against existent executions, an assignment of a lease held by a judgment debtor or his *alter ego*, in the presence of such an array of executions well known to the assignee and in law binding the lease if as found the property of the debtor. For the title of the respondent to the crop as against appellant depends entirely upon the assignment of the lease procured in the son's name.

Such result I submit should not be reached if we pay heed to the peculiar facts and circumstances in this case and the law relative to the effect of executions which we find in No. 609 of the Alberta Rules of Court, as follows:—

> Subject to the provisions of any statute a writ of execution shall bind the goods of the judgment debtor from the time of delivery thereof for execution to the Sheriff of the Judicial District within which the goods are situate, but not so as to prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had, at the time when he acquired his title, notice that such writ had been delivered to the sheriff and remained in his hands unexecuted.

To understand properly the foregoing and what I am about to express hereafter requires a knowledge of the actual transactions which took place between the parties and are involved in the maintenance of the respondent's claim. The judgment debtor was possessed of a homestead free from liability to seizure. The exemption therefrom, however, did not extend to the crops grown thereon, save the limited quantity exempted for seed and six months' provisions.

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In his insolvent condition he bethought himself of a scheme whereby he might save these crops thus liable from the above mentioned executions. He decided to lease the homestead to his infant son then 17 years of age and made a lease dated 1st March, 1915, purporting to be for one year from said date, for the yearly rental of $1. This was drawn upon a printed form which had inserted at the end thereof a typewriten covenant by the lessee with the lessor to cultivate the land in a good and husbandlike manner, and at the proper season seed the same in wheat or other grain as the lessor might consent to, and harvest and thresh the crops in due season at his own expense, and immediately after threshing deliver in the name of the lessor at the nearest elevator a one-half share in kind as the same came from the machine of all wheat and other grain grown upon the said land, which was to be by way of additional rent to that reserved as above. This was followed by a covenant to furnish the lessee with all grain necessary for the seeding. The lease was assigned on the 20th day of May, 1915, by the said infant son to the respondent, by an assignment which recited the making of the lease; that by the terms thereof the lessee was entitled to one-half of the crop to be raised on the said lands during the said term; that the said lessee was then indebted to the respondent in the sum of $2,513, which represented a past indebtedness of the party hereto of the first part as a customer and that in order to better secure the party of the second part the repayment of the said indebtedness, the said lessee had agreed to execute the assignment.

The instrument proceeds then, in the operative part, to transfer all the interests acquired under the lease, and his said share of the crop, followed by a covenant that he would on request execute such

further assurance as the respondent might require. That was followed by a proviso that the instrument was only to operate as and by way of collateral and additional security to the said indebtedness, and as soon as the same is fully paid and satisfied should cease and become void and of no further effect. The judgment debtor, though not a party to the instrument, signs as if he were and the signatures are followed by a paragraph which acknowledges this assignment as signified by his signature thereto. This, though clumsily done, no doubt was intended to be, and was, effective only for the purpose of assenting to the assignment by the lessee who was prohibited from assigning without leave.

On the 8th April, 1915, a memorandum was made which provided that Mr. Gwillim (without stating which of them) agreed to lease 250 acres or more of section 15, township 11, range 21, from Mr. Oliver; Gwillim to furnish the seed and do all the necessary work connected with the seeding and harvesting, Oliver to pay one-third of the threshing bills; Mr. Gwillim agreeing to give Mr. Oliver one-third of the crop delivered at the elevator. This informal scrap of paper is signed by Wilfred Gwillim and N. W. Oliver in the presence of one Fletcher.

This lease was assigned on the 19th of May, 1915, by the said Wilfred Gwillim to the respondent by an assignment which recited the making of the said memorandum, the terms thereof, and that the said Wilfred Gwillim was then indebted to the respondent in the sum of $2,513, which represented a past indebtedness as a customer, and that in order to secure the respondent the repayment of the said indebtedness he agreed to execute the instrument. By the operative part of the said assignment, in consideration of the

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said indebtedness, the said Wilfred Gwillim assigned all his rights, titles, estate and interest both legal and equitable in and to the lease and land mentioned and to his share of the crop so to be raised thereon, as aforesaid. The instrument further provided for further assurances such as required and might be necessary in relation to the premises, but that notwithstanding anything to the contrary was to operate merely as and by way of collateral and additional security to the said indebtedness and as soon as the same was fully paid and satisfied these presents should cease and become void. These assignments of leases were drawn by the solicitor of the bank.

The grain now in question in this issue was grown for the greater part on this last mentioned parcel of land. Some of it was the product of farming the homestead. If the two transactions had been kept throughout entirely separate and independent of each other, different considerations possibly might be applied to the resulting effect upon the validity of part of the respondent's claim.

As I understand the facts, however, the assignments though dated on different days were but the result of one agreement which had been made between the respondent and the judgment debtor whereby they were to finance the operations under the said lease, and they had made advances accordingly. I assume for the present that the indebtedness owing by the lessee was that owing by the father. The first question that arises is what titles could pass to the bank by the last mentioned assignment?

These executions bound the term created by the lease from the landlord Oliver to the infant son of the debtor as his *alter ego*.

Of the notice to the respondent of these executions

there is left no manner of doubt for its agent, who had the business in charge and procured the assignment of that lease, says expressly as follows:—

Q. Then he was in difficulties with other people besides the bank?
A. Oh, yes.
Q. For how long had you known he was in that condition?
A. Quite a long time, I think, in fact back as far as 1912.
Q. Had you any difficulty with his account in any way, by reason of these other creditors trying to attach it or anything of that kind?
A. I don't remember anything of that.
Q. Do you know whether or not they had judgments or executions against him?
A. Oh, yes.
Q. And he was in that condition of having a lot of executions outstanding for a year or two before this transaction took place?
A. Yes.
Q. So that the trust account was opened for that purpose, so that it could not be seized on executions?
A. Yes.
Q. Had the son ever had an account with the bank?
A. No.

It seems absurdly comical to try to rest a claim to these crops grown upon the land leased from Oliver by reason of an assignment of a term which is itself bound by the executions and through the term so bound entitles the execution creditors to all the fruits derivable from the lease.

I will deal with the lease of the homestead to the son presently so far as its peculiar features and all relative thereto suggest a possibility of differentiating them in favour of respondent.

Meanwhile I wish to follow up the other grounds upon which the respondent's claim as a whole is rested.

The respondent was approached by the father who was notoriously insolvent and owed it from $2,000 to $3,000, (possibly the $2,513 referred to in the assignment though not proven), with several suggestions rejected, and finally with this scheme of a lease to his son of the homestead, and that to the son by Oliver being assigned to respondent and it would make ad-

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vances to help carry on the farm and get the crops as security.

The respondent assented to the proposal and made advances accordingly before and after the bank's solicitor had prepared the assignments of the said leases and got them executed.

Mr. Justice Beck says the father and son signed jointly a note to the bank for $2,513 being the amount then owing by the father to the bank, and that the assignments of leases declared they were given to secure that.

I cannot find that in the evidence which is obscure on the point. Possibly the facts were cleared up by admissions of counsel before the court below in a way we were not favoured with, or more probably he only assumed the fact from the recital, which assumption is not borne out by the evidence.

The respondent's agent in his examination seems to indicate that there was a joint note for the old debt as Mr. Justice Beck suggests, but on being shewn the bundle of exhibits failed to identify any such note and pointed to a note for $1,700, dated the very day one of those assignments was given, which destroys the assumption and hence I must deal with that aspect of the case alternatively.

Assuming first Mr. Justice Beck's impression correct, then it is to be observed that there is nothing in the assignments of the leases which secures anything beyond that sum, for they each expressly provide that upon the payment of the said sum then the assignment is void. And neither professes that there is anything secured beyond that sum, or any ulterior purpose to be served by reason of any such assignment.

Yet it is contended that the respondent was in some way secured by said assignment for the advances

made by respondent for seed wheat for the Oliver place, and other expenses of operating these farms during that season of 1915. On what does it rest?

Clearly it cannot rest on these instruments which are expressly confined to the securing of the old indebtedness to the extent of $2,513.

If they could be upheld as against the execution creditors the proper judgment would be to restrict the claim to that sum and that alone.

The son, however, being but the agent or tool of the judgment debtor father in taking the Oliver lease and, as already pointed out, the same being bound by the executions, that part of the crop cannot be held by respondent even for the old indebtedness.

What then can such claim rest upon?

The agent of respondent many times in course of his examinations says he expected he would get the crops to repay the advances first for 1915 and then have a right to apply so much of the balance as needed to pay the old indebtedness.

I rather think it was a mere expectation that he should be enabled to do so by the goodwill of the father and that the assignment of the leases was but a lever, as it were, which would help in some way to secure a future assignment thereof.

The fact that the assignments made no provision therefor, except in relation to the past indebtedness, and yet were followed in September by bills of sale which respectively pretend to have been made pursuant to a mere covenant for further assurance, is most suggestive.

These bills of sale were apparently prepared as early as August but failed of prompt execution for some unexplained reason.

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The agent of the respondent in his evidence puts the matter of agreement for and nature of title, thus:—

Q. And you got the son to assign everything to the bank and you considered the son had no further interest in the crop?

A. The agreement that we had, as I said before, was that when the crop was harvested the first money received would go to pay the new debt contracted by the father and son; when that was paid any further moneys would first go to pay the old indebtedness to the bank.

Q. And what would become of the balance?

A. The balance they stated they intended to pay on other liabilities.

Q. Whose?

A. Gwillim's.

Q. Which Gwillim?

A. J. T. C. Gwillim.

Q. Then I am correct in saying that the son had no interest in the crop at all after he had turned these securities over to you?

A. Well, I could not say that; he was doing the work and presume he would get certain pay from it.

Q. What I mean is, as far as the crop itself was concerned, you would consider that any balance would go to pay the father's debts?

A. That's the agreement upon which I—the bank—advanced them the money; first get that paid up and then the old indebtedness, and on that understanding the bank loaned them the money to put the crop in.

Q. You were asked in Toronto (Q. 96): "So far as you were concerned you were treating the whole proceedings of that account as being properly accountable to the father? Answer, Yes."

A. All the proceeds of the crop would certainly go to the trust account of J. T. C. Gwillim, and be disbursed from that account.

Q. The son had no right to sign cheques on that account?

A. No.

Q. He was a minor?

A. Yes.

Q. Now, these assignments and bills of sale were taken by way of collateral security to the indebtedness, not taken as transfers of the crop to you as to the bank?

A. The bill of sale was.

Q. The bills of sale?

A. That's the way I understood it.

Q. But you were to account for any surplus to the trust account?

A. Yes.

Q. The bill of sale was then not really an actual bill of sale as we understand it, but by way of mortgage?

A. Yes, I presume it is. We were not buying the crop.

Q. You have already told us that you had knowledge of the executions that were outstanding at the time?

A. Yes.

Why did the business take this most circuitous course? Why did the assignments not provide for it all? Can there be a shadow of doubt that it was because the agent and his solicitors were confronted with two well known statutory provisions against such agreements?

In the first place the "Banking Act" by section 76, s.s. 2 (*c*), prohibits that and other like dealings, as follows:—

> 2. Except as authorized by this Act, the bank shall not, either directly or indirectly,—
>
> * * * * *
>
> (*c*) lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares or merchandise.

It is apparently assumed by the judgment appealed from that the crops were on the date of these assignments of leases non-existent. If we would apply common knowledge to at least the wheat crops and probably all, they had by 20th May been growing for a long time and were just as assignable and exigible then as ever, but being chattels were goods upon which, under the circumstances, the bank could not advance.

And in the next place there had stood for twenty years an enactment in force in the North West Territories, and in Alberta since its creation, which for good reasons had prohibited any such bargain as might create just such a claim as in question herein.

That enactment is section 15 of the Bills of Sale Ordinance, as follows:—

> 15. No mortgage, bill of sale, lien, charge, encumbrance, conveyance, transfer or assignment hereafter made, executed or created and which is intended to operate and have effect as a security shall in so far as the same assumes to bind, comprise, apply to or affect any growing crop or crop to be grown in future in whole or in part, be valid except the same shall be made, executed or created as a security for the purchase price and interest thereon of seed grain.

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It would be difficult to use more comprehensive language than in this enactment prohibiting bargaining for a

security upon a growing crop or crop to be grown in the future.

Either the share of the crop was within the express words of the operative part of each assignment of the lease in question or it was not.

If it was within them clearly there was an express infringement of the very language of the statute for each of the instruments so assigning the said share of crop was on its face intended to be by way of security only and the evidence of respondent's agent puts that beyond all peradventure.

If it was so intended then I incline to think and submit that each of the assignments of the said leases designed to produce such effect was itself by reason thereof void, for the whole purpose thereof was to procure that forbidden by the law.

When we find that the bank held a second mortgage on the homestead, and a chattel mortgage on the stock not seized, which together according to the agent's evidence, seemed ample, the whole transactions seem designed in truth only to secure the advances for 1915, and thus falling within both statutory prohibitions and hence void.

And if it can be said that this illegal part of each of the objects of the instruments are severable from the legal then, at all events so far as they may have the contravention of the statute in view or be intended to give vitality to a contract declared invalid, they must be held null and void.

I fail to see how the parts are severable, for what you cannot do directly you cannot do indirectly.

If there is no such contract, then there is no foundation for the respondent's claim.

And if, as I have already observed, these crops were growing (as in all human probability they were) on the date of each assignment, the executions then in the sheriff's hands bound them.

Doubtless it was on account of these manifest objections in law to the assignments and that contained therein, that more explicit provision was not made therein and hope was rested on the peculiar provisions by way of future assurances which was inserted in each and a foundation laid for the bills of sale which on their face are alleged to be made pursuant thereto.

The scheme seems to have miscarried for the respective bills of sale relating to each crop or share thereof which was the only other ground upon which the claim has been rested, was one which the respondent's counsel did not seem disposed in argument here to attempt to rest his client's claim upon.

It is difficult to see how he could, for clearly they were each intended to be instruments which in fact were only mortgages and there was no pretence of any compliance with the statute in such case provided relative to the affidavit to be made.

That statute by section 6, provides as follows:—

6. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged shall within thirty days from the execution thereof be registered as hereinafter provided together with the affidavit of a witness thereto of the due execution of such a mortgage or conveyance and also with the affidavits of the mortgagee or one of the several mortgagees or the agent of the mortgagee or mortgagees if such agent is aware of all the circumstances connected therewith and is properly authorized by power in writing to take such mortgage in which case a copy of such authority shall be attached thereto (save as is hereafter provided under section 21 hereof) such last mentioned affidavit stating that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that it was executed in good faith, and for the express purpose of securing the payment of

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money justly due or accruing due, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor or of preventing the creditors of such mortgagor from obtaining payment of any claim against him; and every such mortgage or conveyance shall operate or take effect upon, from and after the day and time of the filing thereof.

There was no pretence of its observance. They were not only vitiated thereby, but as being in fact founded upon what was illegal, were doubly so.

As to the contention that the transfers were preferential it seems hardly necessary to dwell upon that when in my view, as already expressed, the executions well known to the agent of the bank bound everything and prevented any of these several contrivances from having any validity as against the execution creditors now appellants.

Coming to the lease of the homestead from father to son and the question arising peculiar to it, and all implied therein, we find that one-half of that crop belonged by the terms of the lease to the judgment debtor, and there does not appear a tittle of evidence that he ever assigned that to the respondent except by the bills of sale already referred to.

The assignment of the lease by the son to the respondent could not have such effect, and the father's assent to that assignment could not enlarge its operations, but only waive the covenant of the lessee against assignment of the term.

What answer can be made to this I am unable to understand, and hence clearly his half of the crop rightly seized.

All the authorities relied upon cannot and do not help. It is quite clear that a man can assign without impediment, his homestead, absolutely or any part thereof, to a stranger. But, as already stated, the law does not exempt the crops he may grow thereon. And

a lease cannot help him out of that difficulty. The lease itself, or rather the term created, is chattel property liable to execution against chattels, and need not touch the legal estate in the land.

Again it would be quite competent for the owner of a homestead to bargain for the sale of a part of his crop without offending against the provisions of section 15 of the Bills of Sale Ordinance; and hence many of the cases cited and relied upon are maintainable for that reason.

The share of the crop which the son was to retain by the terms of the lease of the homestead would, but for the peculiarities of the case I am about to advert to, have been at his disposal and for valuable consideration could have been assigned to a purchaser. But that is not what was attempted, nor could it be in the case of a bank by reason of its incapacity to so bargain.

The son owed the bank nothing until he signed as surety for his father cotemporaneously with the assignments of the leases, and how that could be properly termed a past indebtedness so far as he was concerned, puzzles one.

The truth is the whole scheme was framed by the father to defeat his creditors and had created at the moment of putting it in force a term which was properly seizable by sheriff under executions. It seems idle to say there was no present property to be affected, for not only did the term exist when the respondent took an assignment of it, but also the growing crops.

It is not only the Statute of Elizabeth, but also the common law long before it, that forbade the fraudulent transfer of that which was exigible.

And with great respect it seems to me that there is a misapprehension of the scope of the case of *Blakely*

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v. *Gould*(1), which was the assignment of a non-exigible contract that was in question, in assuming that it touches this case where at the very inception of the transaction in question there was the creation of a term which was exigible as were also the growing crops when the respondent knowing the facts and purpose thereof accepted the assignment and still more when it accepted the bills of sale.

It is from these points of view that the purpose of the debtor must be held to have a bearing. And that purpose formed in his own mind until something was done in pursuance of it, could injure no one, but can be looked at and considered when effect is actively given to it in order to affect and transfer that which is exigible and defeat the executions binding same.

However all that may be the many other grounds already fully stated render it unnecessary to pursue the subject.

I think if the advance, about $500, for seed grain made by the respondent could have been, and I imagine it might have been, severed, if at the time and possibly at the trial attention had been given the matter, it ought to have been maintained unless possibly for the offence against the "Banking Act."

The respondents have chosen otherwise. I think the appeal should be allowed with costs throughout.

DUFF J. (dissenting)—I am of opinion that this appeal should be dismissed with costs.

ANGLIN J.—I am, with respect, of the opinion that this appeal should be allowed.

The findings of the learned trial judge, that the lease from J. T. C. Gwillim, the father and execution

(1) 24 Ont. App. R. 153.

debtor, to Wilfred Gwillim, his minor son, was made with the object of defeating or hindering the creditors of the former; that the lease of the McClure farm was taken by Wilfred for his father; that Wilfred had no real beneficial interest in either property; and that, at all events as against the father's creditors, the lease to the son of the homestead must be looked upon as non-existent and the father must be deemed the lessee of the McClure property, appear to be so fully warranted by the evidence that they cannot be disturbed. The father's insolvency and the bank's knowledge of it, likewise found, are incontrovertible. However, I accept the finding made by the Appellate Division, although in reversal of that of the trial judge, that there was no intent on the part of the bank manager to defeat, hinder or delay the creditors of J. T. C. Gwillim, and I deal with the case on the assumption that the honest purpose of the bank was by advancing money to J. T. C. Gwillim to enable him to grow and harvest a crop, which he probably otherwise would have been unable to do, from the proceeds of which all parties interested—the bank, Gwillim himself, and his other creditors—might benefit. I am fully satisfied, however, that the bank manager knew that Wilfred was a mere "stool pigeon" for his father, that the latter was the sole beneficial owner, and that the bank's real transaction was with him as such and with him alone.

For a past indebtedness to it of $2,513 (a debt of his father which Wilfred purported to assume) the Royal Bank on the 19th May, 1915, took as security assignments from Wilfred Gwillim of the two leases above mentioned and of the assignor's share in the crops to be grown on the leased premises. These assignments expressly provide that they shall operate

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only as collateral security for the existing indebtedness and that the assignor shall retain possession and deliver his share of the crops, when grown and harvested, to the nearest elevator in the name of the bank. They also contain covenants for further assurance. Strangely enough, however, they make no reference to further advances. Yet it seems reasonably clear that they were intended to secure further advances to be made by the bank to enable J. T. C. Gwillim to produce and harvest the crops. The evidence of the bank manager puts it beyond doubt that he so regarded the assignments and also that it was only upon the crops growing or to be grown that substantial security was to be obtained thereby. The leases themselves, apart from the crops, had no substantial value, as the respondent in its factum very frankly admits.

Whether because he doubted the efficacy of the bank's security on the crops, or because he wished to provide expressly that they should stand as security for the additional advances made after the assignments of the leases were taken, the bank manager, on the 15th of September after the crops had been severed, took from Wilfred Gwillim and J. T. C. Gwillim a bill of sale of the entire crop grown on the Gwillim homestead and from Wilfred Gwillim a bill of sale of his share of the crop grown on the McClure property, the consideration in each document being stated to be $3,262 then due and owing to the bank.

These instruments contain statements that they are given pursuant to the covenants for further assurance in the assignments of the leases and, although they secure sums of money not mentioned in those assignments, I have no doubt that the fact is that they were so given and were intended to make good, as far as possible, the agreement made in May that the bank

should have security for its past indebtedness and for the future advances then contemplated on the crops to be grown on the two farms. Otherwise as bills of sale given to secure only a past indebtedness their invalidity on the ground of fraudulent preference would seem incontrovertible. There cannot be the slightest room for doubt that the substantial, if not the sole, purpose of the entire transaction was in the first instance to give the bank security on the crops to be grown and afterwards, if possible, to perfect that security.

By section 15 of the Bills of Sale Ordinance, ch. 43 of the Consolidated Ordinances, N.W.T., it is enacted that:—

15. No mortgage, bill of sale, lien, charge, encumbrance, conveyance, transfer or assignment hereafter made, executed or created, and which is intended to operate and have effect as a security, shall, in so far as the same assumes to bind, comprise, apply to or affect any growing crop or crop to be grown in future, in whole or in part, be valid except the same shall be made, executed or created as a security for the purchase price and interest thereon of seed grain.

That the assignments of the leases to the bank were "intended to operate and have effect as a security" and not otherwise is incontestible. They assume to "comprise" and "bind" "a crop to be grown in future in whole or in part." That was their only real purpose. They were admittedly not given "as a security for the price * * * of seed grain." They were, in my opinion, "assignments" within section 15, and were invalid in so far as they "applied to or affected any growing crop or crop to be grown." Since the subsequent bills of sale expressly purport to have been given in pursuance of the agreement for security on the crops to be grown, in partial fulfilment of which the assignments of leases had been taken, they were tainted with the illegality of the agreement on which they were founded; or, if that agreement,

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because of its invalidity, should be regarded as non-existent, they were void, as against the creditors of J. T. C. Gwillim, as securities given for past indebtedness which operated as a fraudulent preference.

For reasons which it deemed sufficient the legislature has apparently sought to protect the farmers of Alberta against their own improvidence or the rapacity of some money lenders by preventing the tying up as security of growing or future crops, thus, as far as possible, insuring to the man upon the land the means of subsistence. The policy which underlies this legislation is similar to that which inspired the exemption of homesteads. With its wisdom we are not concerned. That the legislature appreciated its scope and drastic character is apparent from the express exception made in favour of securities taken for the price of seed grain.

In some cases section 15 may operate to the serious disadvantage of the honest and even frugal farmer who has met with misfortune by preventing him from availing himself of the only security he can offer to obtain advances that might enable him to put himself upon his feet again. This may be such a case. But if, influenced by these considerations, or because it appears unassailable on moral grounds, or even positively meritorious, we should permit a transaction such as that before us to stand, section 15 of the Bills of Sale Ordinance would be rendered ineffectual. Care must be taken that legislation is not frittered away by judicial interpretation in "hard cases." That the courts may not do without usurping the province of the legislature and ignoring or brushing aside the wholesome limitation upon their own function—*jus dicere, non jus dare.*

I am for these reasons of the opinion that at the

time of its seizure by the sheriff the grain in question was as against the Royal Bank the property of J. T. C. Gwillim.

I also incline to think that the assignments of lease were void as against those creditors of J. T. C. Gwillim whose executions were in the sheriff's hands when they were made. The bank manager admits that he had knowledge of these executions when he took the assignments. Indeed he tells us that it was arranged at that time that the account through which future advances were to be made to aid in producing and harvesting the crop should stand in the name of "J. T. C. Gwillim in trust" in order to prevent its being attached by those creditors. The modification of section 16 of the Statute of Frauds made by Alberta Rule of Court No. 609, if authorized by section 24 of chapter 3 of the Alberta Statutes of 1907, does not help the respondent. The rule reads:—

> Subject to the provisions of any statute a writ of execution shall bind the goods of the judgment debtor from the time of delivery thereof for execution to the sheriff of the Judicial District within which the goods are situate, but not so as to prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had, at the time when he acquired his title, notice that such writ had been delivered to the sheriff and remained in his hands unexecuted.

So far as the right of the bank to the crops in question depends upon the assignments of leases it would therefore appear to be subject to the executions which were in the sheriff's hands when they were made. Any rights under the bills of sale subsequently taken cannot be higher. I rest my judgment, however, on the applicability of section 15 of the Bills of Sale Ordinance.

Appeal allowed in part.

Solicitors for the appellants: *Johnston & Ritchie.*

Solicitor for the respondents: *R. Andrew Smith.*

1917
*May 30.
1918
*March 5.

CLARA VÉZINA (PLAINTIFF) ..... APPELLANT;

AND

D. A. LAFORTUNE (DEFENDANT) ...RESPONDENT.

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

Sale—Sheriff's sale—Evidence—Valid title—Possession animo domini—Seizure—Art. 699 C.P.Q.

V. successfully defended an action brought by one S. to recover the balance of the purchase money of property sold, the court holding that the transaction was immoral and void. The sale was not formally set aside and V., retained possession of the property. A judgment creditor of S. caused the property to be sold to himself by the sheriff; and V. by her action to annul the sale attacks the validity of the respondent's title.

Held, Fitzpatrick C.J. dissenting, that V., however defective her title, was in fact in possession of the property *animo domini*, and that its seizure under a judgment against S., who was not in, or entitled to possession, was in contravention of article 699 of the Code of Civil Procedure.

Per Fitzpatrick C.J. dissenting:—It was for V. to establish that she was in possession *animo domini* at the time of the seizure, which was not done.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of the Superior Court, District of Quebec(2), and dismissing the action with costs.

The circumstances in which the action was instituted and the questions in issue in the present appeal are stated in the head-note and in the judgments now reported.

Alleyn Taschereau K.C. for the appellant.

Langlais K.C. for the respondent.

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

(1) Q. R. 25 K. B. 544.

(2) Q.R. 48 S.C. 254.

THE CHIEF JUSTICE (dissenting).—The facts out of which the case arose are few and undisputed. The appeal turns upon the construction to be given article 699 C.P.Q.

The respondent, being the judgment creditor of one Adèle deSenneville, caused a writ of execution to be issued addressed to the sheriff of Quebec, under which the latter took in execution and sold to him, the respondent, the immovable property, the title to which is now in question. After the sale, the appellant brought this action to set aside the sheriff's title on the ground that at the time it was taken in execution and sold the immovable seized had become the property of the plaintiff under a good and valid title. The material allegation of the appellant's declaration, or statement of claim, is in these words:—

La susdite propriété ainsi décrite et vendue est le propriété de la demanderesse qui en est la propriétaire par acte dûment enrégistré et en a toujours été en possession légale depuis le 7 juillet, 1910.

The learned Chief Justice of the Court of King's Bench says that the appellant only incidentally invokes her right of possession. I have carefully read the pleadings and found no reference either near or remote to any title to the property beyond that set out in the paragraph above quoted.

It is well to make it clear at the outset that in an action of this kind, *en nullité de décret*, the plaintiff must prove either that she was the owner of the property or that she was in possession of it at the time of the seizure *animo domini*. The trial judge finds specifically

que la vente du 7 juillet 1910 (*i.e.*, the title relied on by the plaintiff) était nulle et n'a pu conférer aucun titre à la demanderesse.

and that finding, concurred in by the Court of King's Bench, is not appealed from. To succeed here therefore it

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is necessary for the appellant to establish that she was in possession *animo domini*. The fundamental error in the judgment of the trial judge, it I may say so with all respect, lies in the assumption that, in the circumstances of this case, it was for the respondent to prove that the appellant was not at the time of the seizure of the property in possession *animo domini*.

This is not the case of an opposition to the seizure made before the sale by the person in possession. Here the property was seized and sold as that of the person who must be deemed for the purposes of this appeal, in view of the concurrent findings below, to be the rightful owner and adjudged to the respondent. The sheriff's title conveys all the rights of the judgment debtor upon the immovable sold. Articles 760 (8), 778, 779 & 780 C.P.Q.

The only ground upon which the appellant could rely was her possession *animo domini*. (See interesting discussion as to this by Bugnet, note to Pothier, vol. 10, No. 526.) How can the appellant be heard to say that she was in possession *animo domini* when, in a suit brought by her vendor to recover the purchase price, she, the appellant, actually had it declared that the sale she now relies upon was a nullity, that it conveyed no title to her and that she therefore could not be called upon to pay the consideration or purchase price. One feels that it must be superfluous to quote authorities in support of the very elementary proposition that possession *animo domini*, which is what the Code requires, means what it says, a possession which is indicative of ownership. As Baudry Lacantinerie says: Prescription No. 212:—

> La possession est un fait qui ne peut pas d'abord établir un droit mais qui indique la qualité de propriétaire,

and again, par. 214:

Il y a deux éléments dans la possession; un élément matériel, le fait de l'occupation, *corpus*, et un élément intentionnel, la volonté d'avoir la chose à titre de propriétaire ou d'agir à titre de maître, de titulaire d'un droit sur la chose, *animus rem sibi habendi, animus domini*. Le concours de ces deux éléments est nécessaire pour l'acquisition de la possession.

It appears to me difficult to conceive how a vendee can successfully resist a claim for the purchase price of a piece of property on the ground that the sale was without consideration, as the title never passed, and then succeed in retaining the possession of the same property against its legal owner on the ground that the same vendee is in possession with the *animus rem sibi habendi*, or as owner. Mere detention, of course, is not sufficient; there must be a seizin or investiture of the property sufficient to enable the freehold to pass.

Much might be said of the character of the appellant's possession which, at best, is merely constructive. But the Chief Justice below has so fully and conclusively disposed of the appellant's claim that I am content to refer to his reasons for judgment.

I would dismiss this appeal with costs.

DAVIES J.—I would allow this appeal with costs, and would restore the judgment of the trial judge.

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

DUFF J.—I would allow this appeal with costs.

ANGLIN J.—The plaintiff, Vézina, attacks a seizure of real property in the City of Quebec made in May, 1914, at the instance of the respondent, Lafortune, as a judgment creditor of one deSenneville, and his

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title thereto as purchaser from the sheriff at the sale under such seizure.

DeSenneville, formerly the owner of the property, purported to convey it in 1910 to Vézina for $10,000. Vézina successfully defended an action brought by deSenneville in 1913 to recover $1,620, the balance then unpaid of the purchase money, the Superior Court holding that the transaction was immoral and therefore void. The sale was not formally set aside, however, that relief not having been asked and no offer to repay the $8,380 which she had received on account of the purchase money having been made by deSenneville; and Vézina retained possession of the property. That mutual restitution might have been decreed, had it been sought, seems reasonably clear. French law, in that respect differing from English law, now regards that relief as the logical and legitimate consequence of a finding of nullity. Sirey, 90, 2, 97 (cited by Mr. Justice Carroll); *Lapointe* v. *Messier*(1); *Prévost* v. *Bédard*(2).

Whether the respondent, as an execution creditor of deSenneville, can set up the illegality of the transaction between deSenneville and Vézina and the consequent absence of title in the latter by way of defence to her action to set aside the seizure of the property, which deSenneville had purported to convey to her and of which she held possession, is a question that I find it unnecessary to determine. If deSenneville could have recovered the property only upon the terms of making restitution to Vézina of what she had paid on account of the purchase price, it is difficult to understand how the execution creditor of the former can have a higher right than his debtor, whose interest it is that is exigible to satisfy his demand, or how a

(1) 49 Can. S.C.R. 271. (2) 51 Can. S.C.R. 149.

sale made under his execution could vest higher rights in the purchaser.

L'adjudicataire (sur saisie immobilière) ne transmet à l'adjudicataire d'autres droits à la propriété que ceux appartenant au saisi. Bugnet's Pothier, vol. 10, p. 243, note (I).

But the main contention of the appellant is that, however defective her title, she was in fact in possession of the property *animo domini*, that deSenneville neither was nor was reputed to be, and that the seizure under a judgment against deSenneville was, therefore, in contravention of art. 699 C.P.Q.

The seizure of immovables can only be made against the judgment debtor, and he must be, or be reputed to be, in possession of the same *animo domini*.

For the respondent it is contended that Vézina's possession after she had defeated deSenneville's action continued under her deed and was merely that of a tenant of deSenneville so long as any part of the purchase money remained unpaid. The deed is in the record. I find no provision in it constituting the purchaser a tenant. On the contrary, it expressly provides:

Pour la dite acquéreure en jouir, faire et disposer en pleine et entière propriété avec possession immédiate.

Moreover, having successfully repudiated the obligation to make any further payment under this deed because of its nullity, Vézina's possession thereafter could scarcely be regarded as held under such a provision as the respondent suggests, if the deed in fact contained it.

That Vézina held possession *à titre de propriétaire* and not *à titre précaire* seems to me indubitable. She did not hold as tenant or otherwise under or for deSenneville or for any person other than herself. She held it with the intention of asserting ownership.

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Anglin J.

She may have been aware of the invalidity of her title, but that knowledge would not affect the legal character of her possession. That possession would nevertheless be held *animo domini*. Fuzier-Herman, Rep. Vbo. Possession, No. 6; Baudry-Lacantinerie, de la prescription, Nos. 264-5. The distinction made by Pothier between *possession civile* and *possession naturelle*, on which Mr. Justice Carroll relies, would seem to be inapplicable under the Napoleonic Code. Baudry-Lacantinerie, de la prescription, Nos. 204-5, and likewise under the Quebec Code, 9 Mignault, 358, 367.

The seizure and sale having been made *super non possidente*, I am, with great respect, of the opinion that they were invalid and that the title acquired by the respondent from the sheriff was, therefore, null. *Dufresne* v. *Dixon* (1). The appellant, as the person who was, or was reputed to be, in possession *animo domini*, is entitled to have it so declared and to have the sale set aside.

The appeal should be allowed with costs in this court, and in the Court of King's Bench, and the judgment of the learned trial judge should be restored.

Appeal allowed with costs.

Solicitors for the appellant: *Alleyn Taschereau.*
Solicitor for the respondent: *D. A. Lafortune.*

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(1) 16 Can. S.C.R. 596.

THE UNION NATURAL GAS COMPANY OF CANADA (PLAINTIFFS) } APPELLANTS;

AND

THE CHATHAM GAS COMPANY (DEFENDANTS) ..... } RESPONDENTS.

1917
*Nov. 7, 8.
1918
*March 25.

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

Contract—Supply of gas—Area—Extension of municipal limits—Parties.

The Union Natural Gas Co. are producers of gas and the Chatham Gas Co. is empowered to sell and distribute the commodity to consumers in the City of Chatham. By a contract between the two companies the Union Co. was to supply and the Chatham Co. to take all the gas required by the latter for such sale and distribution.

Held, Anglin J. dissenting, that the Union Co. was not obliged to supply gas for distribution and sale by the Chatham Co. in territory annexed to the city after the contract was made. *City of Calgary* v. *Canadian Western Natural Gas Co.,* (56 Can. S.C.R. 117,) distinguished.

The Chatham Co. had contracted to supply gas to a sugar company operating in the territory so annexed to the city and the right of the latter to obtain the gas furnished by the Union Co. under its contract to supply the Chatham Co. only for use in the city depended on the construction of said contract as to the area to be served.

Held, per Anglin J., that the Sugar Co. is entitled to be a party to the action, and the order of the Appellate Division for a new trial with liberty to add it should be affirmed. The case is not one in which the power to give a declaratory judgment not accompanied by consequential relief should be exercised.

Judgment of the Appellate Division, (40 Ont L.R. 148), reversing that at the trial, (38 Ont L.R. 488), reversed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), setting aside the

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

(1) 40 Ont. L.R. 148.

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judgment at the trial(1), in favour of the plaintiffs and ordering a new trial.

In 1906 the predecessors in title of the Union Natural Gas Co. which owned gas leases in the townships of Raleigh and East Tilbury contiguous to the City of Chatham entered into a contract with the Chatham Gas Co. which supplied the inhabitants of the city. By this contract the Union Co. agreed to supply to the Chatham Co. all the gas required by the latter and to furnish gas to no other person or company in the city so long as the Chatham Co. continued to take it and the latter agreed to take all it needed from the Union Co.

In 1915, while this contract was still in operation, the Dominion Sugar Co. established a refinery on land in Raleigh which, in the following year, was annexed to the city. The Chatham Gas Co. by contract in writing agreed to supply the gas required by the Sugar Co. and claimed that the Union Co. was obliged by its contract to furnish this extra supply. The Union Co. denied this and brought action for a declaration that it was only obliged to furnish gas for distribution in the city according to the limits thereof in 1906 when the contract was made and for an injunction against the Chatham Co. diverting its gas to the annexed territory.

The trial judge was of opinion that the contract of 1906 covered the annexed territory but considered the agreement with the Sugar Co. to be unfair to the Union Co. and granted a qualified injunction against diverting the gas to the territory annexed under the contract with the Sugar Co. or entering into any other contract therefor without the approval of the Court.

(1) 38 Ont. L.R. 488.

Both parties appealed to the Appellate Division which, without considering the merits of the case, ordered a new trial with liberty to add the Dominion Sugar Co. as a party to the action. The Union Co. then appealed to the Supreme Court of Canada.

When this appeal was called counsel for the respondent moved to quash it for want of jurisdiction, it being an appeal from a judgment ordering a new trial in the exercise of judicial discretion. The motion was directed to stand until the appeal was heard on the merits and by the judgment now reported the jurisdiction of the court was maintained.

Tilley K.C. for the appellants. A municipal franchise does not *ex necessitate* extend to added territory and there is nothing in the contract between the parties here to make it so extend. See *Toronto Railway Co.* v. *City of Toronto*(1); *Montreal Street Railway Co.* v. *City of Montreat*(2).

The contractual rights of the parties are not affected by an order of Ontario Municipal and Railway Board. *County of Wentworth* v. *Hamilton Radial Railway Co.*(3).

Hellmuth K.C. and *Pike K.C.* for the respondents. The Dominion Sugar Co. is a necessary party to the action. *O'Sullivan* v. *Phelan*(4); *Clifton* v. *Crawford*(5); *Beament* v. *Foster*(6).

The contract between the parties extends to the added territory and was so contemplated when it was made. See *In re Toronto Railway Co. and the City of Toronto*(7); *City of Calgary* v. *Canadian Western Natural Gas Co.*(8); *City of Toronto* v. *Toronto Railway Co.*(9).

(1) [1907] A.C. 315.
(2) [1906] A.C. 100.
(3) 54 Can. S.C.R. 178.
(4) 14 Ont. P.R. 278n.
(5) 18 Ont. P.R. 316.
(6) 35 Ont. L.R. 365.
(7) 34 Ont. L.R. 456.
(8) 10 Alta. L.R. 180.
(9) [1916] 2 A.C. 542.

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The Chief Justice.

THE CHIEF JUSTICE.—I have read with great care the elaborate and able judgment of Mr. Justice Lennox before whom this action was tried, but as the strength of a chain is its weakest link, so the value of his conclusion depends upon the weakest point upon which it is based. The learned judge has formed the opinion, as surprising to me as I think it is without foundation, that the contract between the appellant's predecessors in title and the respondent for the supply of natural gas to the latter constituted them partners in the respondent's undertaking and operation of its franchise for distributing gas in the City of Chatham; and the learned judge, though going so fully, as I have said, into the case, gives little reason for his opinion on this point beyond a paraphrase of the agreement which does not seem to carry the matter any further than the document itself. The absence of such reason renders unnecessary more than a brief statement of the considerations which have led me to a contrary conclusion.

The learned judge has held that the respondent

> is seized and possessed of a franchise of the same character, and with the same incidents, obligations and duties in the whole of the City of Chatham, as it now is, as this company was seized of and subject to in the area constituting the City of Chatham before and at the date of the annexation,

and he continues:

> considering the whole agreement, *i.e.*, between the parties * * * I have come to the conclusion that the proper interpretation is that its provisions were intended to extend to and include not only the City of Chatham as it was bounded and constituted at the date of the agreement, but land which might thereafter be annexed as well.

It seems in any case too much to say that "its provisions were intended to extend," since this must depend on the previous finding as a legal conclusion that the franchise did so extend; perhaps at most it could be said that it follows from the previous

finding that they must be considered to so extend, but indeed the real reason for the judge's interpretation is given in his previous statement as follows:

> If the franchise of this company (the respondent) included the right and obligation to supply gas in territory subsequently acquired, the right to share in the benefit of this franchise was conferred, and the correlative obligation to furnish the additional gas required for customers in the added territory was imposed upon the Union Company by the agreement of 1906. It might not always be so, but it seems quite impossible in the circumstances of this case to hold that "City of Chatham" means one thing as regards area in relation to the rights and obligations of the Chatham Company and the City Corporation, and another thing as regards the rights and obligations of the parties to the agreement of 1906. Why? Because the document of 1906 is in substance and effect a partnership agreement and practically nothing else.

Here we have the real reason for holding that the agreement, whatever its intention, extended to the territory subsequently added to the city. There is no other; for there is no reason that I can find why "the City of Chatham" should not mean one thing as regards the area covered by the respondent's franchise, and another as contemplated by the agreement of 1906 between the parties. On the contrary, I think there are good reasons why this should be so. In granting a franchise within the city, the corporation is naturally dealing with the area subject to its jurisdiction, whatever that may be, but parties making an agreement as private individuals for the supply of a commercial commodity in a particular area, are dealing with a geographical area and are not concerned with any question of what particular municipal jurisdiction it comes under. In the case of *The City of Calgary* v. *The Canadian Western Natural Gas Co.*(1), recently heard on appeal to this court and which was referred to in the argument, it was pointed out that between the years 1905 and 1914, the area comprised within

(1) 56 Can. S.C.R. 117.

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the municipal boundaries had been extended from 1,800 to 25,000 acres, whilst the population had grown from 12,500 to 90,000. The franchise which was involved in that case was held to extend to the added territory; but it would surely be impossible, in a private contract for the sale of any commodity, to hold, without the plainest evidence of the intention of the parties, that the area within which it was to be supplied was not that covered by the proper description at the date of the contract, but such an enormously increased area as in the instance of the City of Calgary, and because the area within the jurisdiction of the City Corporation, no party to the contract, had been subsequently enlarged. It would be only reasonable to suppose that if the area were to be increased more than twelvefold the intention would be that the parties owning the franchise would have to make quite other arrangements for so changed a subject-matter of the contract. The conditions in the one case not only might, but probably would, be wholly unsuitable in the other.

As Lord Loreburn said in *Tamplin S. S. Co.* v. *Anglo-Mexican Petroleum Co.*(1), at page 403:

> A court can and ought to examine the contract, and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist.

If we look at the particular contract, we find that it starts with the recitals:

> Whereas the Chatham Company is the owner of a system of mains and pipes laid through, under and along the streets, squares, highways, lanes and public places of the *City of Chatham* by and with the authority and sanction of the said City, also of certain rights and franchises to distribute and sell gas to the inhabitants of the said City.

(1) [1916] 2 A.C. 397.

And whereas the parties hereto have agreed for the supply by the producers (the appellant) to the Chatham Company of natural gas, and for the sale and distribution *in Chatham aforesaid* of the same by the said Chatham Company on the terms and conditions following.

In the first of these recitals there is an identification of the respondent's system of pipes in the City of Chatham as it existed at that time, and the agreement is for the supply of gas by the appellant in Chatham aforesaid. In other words, read as a whole, the contract is merely one by which the appellant agrees to sell the respondent a quantity of natural gas at a certain fixed price, which quantity is determined by the capacity of the system of mains and pipes then laid through, under and along the streets, squares, highways, lanes and public places of the City of Chatham, as it then was. If there be doubt, I presume that the rule laid down by Pothier in his Treatise on Obligations, No. 97, would apply. The contract is interpreted as against him who has stipulated and in favour of him who has contracted the obligation. *City of Toronto* v. *Toronto Railway Co.*(1).

And in estimating the probable intention, I do not think we can overlook the facts that the contract contemplates the supply by the appellants of gas outside the city therein mentioned to others than the respondent, and that at the time of its execution the appellants held a ten days old grant of a franchise from the Corporation of the Township of Raleigh which included the area in question here. This franchise, in so far as the 51 acres are concerned at any rate, is still in existence. The appellants moreover hold numerous similar franchises in other neighbouring municipalities. Sec. 33 of the Municipal Act, R.S.O. [1914] ch. 192, provides:—

(1) [1907] A.C. 315.

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> Where a district is annexed to a municipality, its by-laws shall extend to such district * * * and the by-laws in force therein shall cease to apply to it, except those relating to highways * * * and except by-laws in force conferring rights, privileges, franchises, immunities or exemptions which could not be repealed by the council which passed them.

If we conclude that the agreement of 3rd November, 1906, is not as the trial judge finds "articles of partnership" between the parties and there is nothing else to shew that the area as regards the contract is necessarily the same as that embraced in the respondent's franchise, but rather the contrary, then it becomes unnecessary to determine in this action what is the limit of the area covered by the respondent's franchise.

The appellant's claim is for a declaration that it is not bound under the contract of 6th (3rd) November, 1906, to supply gas to the respondent except for distribution within the limits of the City of Chatham as it then existed; and the consequent relief sought is an injunction restraining the respondent from diverting the gas supplied to it by the appellant to or for the purpose of the respondent's contract with the Dominion Sugar Company, one of its principal customers, whose factory is situated within the territory added to the city.

The trial judge found against the appellant and held that:

> the proper interpretation of the agreement is that its provisions were intended to extend to and include not only the City of Chatham as it was bounded and constituted at the date of the agreement, but land which might thereafter be annexed as well;

and that

> It follows that the respondent will be entitled to obtain from the appellant a sufficient supply of natural gas for its customers on the annexed land.

And referring to the claim for an injunction the learned judge says:

> this prayer is based on the assumption that it would be declared that the agreement applies only to the city as it then was.

The finding being otherwise, no such injunction as prayed could of course be granted; but the judge has entered into a consideration of the contract made between the respondent and the Dominion Sugar Company and, being of opinion that it was

> not one under which the respondent has a right to divert gas to the Sugar Company against the will of the appellant,

has granted "a qualified injunction" restraining the respondent from so diverting gas under any agreement unless and until it is approved by the court.

Against this judgment both parties appealed, and the Appellate Division, apparently approving the judgment as to the refusal of the declaration sought by appellant, decided that, in view of the Sugar Company not having been a party to the proceedings, there would have to be a new trial with liberty to the appellant to add the Sugar Company as a party defendant.

The judgment on trial being now reversed, there is, of course, no ground on which a new trial could be ordered. The appellant is entitled to the declaration and consequential relief sought.

The appeal will therefore be allowed, and the judgment on trial set aside; and it will be declared that under the contract of the 3rd November, 1906, between Symmes and Coste, the predecessors in title of the appellant and the respondent, the appellant is not bound to supply gas to the respondent except for distribution within the limits of the City of Chatham as it then existed or in special cases with respect to

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which agreements exist. The respondent will be restrained by injunction from diverting gas supplied to it by the appellant otherwise than in accordance with such declaration.

In *Hartlepool Gas and Water Co.* v. *West Hartlepool Harbour and Railway Co.*(1), the dock company were supplying their own water to their lessees in breach of their covenant to take all their water from the water company. The water company were held sufficiently satisfied with damages for breach of the covenant.

In the present case the defendant is diverting and supplying to strangers gas and water respectively belonging to the plaintiff to which the defendant has no right except under its contracts which do not provide for this.

It is no answer for the defendant to say: We have made a contract with strangers to give them your gas or water to which we have no right, and, therefore, we cannot be stopped appropriating and giving away your goods. Neither is it necessary to hear what the receiver of the misappropriated goods has got to say.

Davies J.—I am of the opinion that this appeal should be allowed and the judgment of the Appellate Division should be set aside and that it should be declared that appellant is not bound to supply gas for the territory annexed to the City of Chatham since the agreement in question was entered into, and I am also of the opinion that an injunction should be granted in aid of that declaration.

I concur generally in the reasons for judgment stated by Mr. Justice Idington, costs, of course, to follow the result.

(1) 12 L.T. 366

IDINGTON J.—The appellant as the assignee of the rights of H. D. Symmes and D.A. Coste under a contract made on 3rd November, 1906, between them and respondent, brought an action for the construction thereof, and in the event of appellant's contention relative thereto being maintained, for an injunction restraining the respondent from violating same.

The learned trial judge's construction of the contract failed to maintain the appellant's contention yet he fell far short of satisfying respondent.

Hence both served notice of appeal to the Appellate Division of the Supreme Court of Ontario which, without expressing any opinion on the merits of any of the several contentions set up, set the learned judge's judgment, which had granted an injunction against respondent, aside and directed a new trial with liberty to appellant herein to add the Dominion Sugar Company as defendants.

Upon appeal here from said judgment the objection is raised that it was merely in the exercise of its discretion that the Appellate Division directed a new trial, and hence no appeal would lie here, and further that nothing but questions of practice and procedure were involved in the appeal.

I am afraid that something more is involved, and that we cannot, by that easy way, evade the duty of deciding the questions raised.

In the first place, the then prevalent application of the rule relative to non-interference with the discretion of an appellate court granting a new trial got rather a bad blow from the Judicial Committee of the Privy Council in the case of *Toronto Railway Co.* v. *King*(1). We, following what had been the usual

(1) [1908] A.C. 260.

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practice in this court up to that time, of assuming that when the court below in any case had, for one or other apparently good reason, decided to grant a new trial, it had exercised its discretion and hence, under section 45 of the "Supreme Court Act," now involved, no appeal would lie, refused to hear the appeal of *King* v. *Toronto Railway Company*.

The railway company was unwise enough as the result shewed to appeal to the Privy Council from the judgment of the Ontario Court of Appeal there in question to have the action dismissed, and that ended not only in the company's appeal being dismissed, but also the trial judgment which had been given against the company, being restored. That led to our examining in other cases thereafter the foundation for such alleged discretion as ground for declining jurisdiction instead of assuming it to exist.

When so examined herein, I fail to find any reason for declining jurisdiction. I also fail to find any adequate reason for the court below granting a new trial.

I have considered all the cases cited by Mr. Justice Hodgins and supplemental thereto on the same point by counsel for the respondent in their factums. None of them seem to me to touch what is involved in the alleged necessity for the Sugar Company being made a party to this suit.

The test of whether or not a party is necessary to the due constitution of a suit, was neatly put by Lord Cairns in the case of *Kendall* v. *Hamilton*(1), where he says, at page 516:—

> I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed.

(1) 4 App. Cas. 504.

Pleas of abatement being abolished, as he had observed, did not prevent the application of the test. Such an objection, if relied upon, may still be taken by objection, in the pleading, to the relief being granted unless and until the necessary party has been added or, I imagine, by a motion in chambers.

No such course was taken and adhered to herein. If so taken and adhered to, it should not have prevailed.

When the nature of the relief sought is such that parties to the original transaction giving rise to the litigation, and thus in privity with him complaining, have obviously a direct interest in having the question correctly decided they may have, though perhaps not actually necessary to the proper constitution of the suit, a clear right to be added.

Some of the cases cited are of this character as, for example, that of a party suing and alleging he sues on behalf of all other shareholders, when in fact he does not.

Other cases, such as those concerned in the construction of a will or its validity, have given rise to those concerned being added.

These several cases seem to have been disposed of by application in chambers.

In short, I think the rule was correctly laid down by Buckley J. in the case cited by Mr. Justice Hodgins of *McCheane* v. *Gyles* (No. 2)(1), at page 917, as follows:

> Looking at the rule you must, in order to say that a person who is not a party ought to be added, find either that he "ought to have been joined," or that his "presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter."

I understood it to be admitted in argument that the rule in Ontario is in substance the same as that he

(1) [1902] 1 Ch. 911.

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quoted. And surely if, as in that case, for any reason the absence of a co-trustee of him sued, or the representative of such a co-trustee alleged to have been equally at fault with the one so sued, can furnish no bar to the validity of the proceeding, the absence of one who never had anything to do with the contract in question or the creation of the obligation of which a breach is complained, cannot be heard to complain so long as the one bound by such obligation and answerable in damages is a party and liable also to have the substitutionary relief of an injunction granted against him.

It is not necessary to determine the question here of whether or not, for purposes of discovery, for example, or otherwise, some third party or stranger to the creation of the obligation in question, yet who has improperly intervened in thwarting the due observance of the obligation by those who were parties to its creation, might properly have been made a party defendant. The distinction between those who may properly be made parties and others who must, is old and often found applicable.

One rather curious feature of this case is that it has not been suggested that the Kent Company, an incorporated holding company possessed of all respondent's shares, except some held by its directors for qualification purposes, and which seems to have manipulated the whole business transactions now complained of and is to protect the Sugar Company in event of litigation, is a necessary party.

And yet the agreement between that company and the Sugar Company expressly provides for the defence of respondent in case of litigation in some features of its dealings through that company being handed over to the Sugar Company if it so desire.

I imagine the legal mind that constructed some of the devices in question had not the same view of the law requiring those conspiring to defeat a solemn obligation directly resting upon others than themselves being necessary parties to litigation arising thereout, that the judgment of the Appellate Division implies.

I conclude that such like parties are neither necessary parties to this suit nor entitled as of right to intervene and hence no new trial is necessary.

Moreover this is not a common law action, but essentially a judicial proceeding in the nature of suits or proceedings in equity within the meaning of the excepting part of section 45 of the "Supreme Court Act." And as we held in *Clarke* v. *Goodall*(1), a case may present both common law and equity features, and latter have to be observed in this connection.

I have therefore no doubt of our jurisdiction to hear the appeal and give the judgment which the court appealed from should have given.

I cannot agree with the learned trial judge's construction of the contract as being that which was within the contemplation of the parties. Nor am I free from doubt as to the form of the judgment granting an injunction.

I am of the opinion that the respondent has violated and threatens to continue violating its covenants with the assignors of the appellant which it is entitled to claim the observance of and, under the circumstances in question herein, to have that observance enforced by an injunction of the court.

The agreement of the 3rd November, 1906, between the respondent and Messrs. Symmes and Coste, provided that the latter should for a term of years,

(1) 44 Can. S.C.R. 284.

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yet unexpired, furnish the former, from sources therein referred to, with natural gas.

I shall presently deal with the questions raised as to the extent of the supply intended by the contract, but meantime think it well to dispose of another aspect of the case presented.

The said agreement, by clauses 10 and 11 thereof, provided as follows:—

> 10. It is further agreed that the net prices to be charged and collected from consumers of natural gas in Chatham shall be as follows: 25 cents per thousand cubic feet for consumers using natural gas for heating, cooking and other purposes during the months of October to March inclusive; 35 cents per thousand cubic feet for consumers using said gas for heating, cooking and other purposes during the months of April to September inclusive; 35 cents per thousand cubic feet all the year round for consumers using natural gas for cooking, but not for heating, and 15 cents per thousand cubic feet for consumers using 250,000 cubic feet per month or more, excepting what gas shall be used by the Chatham Company at their own works, for which the net price to be paid the producers shall be 7½ cents per thousand cubic feet.
>
> 11. It is further agreed that for all gas furnished hereunder the Chatham Company shall pay the producers as follows: As long as the gross recepts from the sales of gas are less than $60,000 a year, 60 per cent. of the gross receipts shall be paid by the Chatham Company to the producers, and as soon as the gross receipts from sales of gas amount to over $60,000 per year, then the Chatham Company shall pay 66⅔ per cent. of the gross receipts to the producers and settlement to be made at the end of the year from the time said natural gas is supplied by the producers or at the end of each following year at the same date whenever said receipts have proven to be more than $60,000.

It then further provided for the keeping of the necessary meters, books and records, and rendering of accounts whereby the observance of said agreement should be carried out. The binding nature of the limitations upon the prices to be charged was of the essence of the contract.

That was fully recognized by respondent for many years in many ways, and especially by several agreements made between itself and others who had become the assignees of the said Messrs. Symmes & Coste,

varying the prices and classification thereof either in general or in reference to the supply to particular individuals or companies.

For some reason or other they were unable to agree in like manner with regard to the Sugar Company's request for a supply, and in consequence thereof the respondent most unjustifiably proceeded by indirect means to supply the Sugar Company at a lower rate than it was entitled to serve any one in its class under above quoted clauses or any modification thereof.

That was attempted moreover to be put in execution by a deceptive and circuitous method which if maintained would be destructive of the efficacy of the contract.

The Kent Company, above referred to, as holding all the shares in respondent company, save such as needed to qualify the directors of the respondent, seemed to have such a curious conception of the obligations of a contract that it undertook to circumvent the provisions of that in question herein, and imagined that it could do so by a juggling of words to accomplish its end.

It was content to have the directors of the respondent as its puppets pretend in words it was observing the terms of the contract, whilst it, the real master, behind, was emasculating the vital efficiency thereof by handing back to the Sugar Company the rebate that reduced these words to a nullity.

In my opinion such a scheme was conceived in fraud, and is destitute of any legal defence to maintain it in face of the powers of a court of equity which has long exercised the jurisdiction of suppressing fraud.

I think the appellant is entitled to an injunction so framed as to prohibit the violation by the respondent,

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directly or indirectly, of the terms of its contract in question.

What I am inclined to doubt, but express no opinion upon, especially in the absence of argument directed to the point, is whether or not the injunction granted by the learned trial judge does not go so far as to exercise a supervision over the execution of the respondent's business in a way that courts of equity have uniformly declined to accept the burden of in granting injunctions.

In the view I have reached and am about to express I need not, if agreed to by a majority of the court, form such a definite opinion as might otherwise be necessary on this point.

Coming to the question which, beyond all others, the parties concerned seemed most anxious to have decided, of whether or not the contract bound the appellant's assignors, and hence it, to furnish natural gas to serve those needing such service beyond the bounds of the city as they existed at the date of the contract, I desire at the outset to remove any impression that may be derived from the mutual course of conduct which was observable throughout in serving consumers beyond the said limits.

If a contract is ambiguous the surrounding circumstances must be considered by way of illuminating that which may have been imperfectly expressed.

In other words, if we would understand what men have expressed we must realize the business they were about.

That cannot be extended beyond the immediate acts following the signing of their contract.

I, therefore, exclude all that was done by way of subsequent contracts, evidenced only by the conduct of the parties, in the interpretation or construction of the contract in question.

Such subsequent transactions must stand or fall on their merits.

The construction of the contract in question depends upon the meaning to be attached to the words "City of Chatham" used therein, at the time it was executed.

Stress has been laid upon the word "customers" and it has been connected in argument with the existence of a customer or customers outside the bounds of the city at the time of the making of the contract, as indicative of some intention to operate beyond the then city limits and hence to extend to any obtainable customers.

It is also pointed out that in the first clause the producers were bound to furnish a high pressure line of sufficient capacity for all the requirements of the Chatham Company and its consumers. The subsequent clauses make clear what is meant. The requirements of the company were specially referred to and a lower price therefor charged than to others, being its customers. Again the producers are restrained in clause 4 from furnishing gas to any one outside Chatham excepting the supply shall be greater than that required by the company for itself and its consumers for all purposes.

And again in clause 6 the company is bound to take and supply the gas to its consumers in Chatham.

Inasmuch as the contract is clearly intended to be reciprocal this provision and the entire absence of any provision for outside customers, seems to put beyond peradventure what was meant by the word "customers." Clearly it was only those within the city that were actually provided for.

The supply to any others outside must depend upon collateral contracts and whether these were *intra vires* or not does not concern us here.

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The scope and purpose of the written contract was the sale of gas in the City of Chatham to customers to be found therein and served there.

All other more or less irrelevant issues being eliminated, we have to determine whether it was only the then City of Chatham or also a future greater Chatham that was within the contemplation of the parties in thus framing their contract.

The plain literal meaning of the words surely limits the contract to that which was then existent just as much as if the supply contracted for had been for a given factory or block of buildings. What right would any one so bound have to extend it beyond the then present limits? What right have we to extend it beyond?

Suppose the city had so decayed, or grown in another direction than anticipated, as to render it expedient for purposes of its municipal government to have the limits changed and a part of it cut off, and in that cut off part there was a single factory to which a service pipe of the respondent had extended, could it be said that the appellant might then refuse to furnish gas for that factory, simply because the boundaries of the city had been changed for municipal purposes?

I put the converse case in order to bring out clearly what is involved in the contention of respondent. I venture to think no court would heed very much such a contention as assumed on the part of appellant in the case I put.

Moreover there may occur at any moment in a rapidly growing city the annexation of a suburban village already equipped with a plant of its own, or a service supplied by a gas or water company; could the contracting parties serving, just as here, the rapidly growing city, pretend they had as of course in such a

contingency thereby the right to serve the village annexed and discard what existed there for the like service? That seems inconceivable, yet it is what had happened and been contended for unsuccessfully in the analogous case of street railways in Detroit.

I cannot help thinking that the process of reasoning which rests upon the application of by-laws enacted for the general good government of a municipality to any new annexation thereto, and pressed on us as being relevant to and of necessity governing the determination of the contractual rights either of the municipality or those ancillary companies contracting for the service to be given the inhabitants thereof, is essentially unsound.

I submit there is a confusion of thought in such a mode of reasoning. The promiscuous mingling of the governmental jurisdiction of a council with the contractual relation of the corporate body does not help to anything but to confuse and mislead. And none the less so when we know that the mode of entering into a contract must be by by-law and the legislative function must also be discharged by a by-law.

To apply that mode of reasoning as sought herein must inevitably lead to unjust and possibly in some cases disastrous consequences.

Whatever may be said and there is much in favour of the reasonable expectation of a local company incorporated under and by virtue of the statute whereby respondent was first and secondly constituted, being liable to be defeated by the narrower construction of the said statutes than respondent contends for, is to my mind far outweighed by the consequences liable to flow from the maintenance of such contention.

It is to be observed that this sort of corporate companies are by the statutes enabling their creation so

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limited as to capital and time of existence as to shew they were only intended as a temporary expedient.

And, as if anticipating the very argument set up herein derivable from their creation by by-law and the enactment that in case of annexations the by-laws of the annexing municipality are to prevail, the statute has been amended to read as follows:—

> Section 33. Where a district or a municipality is annexed to a municipality, its by-laws shall extend to such district or annexed municipality, and the by-laws in force therein shall cease to apply to it, except those relating to highways, which shall remain in force until repealed by the council of the municipality to which the district or municipality is annexed, and except by-laws conferring rights, privileges, franchises, immunities or exemptions which could not have been lawfully repealed by the council which passed them.

I call attention to the excepting part of this new clause which I may be permitted to suggest is of very doubtful import.

Clearly it was intended to prohibit the very conflict I have suggested as possible by virtue of annexations of villages to towns or cities.

Evidently the draftsman did not suppose that such a conflict was in law possible by a claim on the part of those supplying a service to the larger and annexing municipality, as here in question.

The "Municipal Franchises Act," 2 George V., ch. 42, seems on the facts presented to be an impassable barrier in the respondent's way herein, unless its contention that by virtue of the annexation it obtained by force of its charter a right to serve the annexed part is maintainable.

I have suggested all I need say in that regard.

My opinion is that the instrument before us is but a contract which related to a limited period and only contemplated a service for the purposes of the City of Chatham as it existed at the date thereof.

The like reasoning which supported that part of the judgment of this court in the case of *Toronto Railway Co.* v. *Toronto* (1), and the court above in the same case(2), relative to the boundaries of the city at the date of the contract being the governing line and limit of the operation of the contract, seems to me to support the opinion I express.

I recognize, however, that as has been so often said, decisions upon one contract may be of little service in determining the meaning of another. As illustrations, however, they are no doubt useful.

And in closing I may be permitted to say that I have a great reluctance to extending by implications, unless so clear as to be necessary to execute the purpose of the parties as expressed, that which is not expressed in a contract, and especially so when that contract is one in common use likely to bring undesirable consequences as the result of such treatment. I have more faith in parties being able to express what they want than in any guess a court is likely to make.

The respondent argues that its charter by its very nature shews it was intended to operate in the whole of the municipality whatever might be its bounds and the company to serve all the inhabitants thereof.

I have already illustrated how such a contention if upheld might produce undesirable results and attempted to shew thereby how doubtful the proposition may be in law.

The tendency of these several statutory changes I have just cited as illustrative of the minds of legislators relative to such a contention, rather suggests that the view put forward as to the scope of such like charters has not been generally accepted and hence cannot

(1) 37 Can. S.C.R. 430. (2) [1907] A.C. 315.

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fairly be said to have been one of the things which inevitably must have been present to the minds of Messrs. Symmes & Coste in framing the contract, and hence necessarily within the contemplation of the parties.

It may well be that the powers of a corporate company must form in arriving at an agreement the subject of due and full consideration in some cases. But it does not in this sort of case necessarily go beyond attention being paid to the actual fact of its having power to do that which the parties contracting with it have presented to their minds.

And if the respondent had clearly the widest sort of corporate power entitling it to go far beyond the bounds of the city in carrying on its business, that fact could not expand the plain literal meaning of the words used.

There is far more force in the counter argument of appellant that this unexpected demand upon its material appliances and resources would render it necessary to double its capacity.

That, however, is a contingency that possibly might have arisen had chance brought the Sugar Company to locate within the bounds of the city as they existed at the date of the contract.

Neither argument seems to me entitled to much weight relative to the construction of the contract.

The lastly mentioned one, however, does bring added force to the appellant's case by emphasizing the unjustifiable conduct of the respondent in seeking to destroy the efficacy of the contract relative to the rates to be charged.

I conclude that the parties having, in framing this contract, had in contemplation only a service for the inhabitants of the city as then delimitated, it should be so declared and an injunction be granted as prayed, and

alternatively that in any event the appellant is entitled to have the respondent enjoined against departing from the terms of the contract as modified.

The appeal should be allowed and the injunction granted as prayed for with costs to the appellant throughout.

DUFF J.—I am of opinion that the appeal in this case should be allowed in part.

ANGLIN J. (dissenting)—The foundation for, as well as the occasion of, this action is alleged contravention by the defendant of its contractual obligations to the plaintiff involved in a contract for a supply of natural gas made by the defendant with the Dominion Sugar Company. No other breach of the contract between the plaintiff (assignee of Symmes & Coste) and the defendant is suggested in the statement of claim. In addition to a judgment declaratory of the rights of the plaintiff and defendant *inter se* as to the area within which the latter is entitled to distribute natural gas supplied to it by the former, the plaintiff expressly prays for an injunction restraining the defendant from supplying to the Sugar Company natural gas furnished by it.

The learned trial judge held that upon the proper construction of the contract between the plaintiff and the defendant the situation of the Sugar Company's refinery did not preclude the defendant from supplying it with gas furnished by the plaintiff. In his opinion, however, the contract between the defendant and the Sugar Company was unfair to the plaintiff and such that the defendant was not entitled to require the plaintiff to supply gas to enable it to be carried out, in that, although to provide means of furnishing the quantity of

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gas which the Sugar Company might need would entail a duplication of the plaintiff's plant at great expense, there was no obligation on the part of the Sugar Company actually to take more than a trifling quantity of gas, and that a collateral agreement for a rebate gave that company an undue preference over other Chatham consumers, and was also contrary to the bargain as to prices to be charged by the defendant to its customers fixed by its contract with the plaintiff. He granted an injunction restraining the defendant from diverting gas supplied by the plaintiff to the Sugar Company under the existing agreement between that company and the defendant and under any other agreement that might be made or other conditions that might arise until sanctioned by the court.

The Appellate Division, expressing no opinion upon the construction of the contract between the plaintiff and defendant as to the area within which gas furnished under it might be supplied by the defendant to its customers, but disapproving of the order disabling it from making any agreement with the Sugar Company except with the sanction of the court, was unanimously of the opinion that in the absence of the Sugar Company the action was not properly constituted. The course suggested by the court, that that company might be added with its own consent and that of the present parties and the case determined on the record so amended, having for some reason been found unacceptable, the judgment of the trial judge was set aside, and a new trial ordered, with liberty to the plaintiff to add the Sugar Company as a party defendant. From that judgment the plaintiff now appeals.

It is obvious that the first matter for consideration is whether the appellant is entitled *ex debito justitiæ* to obtain the relief which it seeks without the Sugar Com-

pany being brought before the court, or whether, either because that company is a necessary party, or because judicial discretion would be properly exercised in directing that it should be added as a defendant, in order that it may have an opportunity of upholding any rights which its contract with the defendant purports to confer before it should be determined that those rights are non-existent, the order pronounced by the Appellate Division should be sustained.

Under its contract with the defendant it is natural gas furnished by the plaintiff that the Sugar Company is to receive. The obligation of the defendant to supply and that of the Sugar Company to take is to

> continue so long as natural gas can be obtained or secured by the Gas Company (the defendant) under and pursuant to the terms of the agreement between the Gas Company and the producers (the plaintiff)."

It may at least be arguable that if the plaintiff is unwilling and cannot be compelled to furnish gas to the defendant for delivery to the Sugar Company there is a failure of the subject matter of the contract between the defendant and the Sugar Company, and that consequently an action by the latter against the former for damages for breach of contract would not lie. As Mr. Justice Hodgins points out, we are not dealing with the ordinary case of "a contract for the supply of a commercial article," in respect of which, upon his vendor's failure to deliver, a sub-purchaser would have the ordinary recourse in damages.

Under these circumstances, if the construction should be placed upon its contract with the defendant for which the plaintiff contends, the effect might be to determine that the Sugar Company has no rights whatever against the present defendant. Such a determination of the Sugar Company's rights and position behind its back, though not binding upon it as *res judicata*,

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could not but prove prejudicial to it in any future contest over the same question. Moreover, unless the Sugar Company should be deterred by the practical effect of an adverse judgment rendered in this action from seeking to enforce its contractual claims, a second litigation of the same question (its right as a customer of the defendant within the present limits of the City of Chatham to be supplied with natural gas furnished by the plaintiff) must ensue—a result which it is now the policy of the courts to obviate, when that may be done without seriously prejudicing or embarrassing the plaintiff, by adding parties not otherwise necessary, but proper to be added within the limits prescribed by the rules. *Clifton* v. *Crawford*(1); *Cornell* v. *Smith*(2).

While an injunction forbidding the present defendant from delivering to the Sugar Company gas received from the plaintiff would not bind the Sugar Company so as to render it technically liable for a breach thereof because it would not be enjoined from receiving the gas, yet it would be just as effectively prevented from taking gas furnished by the plaintiff as if it had been so enjoined because such taking, with knowledge of the injunction, would be "assisting in setting the court at defiance"—would "obstruct the course of justice"—would "contumaciously set at naught the order of the court"—and would therefore properly render the Sugar Company punishable for contempt. *Seaward* v. *Paterson*(3), at pages 554 *et seq.*; *Scott* v. *Scott*(4), at page 457.

The case of *Hartlepool Gas & Water Co.* v. *West Hartlepool Harbour & Rly. Co.*(5), cited by Mr. Justice Hodgins, is indistinguishable in principle from that at

(1) 18 Ont. Pr. R. 316, 318.
(2) 14 Ont. Pr. R. 275, 276.
(3) [1897] 1 Ch. 545.
(4) [1913] A.C. 417.
(5) 12 L.T. 366.

bar. In alleged violation of an agreement with the plaintiff, the defendant in the *Hartlepool Case*(1) supplied its lessees (P.S. & Co.) with water not obtained from the plaintiff. Kindersley V.C., although he thought, as then advised, that the defendant could be restrained from doing this, was

> quite satisfied that the court cannot express any such opinion in the absence of P. S. & Co. so as to deal with them in such a manner as most materially to affect the important interests of those absent parties. * * * If the defendants had not entered into any lease or contract with P. S. & Co., I should grant the injunction, but inasmuch as they have entered into this lease or contract, I cannot grant an injunction without doing such prejudice to P. S. & Co. as ought not to be done to an absent party. It is not because the defendants would not (*sic*) be liable to an action by P. S. & Co. or to any inconvenience which might arise but it is because the court, on principle, will not ordinarily and without special necessity interfere by injunction, where the injunction will have the effect of very materially injuring the rights of third persons not before the court.

The interests of their lessees (P.S. & Co.) in that case would have been affected by an injunction against the defendants precisely in the same manner as those of the Sugar Company would be affected by an injunction against the present defendant.

It is, no doubt, quite within the power of the court to determine the construction of the contract between the parties to it in this action as now constituted. In that sense the Sugar Company is not a necessary party. If it rests on the contrary view, the judgment of the Appellate Division, even were this not an equitable action, would not be non-appealable under section 45 of the "Supreme Court Act." Yet, having regard to all the circumstances, and particularly to the obvious prejudice to the Sugar Company's contractual claims which must result from a judgment adverse to the defendant, to the occasion for and object of the present action, the form which it has been given, the allegations

(1) 12 L.T. 366.

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of the statement of claim and the relief sought, and to the desirability of having an adjudication in it which will preclude a second action upon the same issue, in my opinion, the order directing a new trial and giving the plaintiff liberty to add the Sugar Company as a defendant may well be supported as one that might have been made in the exercise of a judicial discretion which could not be held to have been erroneous.

For these reasons it would seem to me to be improper to grant relief by injunction in the absence of the Sugar Company; relief by way of damages for breach of contract is not asked and would scarcely be appropriate; and the circumstances are not such that the discretionary power of the court (*In re Berens* (1)), to pronounce a declaratory judgment unaccompanied by consequential relief, which, wide as it is (*Guaranty Trust Co.* v. *Hannay & Co.*(2), at pages 562, 564), is always acted upon "with extreme care and caution" (*North Eastern Marine Engineering Co.* v. *Leeds Forge Co.*(3)); *Faber* v. *Gosworth Urban District Council*(4), and usually only if it does not involve "interfering with the rights of other persons" (*Austen* v. *Collins* (5)), should be exercised.

In England, where the provision for pronouncing declaratory judgments, formerly contained in the statute 15 & 16 Vict. ch. 86, sec. 50, is now found in an extended form in a Rule of Court (O. XXV., r. 5), its validity in this latter form has been upheld by the Court of Appeal on the ground that it does not confer jurisdiction in the sense that without it the court would lack "power to deal with and decide the dispute as to the subject-matter before it," but merely enables it to

(1) [1888] W.N. 95.
(2) [1915] 2 K.B. 536.
(3) [1906] 1 Ch. 324, 329.
(4) 88 L.T. 549, 550.
(5) 54 L.T. 903, 905.

do so "in a different manner, under different circumstances and when brought before it by a different person," and that it is therefore "only dealing with practice and procedure." *Guaranty Trust Co.* v. *Hannay & Co.*(1), at pages 563-4, 570. In Ontario the former Chancery Order, No. 538, which corresponded with the former Imperial statute (15 & 16 Vict. ch. 86, sec. 50) is now replaced, likewise in an extended form, by sec. 16 (*b*) of the "Judicature Act," which is identical with the present English O. XXV., r. 5. Under the Ontario statute, as under the English Rule of Court, whatever may be the proper view as to the scope and character of the provision itself, the propriety under any given set of circumstances of exercising the power which it enunciates cannot be other than a matter of practice and procedure—just such a matter as it has been time and again decided should be finally determined by the Appellate Court of the province in which it arises, and, without questioning our jurisdiction, has been held not to be a proper subject of appeal to this court. *Emperor of Russia* v. *Proskouriakoff*(2); *Green* v. *George*(3); Cameron's S.C. Practice 85; *Arpin* v. *Merchants Bank*(4).

I would therefore be disposed to dismiss this appeal without any expression of opinion upon the construction of the contract between the plaintiff and the defendant.

In deference however to the contrary opinion on this aspect of the case held by the majority of the court, I proceed to state briefly my view upon the proper construction of the contract between the plaintiff and defendant as to the area within which the defendant is entitled to distribute natural gas supplied by the plaintiff.

(1) [1915] 2 K.B. 536.
(2) 42 Can. S.C.R. 226.
(3) 42 Can. S.C.R. 219.
(4) 24 Can. S.C.R. 142.

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The contract requires that the producers (the plaintiff) shall furnish to the defendant natural gas

through a high pressure line or lines of sufficient capacity for all the requirements of the Chatham Company and its consumers:

that they shall so

furnish to the Chatham Company natural gas in sufficient quantities at all times for the purposes of the Chatham Company's present and future consumers, and the Chatham Company's own use * * * and shall use due diligence at all times in prospecting and drilling wells for gas so that the supply may be continuous for all the purposes of the Chatham Company, and * * * shall make any reasonable expenditure that may be necessary to make the supply continuous:

and that they

shall not furnish natural gas in Chatham during the continuance of this contract to any person or corporation other than the Chatham Company so long as the Chatham Company continues to take its supply from the producers.

It requires the Chatham Company to take its supply from the producers (the plaintiff), unless they are unable to deliver it, and forbids the producers supplying any person or corporation outside the city, except

customers along their high pressure line, between the field and Chatham, unless the supply from time to time shall be greater that that required by the Chatham Company for itself and its consumers for all purposes.

It requires the Chatham Company to maintain and operate

a system of mains, pipes, fixtures and apparatus suitable and sufficient to distribute the gas to be supplied under this contract to any person, firm or corporation in the said City of Chatham desiring to use the same.

Two features stand out as essential and predominant in this contract—the defendant is obliged to take all its gas from the plaintiff (so long as it can furnish sufficient for the defendant's business) and to provide for its distribution to every person in Chatham desiring to use it; the plaintiff is obliged to supply (as far as it can or as due diligence and reasonable expenditure will enable it to do so) all the gas required by the defendant

for itself and all its customers. The franchise of the defendant to distribute, and the obligation of the plaintiff to furnish gas (within the limitation stated) would therefore appear to be co-extensive and co-terminous and to have been intended to remain so during the term of the contract between the plaintiff and the defendant. The limit of the plaintiff's obligation is the requirements of the Chatham Gas Company within its franchise.

The Chatham Gas Company was constituted in 1872, under a power then enjoyed by municipal corporations (C.S.C., ch. 65) enabling them to incorporate companies "for supplying cities, towns and villages with gas and water," by a by-law of the Town of Chatham which recited the desirability of "lighting with gas the streets and buildings of the said town" and gave it authority for that purpose to "lay down pipes or conduits under any of the streets or public squares of the town." It was "re-created and re-constructed" under the same statutory authority (R.S.O., [1877] ch. 157) by a by-law passed in 1884, and its corporate existence was formally recognized and declared by the Ontario statute 48 Vict. ch. 81. The right to substitute natural gas for artificial gas, if it did not already possess it, was conferred upon it by a by-law in 1906, when its agreement with the plaintiff was made.

It was the obvious purpose in creating this corporation that its franchise and its functions should be territorially co-extensive with the area of the municipality. The creation of such a company was the means provided by the legislature for the carrying on of a public utility under municipal authority and control for the benefit of an entire city, town or village. It was intended that the Chatham Gas Company should supply the needs of all citizens. Its franchise was

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perpetual. It would seem to follow that, as the municipal limits should extend, the franchise of the Gas Company with its co-related powers and obligations should also extend. If not, it would lose its municipal identity and the purpose of its creation would be defeated.

When the territory within which the refinery of the Dominion Sugar Company is situated was brought into the City of Chatham, the franchise, powers and obligations of the Chatham Gas Company, in my opinion, automatically extended to the area so annexed, subject, it may be, to any existing right or franchise of the plaintiff or any other company within the annexed territory. R.S.O. [1914] ch. 192, sec. 33; *Wentworth* v. *Hamilton Radial Electric Railway Co.*(1). There was no exclusive gas franchise in this annexed territory.

Moreover, assuming that the contract should be construed as the plaintiff contends, I am by no means satisfied that it is entitled in this action as now framed to a declaration that its contractual obligation with the defendant is restricted to supplying gas to be distributed within the limits of the City of Chatham as it existed at the date of the contract, the 6th November, 1906. The plaintiff well knew that at that time the defendant was supplying gas to a considerable number of consumers outside the limits of the city and it has since continued, with the knowledge and acquiescence of the plaintiff, to supply these and other outside consumers with natural gas furnished by the plaintiff. The plaintiff has for upwards of ten years under the terms of the contract knowingly taken its 60%, or 66⅔%, of the defendant's receipts from such customers. If granted the declaration it seeks, the plaintiff would be

(1) 54 Can. S.C.R. 178

entitled now to require the defendant to cut off all these customers. A general injunction restraining it from supplying consumers outside the limits of the city as they were in 1906 would have that effect and would seem to be open to the objections that it would be unfair to many persons not represented and also *ultra petita*, the only injunction asked being to restrain the supplying of gas to the Sugar Company. It may be worthy of the plaintiff's consideration whether there should not also be representation of other outside consumers.

In the absence of the Dominion Sugar Company the only observation I desire to make upon other features of its contractual relations with the defendant referred to in the judgment of the learned trial judge is that, at all events without some explanation not in the record, at least one of them—that providing for a rebate through the medium of a holding company—savours of methods which a court of justice cannot countenance.

If required now to dispose finally of the present action I should dismiss it.

Appeal allowed with costs.

Solicitors for the appellants: *Kerr & McNevin.*
Solicitors for the respondents: *Wilson, Pike & Stewart.*

1917
*Oct. 29, 30.
1918
*March 5.

THE CITY OF QUEBEC (DEFENDANT)..... APPELLANT;

AND

FREDERICK LAMPSON (PLAINTIFF)..... RESPONDENT.

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

Emphytcusis—Lease—Sale—Intention of parties—Art. 567 et seq. C.C.—Appeal—Jurisdiction—Supreme Court Act, section 46 (b).

By an agreement respecting the unexpired term of an emphyteutic lease, it was stipulated that the vendor should be obliged to give to the buyer a deed of sale of all his rights and claims upon the lease when a sum of two hundred dollars had been wholly paid, and thereupon the buyer should enter into full proprietorship of the immoveable (under the terms of Art. 569 C.C.) subject to the payment of the emphyteutic rent.

Held, Anglin J. dissenting, that the intention of the parties was that the sale was to be deemed perfected by the payment of the sum stipulated, without it being necessary for the buyer to take out a title deed.

Per Anglin J.—When the payment was made, the buyer would become entitled to a transfer of the vendor's title and would enter into full proprietorship only after such transfer should have been made.

Held, Duff J. dissenting, that the existence or non-existence of proprietorship of a lot of land held under an emphyteutic lease "relates * * * to * * * title to lands or tenements" within the clause (*b*) of section 46 of the Supreme Court Act.

APPEAL from the judgment of the Court of King's Bench, appeal side, maintaining the judgment of the Superior Court, District of Quebec (1), and maintaining the action with costs.

The immoveable property in question in this case was leased by the respondent to one Giguère for a

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

(1) Q.R. 49 S.C. 307.

period of twenty-five years; and subsequently, the unexpired portion of this lease, to wit two years, was sold for taxes due by the tenant and purchased by the appellant. The appellant then leased that unexpired portion to one Mrs. Falardeau; and the agreement between them contains this provision:

Il est convenu entre les parties, que la dite Cité de Québec sera tenue et obligée de consentir à la dite Dame Falardeau un titre de vente de ses droits et prétentions sur les dits baux emphytéotiques lorsque la dite somme de deux cents piastres aura été entièrement payée, et alors la dite Dame Falardeau entrera en pleine propriété du susdit immeuble, sujet toutefois au paiement de la dite rente emphytéotique.

Mrs. Falardeau entered into possession of the property immediately after the lease was made, and she fulfilled all her obligations to the appellant, her vendor and to the respondent, the landlord; but she did not apply for nor obtain a deed of sale.

The appeal turns upon the meaning of the above clause, interpreted in accordance with the above facts and the intentions of the parties and the question to be decided is whether Mrs. Falardeau or the appellant has the proprietorship of the immoveable leased.

L. A. Taschereau K.C. and *J. E. Chapleau K.C.* for the appellant.

Chs. Angers K.C. and *Louis Larue* for the respondent.

THE CHIEF JUSTICE.—I am of the opinion, with all possible respect, that we have jurisdiction to hear this appeal under section 46 (*b*) of the "Supreme Court Act." By this action, the plaintiff (respondent here) claims: (*a*) the possession as landlord of a lot of land held as

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he alleges, by the city, under an emphyteutic lease; and (*b*) the payment of different sums of money for arrears of rent, for damages and for repairs. The question at issue between the parties relates therefore to the right or title to property held under emphyteutic lease. Emphyteusis carries with it alienation; and, so long as it lasts, the lessee enjoys the rights attached to the quality of a proprietor. Art. 569 C. C.

Le droit de l'emphytéote est réel et puisqu'il s'exerce dans un immeuble, c'est un droit réel immobilier.

Laurent, vol. 8, No. 352. *Delisle* v. *Arcand*(1). This point was not raised at the argument

On the merits, I have reached the conclusion that the city is not now, and has not been for many years, to the knowledge of Lampson, in possession of the property in question, and that whatever rights the city acquired under the sheriff's title, hereinafter referred to, were assigned to Falardeau. The facts are not in dispute. The whole controversy turns upon the obligation of the city to pay rent for the property during the occupancy of Falardeau and that obligation depends upon the effect to be given the deed made by the city to Falardeau. Was it a mere lease, as Lampson contends, or did it operate to transfer the title to the realty for the unexpired term of the lease?

I do not think that either of the parties to these proceedings ever intended to argue that emphyteutic rent can be collected from a tenant who has, by valid assignment, parted with his rights in the property held under the emphyteutic lease. The confusion has, I think, arisen out of the claim which appears to have been made that novation was effected by the substitution of Falardeau as the debtor of the rent in place of the city with the consent of Lampson. That is

(1) 36 Can. S.C.R. 23.

the question which the Chief Justice who tried the case deals with, and I agree with that distinguished judge, who held that a case of novation was not made out. I have, however, the misfortune to be unable to agree to the construction which the Chief Justice puts on the deed by the city to Falardeau. It is, I grant, difficult to imagine how such a simple agreement as the parties evidently had in contemplation could have been so clumsily expressed. But, in construing a deed what must be sought is the intention of the parties; and however ambiguous and involved the language they used may be, if that intention can be ascertained with reasonable certainty, then effect must be given to it. Mr. Justice Archibald, in the case of *Stevenson* v. *Rollit*(1), gives the rule of construction applicable to deeds which contain a promise of sale of an immoveable when followed by actual possession. As that learned judge says, the answer to the question as to whether the right of property has or has not passed must be gathered from the promise of sale as to the intention of the parties. If there is

a clause in the promise of sale *which provides that the right of property should not pass*, the courts have never held that, notwithstanding such provision, the right of property did pass.

But, in the absence of such a provision, effect must be given to article 1478 C.C.

Les parties ont stipulé expressément qu'elles entendaient faire un contrat de location, mais le rapport de droit, tel qu'il résulte objectivement des clauses de l'acte, correspond au contrat de vente dont l'élément spécifique, transfert de propriété, se trouve réalisé. S.V. 1888, 1. 87; D. 96, 1. 57; D. 98, 1. 271.

This appeal, as I understand the contentions of the parties, turns upon the question as to whether it was the intention of the city not to part with the property held under emphyteutic lease until the "titre de vente," *i.e.*, the title deed or writing evidencing the sale was

(1) Q.R. 42 S.C. 322 at p. 328.

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taken out by Mrs. Falardeau. There is no doubt that the deed of lease contains a promise of sale and that Mrs. Falardeau entered into possession thereunder. But it is said it was a condition of the deed that the title should not pass until Mrs. Falardeau had applied for and obtained her deed of sale.

The property in question was leased by Lampson to one Giguère for a term of years under emphyteutic lease and subsequently the unexpired portion of that term was sold for taxes due by the tenant. It was purchased by the city and the agreement now in question was then entered into. By that agreement, the city leased to Mrs. Falardeau for two years the unexpired portion of the lease to Giguère, the lessee undertaking to pay to the city $200 in eight equal instalments of $25 each and to Lampson, the landlord, his emphyteutic rent. In a word, by the terms of the lease, Mrs. Falardeau assumes all the obligations of a proprietor and, in addition, agrees to pay the city for its interest the $200 above mentioned. Then the lease contains this provision:

> Il est convenu entre les parties, que *la Cité de Québec sera tenue et obligée de consentir à la dite Dame Falardeau un titre de vente* de ses droits et prétentions sur les dits baux emphytéotiques lorsque la dite somme de deux cents piastres aura été entièrement payée, et alors la dite Dame Falardeau entrera en pleine propriété du susdit immeuble, sujet toutefois au paiement de la dite rente emphytéotique.

This appeal turns upon the meaning of that language. I construe that clause, read with all that precedes, to mean that, when the sum of $200 has been paid, Mrs. Falardeau becomes the owner of the unexpired term of Giguère's lease acquired by the city under the sheriff's title and, in addition, the city binds itself to give a deed conveying to Mrs. Falardeau all its rights and pretensions to the unexpired portion of the lease. Mrs. Falardeau entered into possession of the prop-

erty immediately after the lease was made to her and she fulfilled all her obligations to the city, her vendor, and to Lampson, the landlord; and it is now for us to say what was in all these circumstances the intention of the parties when they made that agreement. It is reasonably clear that Mrs. Falardeau meant to acquire and the city to sell all the right of the latter in the property. The total consideration stipulated for was the sum of $200 and when that sum was paid to the city Mrs. Falardeau had fulfilled her part of the agreement. She could then, at any time, force the city to give her the paper title, which would be merely evidence of the fact that she had performed her part of the agreement. The language of the deed, as I have already said, is not happily chosen; but why should we assume that the taking out of the paper title by Mrs. Falardeau was a condition of the sale? Nothing remained to be done by her when she had completed her payments and it is not easy to see why the city should make it a condition of the sale that Mrs. Falardeau should take out a deed. What could be the possible object of such a stipulation?

The language of the instrument is:

> Il est convenu * * * *que le cité sera tenue et obligée de consentir à un titre de vente* * * * lorsque la dite somme de deux cents piastres aura été entièrement payée.

I can find in these words no trace of any intention by the city to retain the title to the property after the $200 had been paid. When that sum was paid, Mrs. Falardeau had fulfilled all her obligations to her vendor and she was entitled absolutely and of right to her "titre de vente"—document of title. The city could not refuse to give it to her and therein this case is clearly distinguishable from such cases as *Stevenson* v.

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Rollit(1); *Hogan* v. *City of Montreal*(2); *Thomas* v. *Aylen*(3); *Grange* v. *McLennan*(4), which will all be found collected at pp. 29 and 30 of Mignault, vol. 7. That learned author sums up his analysis of all these cases thus:—

> Quelle interprétation devra-t-on donner à la clause par laquelle le vendeur s'engage à donner un titre lorsque le prix sera payé? *C'est une question d'interprétation* de l'interprétation de l'intention des parties.

It is difficult for me to find in the language of the instrument an intention to give the purchaser the right to enjoy the property for years, and then permit her by refusing to exercise her discretionary right to take the paper title to defeat the whole scheme of the agreement. It is not, I insist, the vendor which stipulates, as in the cases referred to by Mignault, for the retention of the title for its own protection, but the purchaser who neglects to exercise her right to ask for and obtain the evidence of the transaction entered into with the city. Under the Code, sale is perfected by the consent alone of the parties (Arts. 1472 C.C.; 1025 C.C.). No deed is necessary and the paper title gave no additional force or effect to the transaction in so far as Mrs. Falardeau was concerned. The latter, as I have already said, entered into possession immediately after the lease was passed, made her payments within the stipulated time and thereafter dealt with the property as if it was her own, not only to the knowledge of the city but also of Lampson who treated her as his emphyteutic tenant.

It is said that there was no obligation on the part of Mrs. Falardeau to acquire the emphyteusis; but that was the consideration for the payment of $200. The emphyteusis was the thing sold or for which she

(1) Q.R. 42 S.C. 322.
(2) M.L.R. 1 Q.B. 60.
(3) 16 L.C.Jur. 309.
(4) 9 Can. S.C.R. 385; 28 L.C.Jur. 69.

agreed to pay and did pay the $200 and of which she entered into possession immediately when the deed was made. As for tradition, I assume that Pothier's definition will be accepted by the majority:

La tradition réelle est celle qui se fait par une préhension corporelle de la chose faite par celui à qui on entend en faire la tradition, ou par quelqu'un de sa part. *Il n'est pas nécessaire* pour la tradition réelle qu'il en soit fait un acte par écrit.

(Art. 1493 C.C.). The obligation to deliver is satisfied when the buyer enters into possession with consent of seller. Title passes by the effect of the contract (1025 C.C.).

On the whole, I am of opinion that the appeal should be allowed with costs.

DAVIES J.—I concur with His Lordship the Chief Justice.

IDINGTON J.—I concur with His Lordship the Chief Justice.

DUFF J. (dissenting).—I am to dismiss for want of jurisdiction, with costs.

ANGLIN J. (dissenting).—The plaintiff, as emphyteutic lessor, sues the City of Quebec, as purchaser, at a judicial sale for taxes, of the unexpired term of two emphyteutic leases, for an unpaid balance of the ground rent or *canon* accrued since the purchase, for the cost of neglected repairs which the emphyteutic lessee was bound to make, and for delivery up of the leased premises, the emphyteusis having now expired. To this claim the city pleads that it sold its interest in the premises to one Mme. Falardeau, and that she has been the sole proprietress thereof under the emphyteutic leases since the first of August 1896. In his reply the plaintiff denies that Falardeau had acquired

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title as emphyteutic proprietor and alleges that his rights against the defendant remained unaffected by any agreement made by the defendant with her.

The learned trial judge(1), maintained the action, holding that the city by purchasing the leaseholds at a judicial sale became personally responsible to the lessor for payment of the rent or emphyteutic *canon* as well as for the other obligations of the original lessee; that a *lien de droit* was thereby established between it and the lessor whereby the latter became creditor and the former debtor in respect of the rent and other obligations of the leases; and that, in the absence of novation, the city was not relieved of the liability thus assumed merely by reason of the occupation or enjoyment of the leasehold premises by Mme. Falardeau *à titre d'emphytéote*, her payments of rent to Lampson and a statement made by her that she had acquired the city's rights.

The Court of King's Bench unanimously affirmed the judgment for the plaintiff, on the ground, however, that, although an alienation of the emphyteusis made by the city in good faith would have relieved it of future obligations to the emphyteutic landlord, there has not in fact been such an alienation to Falardeau.

Having regard to the nature of an emphyteusis —it conveys the immoveable for a time to the lessee (art. 567 C.C.); so long as it lasts he enjoys all the rights attached to the quality of a proprietor,—may alienate, transfer and hypothecate the immoveable so leased (art. 569-570 C.C.); his interest may be seized and sold as real property (art. 571 C.C.); he is held for all the real rights and land charges to which the property is subjected (art. 576 C.C.); the rent itself is an immoveable (art. 388 C.C.):

(1) Q.R. 49 S.C. 307.

En effet, le bail emphytéotique est une aliénation de la propriété utile au profit du preneur pendant tout le temps que doit durer le bail, la propriété directe demeurant reservée au bailleur;

(Merlin, Rep. vbo. Emphytéose, 1,3)—I entertain no doubt that the issue as to the existence or non-existence of this proprietorship in the defendant "relates to title to lands or tenements" within clause (*b*) of s. 46 of the Supreme Court Act and that we have jurisdiction to hear this appeal.

That the City of Quebec by its purchase of the unexpired term of the emphyteutic leases at the judicial sale thereof assumed the obligations of the emphyteutic lessee is not now questioned. It has, of course, not been suggested that its undertaking was more extensive or more onerous. Agreeing, as I do, with the view which prevailed in the Court of King's Bench, that the plaintiff is entitled to succeed on the ground that the city never effectively parted with its interest to Mme. Falardeau, it is unnecessary to pass upon the "*considérant*" as to the absence of proof of novation, on which the learned Chief Justice of the Superior Court reached the same conclusion. It should perhaps be noted, however, that the case of *Credit Foncier Franco-Canadien* v. *Young*(1), cited by him would seem not to be in point. The lease, under which, in the absence of novation, the original lessee was there condemned to pay rent accrued after he had transferred his interest, reserved much more than a nominal rent and did not contain a stipulation obliging the lessee to improve the property and was therefore held not to be an emphyteusis, but an ordinary lease. The opinion of Merlin seems to conflict with the view taken by the learned Chief Justice and to point to the conclusion that, apart from any consideration of novation,

(1) 9 Q.L.R. 317.

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on alienation of an emphyteusis, unless perhaps in the exceptional case where

> le preneur par le contrat d'arrentement a promis fournir et faire valoir la rente, et a ce obligé tous ses biens,

or has otherwise expressly assumed a personal obligation to remain responsible thereafter (*Dubois* v. *Hall*(1)), his liability for future rent ceases. Merlin, Rep. (5 ed.) vol. 7, Vbo. "Déguerpissement" s. III., 1; s. IV., 1, and s. V., 1. The facts that an emphyteusis is terminated by the total loss of the estate leased, or by abandonment (art. 579 C.C.) that it imports the power of alienation and that the rent itself is an immoveable seem rather to support the view that, at all events in the absence of some explicit agreement by the lessee to remain liable for the rent after and notwithstanding a transfer of it, his personal liability terminates on its complete and *bonâ fide* alienation. It is unnecessary however to dwell further upon this aspect of the case since I am of the opinion that in the present instance there has not been the complete and effective alienation or transfer of the emphyteusis by the city which the learned appellate judges think would suffice to terminate its liability to the lessor. As put by Mr. Justice Lavergne:

> Une fois substituée au preneur originaire, le Cité de Québec ne pouvait se libérer de ses obligations quant au canon emphytéotique et au maintien de la propriété en bon état, que par une aliénation de bonne foi, ou le déguerpissement aux termes des articles 579 et suivants.

There is no question of abandonment here.

After acquiring the emphyteusis the city sublet the premises to Falardeau for two years from the 1st of August, 1894, at a rental of $100 a year, payable quarterly, Falardeau undertaking to pay in addition the emphyteutic rent and all rates and taxes and keep the

(1) 7 L.C.R. 479.

buildings in repair. This lease contained the following clause:

Il est convenu entre les parties, que la dite Cité de Québec sera tenue et obligée de consentir à la dite Dame Falardeau un titre de vente de ses droits et prétensions sur les dits baux emphytéotiques lorsque la dite somme de deux cents piastres aura été entièrement payée, et alors la dite Dame Falardeau entrera en pleine propriété du susdit immeuble, sujet toutefois au paiement de la dite rente emphytéotique.

As I translate it into English, this clause reads:

It is agreed between the parties that the said City of Quebec shall be held and obliged to give to the said Dame Falardeau a deed of sale of all its rights and claims upon the said emphyteutic leases when the said sum of $200 shall have been wholly paid, and thereupon the said Dame Falardeau shall enter into full proprietorship of the aforesaid immoveable, subject always to the payment of the said emphyteutic rent.

Although she paid the $200 as stipulated, a deed of transfer of the emphyteusis from the city has never been executed. Her lease from the city is the only title Mme. Falardeau has to the property. As Mr. Justice Lavergne says:

L'appelante a consenti à Madame Falardeau un simple bail pour deux ans, avec promesse de lui transférer la propriété une fois la somme de $200 payée; elle ne lui a jamais consenti la vente promise.

Mr. Justice Pelletier makes the same statement. I agree with the construction placed by those learned judges on the clause which I have quoted from the city's lease to Falardeau. Mr. Justice Pelletier says:—

L'acte que nous avons devant nous est un bail avec une clause déclarant que, au cas de l'accomplissement de deux conditions, Mme. Falardeau pourrait devenir propriétaire; ces deux conditions sont: 1o, le paiement de $200 par Mme. Falardeau à la Cité de Québec; 2o. la passation d'un titre. La clause du bail citée plus haut dit que c'est alors, c'est-à-dire après l'accomplissement de ces deux conditions, que Mme. Falardeau entrera en propriété de l'immeuble en question.

Pour que Mme. Falardeau serait devenue propriétaire, il fallait démontrer d'abord qu'elle avait payé les $200, et en second lieu que l'acte de transmission par la Cité de Québec à elle avait été passé.

As put by Mr. Justice Lavergne:

Madame Falardeau pouvait devenir propriétaire en vertu du bail et de ces conditions après avoir payé la somme de $200; secondement,

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par la passation d'un titre après l'exécution de ces deux premières conditions; il est dit dans le bail: "c'est alors que Madame Falardeau entrera en pleine propriété de l'immeuble." Il n'y a jamais eu de titre donné par la Cité de Québec à Madame Falardeau.

When she should have paid the $200, Mme. Falardeau would become entitled to a transfer of the city's title: when that transfer should have been made (*alors*; thereupon) she would enter into full proprietorship. That, in my opinion, is the intent and effect of the provision invoked by the city: The making of the transfer was a condition precedent to the passing of the property. *Stevenson* v. *Rollit*(1); *Hogan* v. *City of Montreal*(2).

A promise of sale with delivery and possession has not the effect of conveying the right of property to the promisee, when it appears from the terms of the contract that such was not the intention of the parties, but that on the contrary they meant to effect this result by a subsequent act. *Renaud* v. *Arcand*(3). The question is one of intention. *Grange* v. *McLennan*(4).

The evidence establishes that, since 1896, a dispute had been pending between the Falardeaus and the city as to a right of way or passage forming part of or adjoining the leased premises. The landlord had closed up this passage. The Falardeaus deemed it essential to the full enjoyment of the property. They claimed that it was in fact appurtenant to the leasehold and insisted on being given a title to it. The city contested this claim and refused to give a deed including the passage. The Falardeaus declined to take a deed without it. Matters were allowed to rest in

(1) Q.R. 42 S.C. 322, at pp. 329, 330.
(2) M.L.R. 1 Q.B. 60.
(3) 14 L.C.Jur. 102; 7 Mignault, p. 29.
(4) 9 Can. S.C.R. 385.

that position. As David Falardeau put it in giving his testimony:

Par La Cour:

Q. Vous ne l'avez pas encore eu?

R. Je ne l'ai pas encore eu, le titre, seulement ils ne nous ont pas dérangés dans la possession de la propriété, on a toujours été en possession de la propriété.

Par M. Larue, procureur du demandeur:

Q. N'est-il pas vrai que vous avez demandé vos titres à la cité de Québec à plusieurs reprises et que la cité de Québec a refusé, qu'elle n'a pas voulu en donner?

R. Non pas qu'elle refuse de nous en donner, mais seulement ils m'ont offert un titre que je ne trouvais pas acceptable.

Par M. Chapleau, procureur de la défenderesse.

Q. A cause du passage.

R. A cause du passage, je voulais faire clairer le passage et puis, ils n'ont pas * * *

Par M. Larue, procureur du demandeur:

Q. Tant que vous n'aviez pas de passage pour sortir, il était inutile pour vous d'avoir un titre.

R. Je ne pouvais pas continuer mon commerce là, ça ruinait mon commerce, ça nous a ruinés completement. Ils ont offert un titre mais il n'était pas acceptable pour nous.

The appellant urges two grounds in support of its contention that, notwithstanding that no deed had ever been delivered to Mme. Falardeau, she became the emphyteutic tenant under the Lampson leases and that it (the city) was thus relieved from the obligations incurred when it purchased at the sale for taxes. It relies on some payments on account of the emphyteutic rent made by Falardeau after August, 1896, and other alleged acts and admissions of her status as emphyteutic tenant: and it invokes article 1478 C.C.

As found by the learned trial judge, Mme. Falardeau did pay $100 on account of the rent due Lampson subsequent to August, 1896. The city had paid $60. A balance of about $690 remains unpaid. I find nothing in what Mme. Falardeau has done inconsistent with the tacit renewal of her lease from the city (art. 1609 C.C.) pending the adjustment of the question

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as to the lane or passage. While holding under that lease she would be bound to comply with its terms. They required her to pay the emphyteutic rent and to keep the premises in repair, etc. Her conduct and that of her husband is explicable on the assumption that, while Mme. Falardeau actually continued to hold under the lease from the city, they fully expected that she would eventually become proprietor of the emphyteusis. It does not import an election to forego their objection to the title offered by the city. As put by the learned Chief Justice of the Superior Court:

> Tous ces faits cependant ne sauraient constituer, en faveur de la cité, une fin de non-recevoir.

On the other hand, their persistent refusal to accept a transfer unless it included the passage is inconsistent with the Falardeaus having intended that the emphyteusis should actually vest in Mme. Falardeau without the formality of a deed. Taking all the circumstances into account they do not justify a finding that she waived the giving of the deed by the city and that all parties tacitly consented to treat the promise of sale contained in the lease as having been carried out.

There appear to be two formidable obstacles to the application to this case of art. 1478 C.C. In the first place, the promise itself is unilateral. The document contains no agreement by Mme. Falardeau to purchase. The city was, no doubt, bound to sell and convey to her on payment of the sum of $200, but there was no corresponding obligation on her part to take or acquire the emphyteusis. Neither was there any delivery or any taking of possession under the promise of sale such as might import an agreement on Mme. Falardeau's part to become the owner of the property.

In delivering the judgment of the majority of the Court of King's Bench in *Thomas* v. *Aylen*(1), Badgley, J., says:—

> It is also urged that by art. 1478 C.C. *la promesse de vente avec tradition et possession actuelle équivaut à vente;* * * * Now the article at the utmost is only a general expletive of *promesse* with both tradition and possession combined, but as a rule of law allowing it that effect, it could not annul the covenants and conditional stipulations of the parties themselves, which are exceptions to the maxim and qualify the rule, leaving the conditional sale such as it is stipulated, according to the covenants of the parties, in conformity with the stringency of another legal rule paramount to that of the article, that *modus et conventio vincunt legem* * * * It must be observed that the expressions *tradition et possession actuelle,* constituents required to make up the equivalent of sale of the article, are not the legal synonyms of each other. Tradition is the known legal complement and satisfaction of a sale, "*la tradition est la transmission du droit de propriété, c'est transférer sa possession dans l'intention de nous en faire avoir la propriété,*" and it is also expressed in different terms in the 1492 art: '*C'est la translation de la chose vendue en la jouissance et possession de l'acheteur,*" whilst, on the other hand, possession even though *actuelle,* is the mere occupancy of the *immeuble vendu,* the simply permitted use of the land.

The only "tradition" or delivery of the premises by the city was made under its lease to Mme. Falardeau as its tenant. It had no relation to the conditional promise of sale. Her continued possession after the term of two years had elapsed may well be attributed to a tacit renewal of it pending the settlement of the dispute as to a question of title. This dispute still remains unsettled at the expiry of the emphyteusis in 1913. If, therefore, article 1478 has any application to a promise of sale unilateral and subject to a condition to give title upon payment of the price (*Keegan* v. *Raymond et al.*(2); *Levy* v. *Connolly*(3); *Richer* v. *Rochon*(4)), such as that with which we are now dealing there never was the delivery or "tradition" *under it* requisite to enable the city to invoke that article. I

(1) 16 L.C.Jur. 309, at pp. 315-6.
(2) Q.R. 40 S.C. 371.
(3) 7 Q.L.R. 224.
(4) Q.R. 10 S.C. 64.

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also incline to think that the possession of Mme. Falardeau, because consistent with a tacit renewal of the lease from the city and therefore not necessarily ascribable to the promise of sale, was not of the character required by the article. But possession without "tradition" would not suffice.

I would, for these reasons, affirm the judgment of the Court of King's Bench and dismiss this appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Chapleau & Morin.*
Solicitor for the respondent: *J. L. Larue.*

JOHN H. SCOWN (PLAINTIFF) .....APPELLANT;

AND

THE HERALD PUBLISHING COMPANY (DEFENDANTS) ..... } RESPONDENTS.

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*Feb. 28.
*March 5.

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

Libel—Newspaper—Proprietor and publisher—Address of publication—Libel and Slander Act, 4 Geo. V. (2 sess.) c. 12, s. 15.

In an action claiming damages for a libel published in a newspaper the Alberta Libel and Slander Act by sec. 15 requires for certain purposes of defence that "the name of the proprietor and publisher and address of publication" shall be stated at the head of the editorials or on the front page of the paper. The *Calgary Herald* publishes at the head of the editorials: "The *Herald* * * * Published at Calgary, Canada, by The *Herald* Publishing Co." The *Herald* Publishing Co. is both proprietor and publisher of the newspaper, and in an action against it for libel—

Held, Idington J. dissenting, that the requirements of sec. 15 were substantially complied with. Judgment of the Appellate Division (38 D.L.R. 43) affirmed.

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

The only question raised on this appeal is whether or not the statement in the *Herald* that it was "Published at Calgary, Canada, by The *Herald* Publishing Co." was a compliance with the requirements of sec. 15 of the "Libel and Slander Act" that "the name of the proprietor and publisher and address of publication" shall be stated. The appellant contends that the fact of the company being both proprietor and publisher should appear and that the address of

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

(1) 38 D.L.R. 43.

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publication should be more specific. The trial judge agreed with this but was reversed on appeal.

Geo. H. Ross K.C. and *Barron* for the appellant, referred to *Skryha* v. *Telegram Printing Co.*(1), and *Ashdown* v. *Manitoba Free Press Co.*(2).

A. H. Clarke K.C. for respondents cited the above cases and *Knott* v. *Telegram Printing Co.*(3).

THE CHIEF JUSTICE.—Plaintiff (appellant) recovered $300 damages for libel. It is agreed that the only question on this appeal is whether the respondent company can claim the protection which is given by the "Libel and Slander Act" (Alta. 1913, ch. 12, 2nd Session) in view of the provision of section 15, subsection 1, which is as follows:—

No defendant shall be entitled to the benefit of sections 7 and 13 of this Act, unless the name of the proprietor and publisher and address of publication is stated either at the head of the editorials or on the front page of the newspaper.

It is admitted and agreed that the only words published at the head of the editorials or on the front page of the newspaper in question approaching the requirements of the said section 15 were as follows:—

THE HERALD.

Established 1883, Evening and Weekly. Published at Calgary, Canada, by The *Herald* Publishing Co. Limited.

Mr. Justice Ives, the trial judge, concluded that section 15 was not complied with, as the name of the proprietor was not stated.

The majority of the appeal court (Stuart J. dissenting) reversed the judgment on the ground that "the stating the name of the publisher as is done in this case is stating the name of the proprietor as well."

(1) 20 D.L.R. 692; 7 West W.R. 167. (2) 20 Can. S.C.R. 43.
(3) 27 Man. R. 336.

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I would dismiss the appeal because, I agree with Mr. Justice Anglin where he says that

> the spirit of the section (15) was substantially complied with by the respondent.

Idington J.

IDINGTON J. (dissenting).—The question raised herein is whether the 15th section of the Alberta "Libel and Slander Act" was complied with by the respondent in publishing at the head of the editorials or on the front page of a newspaper by printing therein the following:—

> THE HERALD.
>
> Established 1883. Evening and Weekly. Published at Calgary, Canada, by The *Herald* Publishing Co. Limited.

If that was not a compliance with said section the appeal herein should be allowed and the judgment for the plaintiff at the trial restored.

Said section 15 is as follows:—

> 15. No defendant shall be entitled to the benefit of sections 7 and 13 of this Act unless the name of the proprietor and publisher and address of publication is stated either at the head of the editorials or on the front page of the newspaper.

It so happens that in this instance the proprietor and publisher are identical, but quite clearly the proprietor may be and sometimes is an entirely different party from the publisher.

Such a thing has been known as the publisher being a man of straw used by a proprietor of substance as a tool for disseminating libels.

I think that possibly was within the range of vision of the draftsman of this Act which was designed to protect respectable newspaper proprietors and publishers and at the same time facilitate the enforcing of the legal remedies open to any one suffering at the hands of either such.

The clear intention was that every issue should contain the necessary information to enable any one

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so wronged to reach promptly and effectively the wrongdoer, whether proprietor or publisher.

That intention might be frustrated by the courts holding, as the court below has, that only the name of the publisher need be printed as directed.

And the mere accident that in this case the publisher happens to be also proprietor, does not meet the requirement of the statute.

It obviously was intended to furnish full information at a glance to be read by all concerned without being under the necessity of going to the expense of instituting legal proceedings to obtain it.

The proprietor might be liable in damages as a publisher for printing and giving to his ostensible publisher copies of the publication, or might be liable to be enjoined from continuing to print any defamatory matter regarding some person whom he desired to attack in that way.

This legislation to ameliorate the conditions of the public press imposes a very simple price as preliminary to enjoyment thereof.

It is idle to point to the use of the singular number of the word name as indicative of any legislative purpose to enable a purchaser thereby to fulfil the requirements of the statute; for the same sort of reasoning would justify the publication of only one name out of many proprietors or publishers. My opinion is that the respondent failed to comply with the law. I am also far from thinking that "the address of the publication" required, is satisfied by the words, "Calgary, Canada."

It might have been quite sufficient in 1883.

It is not only the well-known and highly respectable newspaper, such as I assume that in question herein to be, that we must keep in view, but also the possibly

obscure and disreputable publication that may emanate in a large city from some place almost, if not altogether, unknown and difficult to discover, that has to be considered in determining the true construction to be put upon an Act of this kind.

This substitute for registration required by legislation elsewhere, if lived up to, will, I suspect, be well worth while making it so full and clear that no complaint is likely to arise.

I think the appeal should be allowed with costs and the judgment entered by Mr. Justice Ives be restored.

ANGLIN J.—It is conceded that if the defendant has complied with section 15 of the "Libel and Slander Act" of Alberta (ch. 12, of 1913, 2nd session) this action has been rightly dismissed by the Appellate Division for non-compliance by the plaintiff with section 7 of the same statute.

Section 15 is as follows:—

15. No defendant shall be entitled to the benefit of sections 7 and 13 of this Act unless the name of the proprietor and publisher and address of publication is stated either at the head of the editorials or on the front page of the newspaper.

At the head of the editorials in the defendant's newspaper there was printed:—

The Herald. Established in 1883. Evening and Weekly. Published at Calgary, Canada, by The *Herald* Publishing Company, Limited.

It is common ground that The *Herald* Publishing Company is both publisher and proprietor of the *Herald*.

The appellant objects that "the address of publication" is not given with sufficient particularity, and that the fact that The *Herald* Publishing Company is

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the proprietor of the newspaper as well as its publisher is not stated.

The address as given would be sufficient for post office purposes and it supplies the information necessary to enable any person affected to comply with section 7 of the statute. I agree with the majority of the learned judges of the Appellate Division that the objection to it should not prevail.

It would almost seem from the use in section 15 of the word "name" in the singular and the non-repetition of the preposition and article "of the" that the legislature did not contemplate or provide for the case where the publisher and the proprietor of a newspaper should be other than the same person or body. The fact that only one address—that of publication—is required to be given tends to strengthen this view. Yet the proper construction may be "the name (or names) of the proprietor and publisher," or *reddendo singula singulis,* "the name of the proprietor and (the name of the) publisher," and when, as may happen, the proprietor and the publisher are different persons or bodies the spirit of section 15 would not be satisfied or its purposes accomplished unless both names were stated.

It is contended for the respondent that, read literally, the statute prescribes merely the printing, in either of the two designated places, of "the name" of the publisher and proprietor. But that interpretation would seem to ignore the significance of the use of the word "stated" which implies more than the mere printing of the name. Moreover, while the printing of the name in prominent characters at the head of the editorials might, without more, afford some indication that it is that of the publisher and the proprietor of the newspaper, the mere printing of

it in some inconspicuous part of the front page, as the statute permits, would not convey that information. I agree with Harvey C.J. that the spirit of section 15 would not be satisfied were the information that the name printed is that of the proprietor and publisher not furnished—at least substantially. It should not be overlooked, however, that it is by implication from the use of the word "stated" rather than because the statute explicitly so directs that we reach the view that this is its proper interpretation. Where, as here, the same person or body is both the proprietor and publisher, the spirit of the section, to which, in the absence of explicit direction, effect should be given, is, in my opinion, substantially and sufficiently complied with and its purpose is attained by the printing in either of the designated places of the statement that the newspaper is published by that person or body.

I would dismiss the appeal.

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

Appeal dismissed with costs.

Solicitor for the appellant: *J. B. Barron.*

Solicitors for the respondents: *Clark, Carson, McLeod & Co.*

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*Feb. 27.
*March 5.

CHARLES STAHL (PLAINTIFF)..... APPELLANT;

AND

WILLIAM MILLER AND JOHN KILDALL (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Sale of Land—Principal and agent—Vendor agent of purchaser—Rescission.

W. M., a member of the firm of "J. J. M." real estate brokers, was one of two trustees appointed by order of court to sell certain lands in Vancouver with liberty to employ "J. J. M." as agents. S. carried on real estate transactions through this firm or its other member and had given W. M. a power of attorney to buy and sell land for him in and around Vancouver. The other member of the firm of "J. J. M." purchased some land for S. from the trustees and an agreement for sale was signed by the latter as vendors and by W.M. as attorney for S. The purchase price was paid with money of S. in his agent's hands. The agreement was not sent to S. until five years after it was signed and he at once repudiated it and brought action for rescission.

Held, reversing the judgment of the Court of Appeal (37 D.L.R. 514), that as the evidence did not shew that S. was aware, until he received the agreement, that his attorney W. M. was one of the vendors, and as he acted promptly as soon as the fact came to his knowledge he was entitled to rescission of the agreement and repayment of the purchase price.

The defendants were sued personally and not as trustees.

Held, per Fitzpatrick C.J. and Anglin J., that as they purported to sell to S. as beneficial owners the proper parties are before the Court. No application to amend has been made but as a matter of grace if they now elect to amend judgment can be entered against them in both capacities.

APPEAL from the decision of the Court of Appeal for British Columbia(1), by an equal division of opinion upholding the judgment at the trial in favour of the defendants.

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

(1) 37 D.L.R. 514.

Reporter's note. The report of the judgment of the Court of appeal states that Martin J. was in favour of dismissing the appeal to that court whereas he and McPhillips J. were to allow it.

The facts of the case are fully stated in the above head-note.

A. L. P. Hunter for the appellant. The rule is well settled that an agent to buy cannot buy from himself. *Harrison* v. *Harrison*(1). And the extent of the agent's interest and fair nature of the transaction are immaterial, *Bank of Upper Canada* v. *Bradshaw*(2); *Cavendish-Bentinck* v. *Fenn*(3).

It was for the defendants to prove that Stahl was aware of the position of his agent or ratified the purchase. *De Bussche* v. *Alt*(4).

Cassidy K.C., for the respondents. The non-disclosure of Miller's interest as trustee would not avoid the sale. *Guy* v. *Churchill*(5). And he had no beneficial interest in the property. See *Great Western Insurance Company* v. *Cunliffe* (6); *Norreys* v. *Hodgson*(7).

THE CHIEF JUSTICE.—The appellant carried on speculations in real estate in Vancouver through the firm of J. J. Miller, real estate brokers in that city, and the respondent, William Miller, was a partner in the firm. On the 13th March, 1907, the appellant gave the respondent, William Miller, a power of attorney

to execute for him all documents, agreements for sale and deeds of land in connection with the purchase or sale of lands in Vancouver and absolute authority to do all acts, deeds, matters and things necessary to be done in and about the premises.

By an order of the court of British Columbia, made on the 13th September, 1910, certain lands of one Christina Kildall, deceased, were vested in the respondents, W. Miller and Kildall, upon trust for

(1) 14 Gr. 586.
(2) L.R. 1 P.C. 479.
(3) 12 App. Cas. 652.
(4) 8 Ch. D. 286.
(5) 60 L.T. 740; 62 L.T. 132.
(6) 9 Ch. App. 525.
(7) 13 Times L.R. 421.

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sale and to stand possessed of the proceeds upon the trusts therein mentioned

with liberty to the trustees to employ the firm of J. J. Miller & Company as agents for the subdivision and sale of the said lands at a commission, etc,

and it was further ordered

that the trustees receive by way of remuneration as trustees, etc.

J. J. Miller, who or whose firm were agents for the appellant, on the 10th December, 1910, purchased of the lands of the deceased Christina Kildall six lots for the appellant; and the respondent William Miller signed the agreement as one of the vendors and also acting under his power of attorney signed the name of the appellant as purchaser.

The appellant had no knowledge of the transaction until after it was completed and, as J. J. Miller retained the documents in his possession, the appellant was not informed of all the facts until he obtained the agreements on the 23rd October, 1915. On the 15th November, 1915, he wrote to the respondents giving notice to rescind the contracts for sale.

On the trial Macdonald J. gave judgment for defendants apparently on the ground that they were only trustees and the Kildall estate was not before the court.

On appeal, Macdonald C.J.A. thought that lapse of time and also the fact that the transaction was a fair one was a sufficient defence. Neither of these grounds can prevail here. *Hitchcock* v. *Sykes*(1).

It is also argued that although the respondents are the registered owners of the property they are not in reality the beneficial owners and therefore there is no conflict of duty by reason of the fiduciary relationship in which William Miller stood. But William

(1) 49 Can. S.C.R. 403.

Miller by the order of the court had absolute power to sell, and he had authority to buy under his power of attorney from the appellant. For his services as trustee, W. M. Miller was entitled to a commission on the sale and in addition he received his share of commission paid the firm of J. J. Miller, who were the selling agents for the respondents. A trustee for sale is no more competent to purchase the trust property as agent for a stranger to the trust than he is to buy it for himself.

As I am of opinion that this case cannot be distinguished from the numerous cases in which it has been clearly established that an agent cannot act for both vendor and purchaser, the appeal should be allowed.

Reference may be made to the case of *Clark* v. *Hepworth*,(1) recently before this court, and to *Armstrong* v. *Jackson*(2).

I entirely concur in the disposition made by Mr. Justice Anglin of the objection that the proper parties are not before the court.

Appeal allowed with costs.

IDINGTON J.—The respondents, being registered owners of the lands in question which had been subdivided into small lots, entered into three written agreements purporting to be for the respective sales of some six in all of said lots to the appellant for prices therein named.

The respondents for themselves each executed these agreements and Miller did likewise on behalf of appellant by virtue of a power of attorney he held from the appellant.

(1) 55 Can. S.C.R. 614. (2) 86 L.J.K.B. 1375.

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This was done without consultation with appellant and without disclosure to him of the position they occupied as trustees for the sale of the said subdivision.

The respondent Miller was a member of a firm sometimes designated "J. J. Miller" and at other times as "J. J. Miller & Company," carrying on business as real estate agents in Vancouver.

The appellant was a farmer in British Columbia, resident some fifty odd miles from Vancouver, who had some years previously paid the firm fifteen hundred dollars to invest.

It was stated by counsel for appellant, and not denied, that on several occasions prior to this transaction parts of that money or other moneys coming into the hands of said firm as agents of the appellant had been used in making real estate purchases for him, but in each case only after having submitted to him the proposal so involved.

In this instance now in question that prudent and proper course was departed from in the way already stated without any excuse so far as I can see unless presuming upon the confidence they had acquired by reason of the said prior dealings.

The appellant was first informed of these transactions in an incidental sort of fashion by letter some months afterwards.

He does not seem to have been for some years fully informed of what really did take place, and then, on discovery of the nature of the transactions thus entered into, sought to be relieved therefrom and went so far as to propose to sacrifice what had been paid and give a quit claim of any interest he might be supposed to have acquired. The respondents declined this offer. It was not until he sought and got the

assistance of a solicitor that he discovered the use which, as stated above, had been made of his power of attorney.

The respondents, it turned out, were trustees for the family of the respondent Kildall. As such they were entitled to a commission, and beyond that the J. J. Miller firm were entitled to a further commission as real estate agents effecting such sales, as made, of the lots in question. Of this latter commission the respondent Miller was entitled to receive and did receive one half.

The alleged sales are now attacked herein and rescission sought by appellant on the ground that the relations of the respondent Miller to him, and the duties owing thereunder, were such as to render it impossible in law for him as vendor to bind appellant without full disclosure of his actual position and interest in promoting such sales and then thereupon procuring the actual assent of appellant thereto.

It seems too clear for argument that a sale made under such circumstances was void and could only be upheld by something in the nature of ratification. These sales have been upheld by the learned trial judge and the equal division of the Court of Appeal.

The learned trial judge seemed to recognize the principles of law governing such a transaction, but to feel unable to give relief because the respondents were in fact trustees appointed by the court and had not been attacked as such, and that respondent Kildall owed no duty to the appellant.

I cannot assent to either of these propositions. In the first place, I think and most respectfully submit that the sooner the court which had control of such a trustee called upon him to explain and if possible

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excuse such an apparently loose mode of discharging his duties as its appointee, the better.

The appearance of the documents should have indicated to him that his co-trustee was, as attorney for the alleged vendee, venturing on a something that called for explanation. He should not have been a party thereto unless and until it was made quite clear that the proposed vendee in truth understood and approved of his attorney's action in buying.

The reasons assigned by the Court of Appeal for dismissing the appeal are of a different and more arguable nature. With great respect, however, I am unable to adopt them.

I do not think the appellant was called upon to give his evidence or explanation until something much more direct and cogent had been given than appears in the evidence of Mr. J. J. Miller.

The respondent Miller had, apart altogether from his monetary interest, placed himself in the position of attempting to discharge two inconsistent duties. One he owed to his *cestuis que trustent* and the other to the appellant.

His relation to the former also as a partner of the firm which had been given the duty of selling the lands in question has been made the basis for a number of ingenious submissions which are untenable, however plausible.

I think the appeal should be allowed with costs throughout and the alleged agreements of purchase rescinded and the moneys paid by appellant or received by respondents on account of the transactions in question be repaid with interest.

ANGLIN J.—The respondents, as trustees for the sale of the Kildall estate, sold the property in question

to the appellant. In the agreement of sale, however, they assumed the position of vendors in their personal capacity.

On their own statement, one of them, William Miller, was a partner in the firm of "J. J. Miller," carrying on business as real estate agents at Vancouver, B.C. John J. Miller, the other partner in the firm, was the agent for the sale of the property. He was at the same time the agent of the appellant, who resided at Whonnock, B.C., to invest moneys deposited by the latter with the firm of "J. J. Miller" in desirable real estate, and, as such, he bought from the respondent trustees the property in question for the appellant. William Miller, the other member of the firm, and one of the trustees for sale, as attorney for the appellant, executed on his behalf the agreement to purchase.

Upon the mere statement of these facts the conflict of duty on the part of John J. Miller is so apparent that it is obvious that the transaction must be voidable by the appellant unless he was aware of the agency of John J. Miller for the vendors when the contract was made or subsequently learned of it and with such knowledge ratified or acquiesced in what had been done. If the facts that the trustees for sale were to be remunerated by a 3% commission and the sale's agent by a 7% commission are taken into account, the element of interest in conflict with duty is superadded.

The learned Chief Justice of the Court of Appeal thus summarizes the evidence as to knowledge and acquiescence on the part of the appellant—quite fairly, if I may say so:

> J. J. Miller, while not quite positive, says that shortly after the making of the agreement in question, and therefore about five years prior to the bringing of this action, he told the appellant that it was the Kildall estate and not the defendants who were the real vendors of the property. He also adverts to certain advertisements which he

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says appellant must have seen and which he thinks disclosed the fact that J. J. Miller was the selling agent of the Kildall estate;

and on this evidence the learned Chief Justice assumes knowledge and finds ratification by the appellant apparently because he "did not think fit to give evidence * * * to rebut the evidence of J. J. Miller."

With great respect, the suggestion of an interested witness that "the appellant must have seen" certain advertisements, and that he "thinks" these advertisements "disclosed the fact that J. J. Miller was the selling agent" cannot be accepted as satisfying the burden of proof which lay on the respondents, rescission being sought, to establish that the dual position of their agent, J. J. Miller, and the conflict between his duty to them and his duty to the appellant and between his interest and the latter duty became known to the appellant, and that he either expressly or by implication elected to uphold the transaction. *Cavendish-Bentinck* v. *Fenn*(1), at page 666; *De Busche* v. *Alt*(2), at page 313. The respondent did not make a *primâ facie* case of the knowledge essential to ratification or acquiescence such that the appellant was called upon to displace it. On the contrary, there is really nothing whatever to shew that he knew anything of J. J. Miller's agency for the vendors until he saw the sale agreement some five years after it had been made; and he then promptly repudiated liability and sued for rescission within a reasonable time afterwards. Indeed, there is very little to indicate that he was aware at any earlier date that William Miller, his own attorney, was also one of his vendors. As put by the learned trial judge:

(1) 12 App. Cas. 652. (2) 8 Ch. D. 286.

There is no evidence before me to shew that the plaintiff knew that the purchase made on his behalf had been in the manner indicated. When it was brought to his attention by the agreement being produced he then took the position by letter, signed by himself, but probably prepared by his solicitor, that he intended to set aside the transaction on the grounds that are now urged.

I am, with respect, of the opinion, that the appellant's right to avoid the transaction, regardless of whether it was fair or unfair, advantageous or otherwise at the time it was entered into, is beyond question.

Objection is taken, however, to the constitution of the action in that the defendants are sued in their personal capacity, whereas they sold, in fact, as trustees for the Kildall estate. In the agreement for sale the vendors are not described as trustees. By it they purport to sell as beneficial owners and to assume the obligation of vendors in their personal capacity. They would, therefore, appear to have no good ground for contending that the necessary parties are not before the court. If for any reason they thought it desirable either in their own interest or in that of the Kildall estate to have that estate represented in this action by themselves in their capacity of trustees, it was their privilege, at any time before trial, to apply for the requisite amendment. Not having done so they should not be heard now to set up as a matter of right that it should have been made. But, as a matter of grace and indulgence, if they desire it, since it will entail no delay, expense or inconvenience to the plaintiff, I would be disposed to allow such an amendment to be made now. Judgment should be entered for the appellant as prayed in the statement of claim against the respondents in their personal capacity; and, if they elect to amend, also in their capacity as trustees.

The appellant is entitled to his costs of the litigation throughout.

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BRODEUR J.—Stahl had given a power of attorney to William Miller and to the firm J. J. Miller, of which William Miller was a member. He had left some money in the hands of the firm J. J. Miller for investment.

It happened that the Kildall estate, of which William Miller was one of the trustees, had some property for sale, and an agreement for sale of some lots was then signed by the trustees of the Kildall estate of which William Miller was one, in favour of Stahl, and the agreement was then signed by William Miller as agent for Stahl. The result is that Miller appeared in the same acts as one of the vendors and as agent of the purchaser.

The price which was paid was given by the Miller firm out of the moneys belonging to Stahl. The taxes were paid in the same way and Stahl was never told that his agent had been, at the same time, his vendors.

Some years after, when he discovered this illegal transaction, he repudiated it and took proceedings in rescission.

It is a settled rule that an agent authorized to buy cannot buy from himself and that if he does so without disclosing the fact to his principal the latter may repudiate the transaction. *Harrison* v. *Harrison*(1); *Gillett* v. *Peppercorne*(2).

The fairness of the transaction is immaterial; and the agent might be acting with the best of good faith; but it does not make any difference, because an agent will never be allowed to place himself in a situation in which, under ordinary circumstances, he would be

(1) 14 Gr. 586. (2) 3 Beav. 78.

tempted to do that which is not the best for his principal. *Bank of Upper Canada* v. *Bradshaw*(1).

Besides, in this case, it is proved that the Miller firm which sold the lots for the Kildall estate was having a commission on those sales, and then William Miller, who was a member of that firm, who had a share in that commission, was naturally interested in disposing of those lots in favour of Stahl, which he had no right to do, being the agent of Stahl.

Stahl should, therefore, succeed in setting aside the agreement for sale and the judgment *a quo* should be reversed with costs of this court and of the courts below.

Appeal allowed with costs

Solicitor for the appellant: *A. L. P. Hunter.*
Solicitor for the respondents: *A. G. Harvey.*

(1) L.R. 1 P.C. 479.

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*Nov. 2.
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*Mar. 11.

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFF).... } APPELLANT;

AND

THE "S.S. STORSTAD" (DEFENDANT) AND THE ÆTNA INSURANCE COMPANY AND OTHERS (CLAIMANTS) ..... } RESPONDENTS.

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

Admiralty law—Collision —Sale of vessel liable for damages—Distribution of insufficient fund—Priority between life and property claimants—Sec. 503 "Imperial Merchants Shipping Act," 1894.

The "S.S. Storstad," arrested and held liable at the suit of the appellant owner of the "S.S. Empress of Ireland" with which she collided, was sold under an order of the court, and the proceeds of the sale were deposited in court for distribution between the claimants for loss of life and property according to their respective rights.

Held, Idington J. dissenting, that the distribution of the fund must be made in accordance with the provisions of sec. 503 of the "Imperial Merchants Shipping Act," the claimants for loss of life or personal injury being entitled to $\frac{7}{15}$ of the fund and then ranking for the balance of their claims *pari passu* with the claimants for loss of property.

Per Idington J. dissenting:—Section 503 of the Act is effective only upon the application of the owner of the ship to a competent court, invoking limitation of his liability.

The appeal was allowed in part and the judgment of the Exchequer Court, Quebec Admiralty Division, was varied, Idington and Duff JJ. being of opinion to allow the appeal in full.

APPEAL from the judgment of the Quebec Admiralty Division of the Exchequer Court of Canada, Maclennan J.(1), who confirmed the report of the deputy district registrar as to the distribution of the fund in court amounting to $175,000.

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

(1) 16 Ex. C.R. 472.

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

Aimé Geoffrion K.C. and *A. R. Holden K.C.* for the appellant.

G. F. Gibsone K.C., Errol Languedoc K.C. and *Eug. Angers,* for the respondents.

THE CHIEF JUSTICE.—The appellants' steamship "Empress of Ireland" was sunk with great loss of life in a collision with the "S.S. Storstad," a foreign ship, in the St. Lawrence River off Father Point on the 29th May, 1914. The "Storstad" proceeded to Montreal where she was arrested in a suit for damages brought by the appellant in the Exchequer Court, Quebec Admiralty District. She was subsequently sold by order of the court and the proceeds $175,000 paid into court to take the place of the ship and to avail for all parties interested therein.

Judgment in the suit was pronounced in favour of the plaintiff's claim and a reference directed to the deputy registrar to report the amount due. A large number of intervenants and claimants came in and established their claims and the deputy registrar made his report admitting claims to the total amount of $3,069,483.94 of which $469,467.51 were for loss of life and the balance for loss of property including over $2,000,000 claimed by the appellant as the value of its ship, the "Empress of Ireland." The fund in court being insufficient to satisfy all claims, the deputy registrar collocated the amount *pro ratâ* in favour of the life claims so far as the same was sufficient and excluded all other claims from participation in the collocation.

On motion by the appellant to vary the report and

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seeking to be collocated for its claim as admitted, judgment was given confirming the report; from this judgment the present appeal is brought.

The liability to any of the claimants found entitled by the Registrar's report is not contested. We have not therefore to consider the effect of the decision in *Seward* v. "*Vera Cruz*"(1). The question for determination turns, I think, upon the construction to be put upon sec. 503 of the Imperial statute "The Merchant Shipping Act" (1894). That Act, so far as material parts are concerned, is expressly extended to the whole of His Majesty's Dominions. A statute of the Imperial Parliament, so declared to extend to all His Majesty's Dominions, is binding on all courts in Canada, those of Admiralty no less than the civil courts. It is upon this statute that the Local Judge in Admiralty has rested his judgment.

Part VIII of the "Imperial Merchant Shipping Act," 1894, is under the caption "Liability of Shipowners" and comprises secs. 502 to 509 inclusive. Sec. 503, so far as material, is as follows:—

503. (I) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say)

(*a*) Where any loss of life or personal injury is caused to any person being carried in the ship;

(*b*) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;

(*c*) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship;

(*d*) where any loss or damage is caused to any other vessel or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship;

be liable to damages beyond the following amounts; (that is to say.)

(*i*) In respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise, or other things, an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage; and

(1) 10 App. Cas. 59.

(*ii*) In respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

The tonnage of the "Storstad" is 6,028 tons and the amount realized by her sale and forming the fund now in court is less than £7 for each ton of such tonnage.

It is contended by the appellant:—

(1) That inasmuch as no limitation of liability has been obtained or sought for by the owners of the ship, the section has no application and that in the distribution of the fund all claims should be paid ratably.

(2) That in any event the section does not give any right to preferential payment.

In an action *in rem* there can be no liability beyond the value of the *res*. Prior to 1862 the ascertaining of the value of the ship was a fruitful source of litigation and expense.

To obviate this and also in order that bad and inferior ships should not have an advantage, in case of collision, over good and valuable ships, 25 & 26 Vict. ch. 63 was passed. That Act struck a rough average value for all ships at £15 or £8 per ton, the valuation to be at the higher or lower rate according as the collision was accompanied by loss of life or personal injury or not. In 1894 it was repealed, but in substance re-enacted by 57 & 58 Vict. ch. 60, sec. 503. (Marsden on Collisions, 6th ed., pages 151-2.)

The "Merchant Shipping Act" is a complete code of the law relating to the subject and Part VIII. under the caption "Liability of Shipowners," must have been intended to deal comprehensively with the subject. It is clear that in a very large number, probably a majority, of cases the value of the ship is, as in the present instance, less than the statutory amount. I do not think it can be maintained that the Act has its application only where the value is the "rough average value" fixed by the statute and not where it is the actual value of the ship.

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We should not, if it can be avoided, construe the Act as making a reservation in favour of the life claims in the case of the statutory value and none at all in the case of the actual value which may be little less or indeed equal to it since there can be no limit of liability unless the real value is greater than the statutory value.

But whilst I think the registrar was right in his report in holding that the distribution of the fund must be in accordance with sec. 503, I think that he has taken a mistaken view of the effect of the section as affecting the particular case. I do not think you can take the maximum amount given in the section when the actual amount is less; it is the proportion that must be observed, that is to say the amounts reserved for the life and other claims must respectively abate in the proportions which the actual fund bears to the amounts fixed by the statute. It is not seven-fifteenths of an amount equal to £15 per ton to which the life claimants are entitled but seven-fifteenths of the fund of $175,000. This would be about $81,000 and leave some $93,000 against which the life claimants would be entitled to rank for the balance of their claims *pari passu* with the other claimants. This, of course, subject to the deduction of costs out of the fund.

I confess that I have some difficulty in following the construction which the courts have placed upon sec. 503 as to the reservation in favour of the life claims. The case of "*The Victoria*" (1), decided in 1888 was, of course, upon the statute of 1862 then in force, but the provisions of this are for all practical purposes identical with those in the statute of 1894 and the construction then placed upon what is sec. 503 in the latter does not seem to have been ever questioned

(1) 13 P.D. 125.

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since that time. It must now be accepted as laying down the law correctly.

I do not see the necessity of the cross-appeal. The order of the 26th September, 1916, against which this is brought simply extends the time for filing claims. It does not, and from the nature of the things cannot, be any adjudication on the claims which may be brought in. The cross-appellants in their factum say that "the judgment decides two things: First, that (after providing for costs) the fund in court to be distributed exclusively among claims founded upon loss of life; secondly, that claims for loss of life filed up to the 10th October, 1916, are to be considered *and apparently to be collocated.*" I can see no grounds for this supposition. It will be open to the cross-appellants on the further inquiry to raise the objection that any new claims are statute barred or for any other reason inadmissible. The cross-appeal should, I think, be dismissed with costs.

The judgment should be varied as above indicated and the whole matter remitted to the deputy registrar for further inquiry and report as directed by the judgment so varied.

The costs of all parties other than of the cross-appeal should be paid out of the fund in court.

DAVIES J.—I concur with my brother Anglin.

I would vary the judgment below by directing that the sum for distribution be apportioned to a fund upon which claimants for loss of life or personal injuries should be entitled to rank exclusively for seven-fifteenths and to another fund upon which these claimants shall be entitled to rank for unsatisfied balances *pro ratâ* with claimants for loss of property. Costs of the appeal out of the fund. I would dismiss the cross-appeal with costs.

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IDINGTON J. (dissenting).—The learned judge below held that in the case of the bankrupt owner of the vessel in fault and the losses suffered thereby, exceeding her value, the classes of sufferers referred to in sec. 503 of the "Imperial Merchants Shipping Act," 1894, or some of them, must be preferred over others in sharing the proceeds of her sale. Whether such holding can be maintained or not must depend upon the scope and purpose of part 8 of the said Act in which the section is found.

An ambiguous section often, indeed generally, has been made to respond to and subserve the obvious purview of the Act in which it is found.

The history of the enactment now in question does not enable that mode of treatment to be successfully applied herein. The "Shipping Act" of 1894, has been the growth of legislation extending over many years, and relates to so many subjects that it is impossible to gather much help from it as a whole in order to be enabled to interpret and construe part 8 thereof, which is all that really is involved or has to be considered in the disposition of the question raised. The enactments contained therein represent the last feature of legislation of that kind applied to the hazardous employment of shipping. The original liability of shipowners for loss suffered by shippers through the misconduct and especially negligence on the part of servants of the shipowners in managing the thing given them in charge, is said to have been unlimited in England until the year 1734. See Marsden on Collisions, 5th ed. 148.

Then 7 Geo. II. ch. 15, limited shipowners' liability for loss of cargo by theft of master or crew to the value of the ship.

26 Geo. III., ch. 86, limited the loss from theft by strangers or by fire.

Then 53 Geo. III, ch. 159, furnished the first limitations of liability in the case of collisions.

The substance of these enactments was incorporated into the "Shipping Act" of 1854. In 1862 many amendments were made to that Act by the enactment of 25 & 26 Vict., ch. 63, sec. 54, which in substance adopted the same terms as appear in sec. 503 of the "Shipping Act" of 1894, now in question. By the first section of the said amending Act it was enacted as follows:—

> This Act may be cited as the "Merchants Shipping Amending Act," 1862, and shall be construed with and as part of the "Merchants Shipping Act," 1854, hereinafter termed the "Principal Act."

When we have regard to this enactment and turn to the said "Principal Act" we find in sec. 514, thereof, the following:—

> 514. In cases where any liability has been or is alleged to have been incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats or goods, and several claims are made or apprehended in respect of such liability, then, subject to the right hereinbefore given to the Board of Trade of recovering damages in the United Kingdom in respect of loss of life or personal injury, it shall be lawful in *England* or *Ireland* for the High Court of Chancery, and in *Scotland* for the Court of Session, and in any *British* possession for any competent court, to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability subject as aforesaid, and for the distribution of such amount ratably amongst the several claimants, with power for any such court to stop all actions and suits pending in any other court in relation to the same subject matter; and any proceeding entertained by such Court of Chancery or Court of Session, or other competent Court, may be conducted in such manner and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the court thinks just.

It was doubtless under this enactment that proceedings were taken in the many cases that arose under the said "Shipping Act" as amended by said sec. 54.

Turning then to part 8 of the "Shipping Act" of 1894, we find sec. 504 providing in substance for that which was enacted in the clause just quoted.

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When we consider the frame of the Act of 1854, or of the said amending Act of 1862, we find each subject matter, as it were, which is dealt with legislatively, made to appear under a defining caption. Having regard to that system of defining the subject matter we need not concern ourselves much with the general purview of the Act as a whole. We should further confine ourselves to looking at the purview of the enactments appearing under each of these respective captions, unless, indeed, as in the case of the amendment by sec. 54 in the amending Act of 1862, we find it relates to cognate matters in the Principal Act, and then, of course, we should consider all such together. It is to be observed that there is nothing expressed in the Act of 1894 which lends the slightest colour to the claim of priority by any one over others in relation to damages which the ship as such was responsible for, and has been condemned to answer, much less to the proceeds of her sale resulting from the condemnation against her.

The same is true of each of the several enactments giving to shipowners a right to secure limitations of liability. It so happened, however, that the courts which had been entrusted with the power of giving effect to the relief provided by these several Acts of limitation, in administering these laws, on the application of the shipowners invoking protection, gave relief only upon payment into court of a sum or sums based on the application of the measurements specified in the Act, and priorities were thus created, indeed of necessity sprang from the course of judicial relief given in each of the classes of cases provided for.

That, however, is surely very far removed from the possibility of constituting the fund realized out of the sale of the vessel, in an action in *rem*, as this is, at the suit of another party like appellant, one which must

be administered on the basis which the courts have adopted in an entirely different sort of proceeding.

Sec. 504, forming part of said part 8, expressly provides that upon such claims as in question in that part of the Act being taken or apprehended, then the owner may apply to a competent court and invoke the relief given him or it by the preceding section.

The enactment was substantially in principle the same as sec. 514 above quoted from the Act of 1854.

The numerous cases which had to be dealt with under the last mentioned section indicate that any preference or priority given to any claimant invoking said section, or the powers therein, was solely in furtherance of the privilege given to the shipowners and for the purpose of effectively working out the scheme of the limitation clause or clauses.

Sec. 504 of the Act of 1894, with which we have to deal, I think has been treated in the same way as in acting upon it the like principles have been applied. This section alone seems to render this part of the Act operative and give the court power to determine the amount to be paid and administer the fund thereby created.

Unless and until this part of the Act has thus been made effective and operative there can be no claim under it.

The case of "*The Victoria*,"(1) relied upon below, was one of the very many decisions passed upon questions raised under the amendment of 1862, and was simply the result of an application to the Court of Chancery under the sec. 514 above quoted. It decides nothing to support the present contention of priority in relation to the fund derived from the sale of the vessel in this action in *rem*. In not a single case so far as I

(1) 13 P.D. 125.

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can find has the construction of the amendment of 1862, or the part 8 of the Act of 1894, been otherwise brought into question or declared to have any effect.

Indeed being a case of privilege given the owner only under certain circumstances, it seems impossible for the question otherwise to arise and when raised the issue must be tried as other questions upon pleadings and proof.

For aught we know the owners may have been privy to the wrong done which is in question here. That suggestion may appear remote when a case has been tried without one word of contention or evidence relevant thereto having been set up, but it is to be observed the case being in *rem* does not necessarily involve the privity of the owner or its individual responsibility.

Such being the conclusions which I have reached upon the construction of the Act relied on, it is needless to pursue the many other questions raised, for admittedly under the "Canada Shipping Act" there can be no claim to the priority alleged.

The appeal must be allowed with costs.

As to the cross-appeal by some claimants that others are barred by the limitations of the time within which those entitled in virtue of "Lord Campbell's Act" must bring action, it seems to be rather late now to raise such a question for the first time.

There is nothing in the judgment appealed from to indicate that such a contention was set up below.

The objection to the right of the judge to amend the order as to the original time fixed for bringing in claims, does not cover the ground.

The case of "*The Alma*"(1), cited in the factum is not in point.

(1) [1903] P. 55.

That is where owners had taken proceedings to establish a limitation under the sections I have already discussed and the question raised before the judge in charge of working out a reference thereunder, was whether or not he could let in claims which were not presented within the time limit originally fixed by the judgment giving relief.

It presented no case based on the Statute of Limitations or the clause of "Lord Campbell's Act" limiting the time.

When those cross-appealing saw any claim competing with theirs presented before the referee they may have been entitled to raise the objection of the Statute of Limitations, or the corresponding limitation in "Lord Campbell's Act," but failing to do so, or someone entitled to do so failing to object, I cannot think it can now be raised for the first time and the cross-appeal should therefore be dismissed with costs which would seem to be trifling if worth noticing in view of the factum.

DUFF J.—I think the appeal should be allowed with costs.

ANGLIN J.—Arrested and held liable at the suit of the owners of the "Empress of Ireland," with which she had collided, the S.S. "Storstad" was sold under an order of the court made in the action by consent of all parties interested. The proceeds of the sale are in court. The respective rights in the distribution of them, on the one hand of persons entitled to maritime liens on the delinquent ship for damages for loss of life or personal injuries, and on the other of persons entitled to similar liens in respect of loss of or injury to property resulting from the collision, form the subject of this appeal. The priority of the claim of the plaintiff

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for its costs incurred in securing the arrest and condemnation of the offending ship is not contested, nor is her liability to any of the claimants found entitled by the registrar now disputed. Were it otherwise the status of claimants in respect of loss of life would call for very careful consideration in view of the decision in *Seward* v. *Vera Cruz* (1).

The money available, however, will answer but a fraction of the claims and falls far short of either the £15 per ton fixed by sec. 503 of the "English Merchant Shipping Act," 1894, or the $38.92 per ton fixed by the "Canada Shipping Act" (R.S.C., ch. 113, sec. 921), as the limit of the owner's liability.

The question at issue between the parties is whether all the recognized claimants are entitled to rank *pari passu* upon this fund, as it is conceded would be the case if the "Canada Shipping Act" should govern or if neither it nor the "English Merchant Shipping Act" should apply, or whether claimants in respect of loss of life or personal injuries are entitled to whatever preference sec. 503 of the latter Act provides for. There is also a question as to the extent of this preference.

Neither the "Storstad" nor the "Empress of Ireland" was registered in Canada. The registry of the "Storstad" was Norwegian, that of the "Empress of Ireland," British. Part 8 (secs. 502-509) of the "Imperial Merchant Shipping Act," 1894 (57 & 58 Vict., ch. 60), is, by sec. 509, made applicable to the whole of His Majesty's Dominions; and, by sec. 735, the power of the legislature of any British possession to repeal wholly or in part any of its provisions is restricted to their application to ships registered in that possession.

(1) 10 App. Cas. 59.

The "Merchant Shipping Act" of 1854 (17 & 18 Vict., ch. 104), contained similar provisions—secs. 502 and 547. I have no doubt whatever that if this case falls within either of them, the liability of the defendant and the rights of the plaintiff and other claimants *inter se* must be determined by sec. 503 of the Imperial Act rather than by sec. 921 of the "Canada Shipping Act," which is *in pari materia.*

The heading of part 8 of the Imperial Act is "The Liability of Shipowners." It was presumably intended to be exhaustive. By sec. 503 (sec. 54 of the Act of 1862), it limits the liability of the shipowner to £15 per ton of the delinquent ship's tonnage in respect of loss of life or personal injury either alone or together with loss of or damage to property, and to £8 per ton in respect of loss of or damage to property whether it is or is not accompanied by loss of life or personal injury. No doubt

> the *ordinary* mode of obtaining this limitation of liability is for the shipowner to pay the statutory amount into court in an action in which he asks a decree limiting his liability to that sum. (Carver's Carriage by Sea, 5th ed., page 36).

But, having regard to the history of the limitation of shipowners' liability in English law, I agree with the learned local Judge in Admiralty that it is not made dependent on such an action being taken.

Sec. 503 enacts in general terms a limitation upon the claimants' right of recovery. The only condition attached is that the loss shall have occurred "without (the owner's) actual fault or privity." I cannot think that this term imports that the fact of absence of personal fault or privity must be established in a proceeding in which it is alleged by the owner as an actor. It must suffice if it appears and is found, as is the case here, in a suit in which the liability of the ship is

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determined—or, it may be, if the contrary does not appear, since such privity or fault should not be presumed. As the learned local judge points out, sec. 504 is permissive. It enables the shipowner where it is his interest to do so, to protect himself against multiplicity of actions with the harassing consequence of burdensome costs, which are not within the limitation. It affords him "the full benefit of having the whole case settled at once" and enables him to obtain a speedy release of his vessel, which may be worth much more than a sum equal to £15 or £8 per ton of its tonnage, as the case may be.

The company that owned the "Storstad," however, had no interest to invoke the protection afforded by sec. 504. She was, so far as appears, its sole asset, and, if not, she was, at all events, the only property owned by it subject to the process of the Canadian court. She was worth only £5 10s. per ton of her tonnage as was proved by the result of the sale. The company therefore had nothing to gain by instituting proceedings under sec. 504; the claimants could not force it to do so; and they were not taken.

Sec. 503 is not merely an enactment for the shipowner's benefit limiting his liability. It contains a substantive provision for the advantage of claimants in respect of loss of life and personal injuries upon whom it confers valuable rights of priority. A construction which would make the existence and enforceability of those rights entirely dependent on the shipowner's seeking and obtaining a judgment under sec. 504 declaratory of the limitation of his liability and fixing the amount thereof would seem so utterly unreasonable and so contrary to what Parliament apparently intended should be the effect of the statute that, in my opinion, it should not prevail. Whether loss of

life and personal injury claims are to have a limited preference over loss of property claims or are to rank *pari passu* with them on the entire fund available was not left to be determined by the action or the inaction of the shipowner whether prompted by interest or purely spontaneous.

An argument in support of the contrary view rests on the juxtaposition of secs. 503 and 504 in the Act of 1894. But in the Act of 1854 the section corresponding to sec. 503 of the statute of 1894 was sec. 504 and that corresponding to sec. 504 of 1894 was sec. 514. When sec. 54 of the Act of 1862 replaced sec. 504 of the Act of 1854, sec. 514 was left unaltered. Compare secs. 1 and 4 of 26 Geo. III., ch. 86; 53 Geo. III., ch. 159, sec. 1 and sec. 7; and see the speech of Lord Blackburn in the *Stoomvaart Maatschappy Nederland* v. *The Peninsular and Oriental Steam Nav. Co.*(1), at pages 814 *et seq.* There is no interdependence between the two provisions. Their juxtaposition in the Act of 1894 has not the significance suggested.

Subject to the priority of the plaintiff for costs of the suit in which the offending ship was seized and its liability determined, the proceeds of the sale of it in court form part of the amount for which the owners are liable under the "Merchant Shipping Act." Their liability to have their ship confiscated for the purpose of making good the damage inflicted is part of the personal liability which that statute has limited. *Leycester* v. *Logan*(2). It follows that credit must be given upon the owner's statutory liability for any sums received by claimants out of the proceeds of the sale of the ship. If those proceeds should be distributed otherwise than in the proportions in which the full

(1) 7 App. Cas. 795.

(2) 3 K. & J. 446, 451.

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amount of the statutory liability, if paid into court by the owners, would be distributed, on the final disposition of the balance of the statutory liability, should it be realized, payments to the claimants would be so adjusted that they would be allowed thereout only such sums as would make the total amount to be received by each equal to what would have been his share in the full amount of the statutory liability had it been paid into court in the first instance. *The "Crathie"*(1). The balance of the statutory liability of the owners of the "Storstad" certainly may not, and in all probability will not be realized. Were the court to distribute the money now available *pro ratâ* amongst all the claimants, as the plaintiff contends for, the policy of sec. 503 of the "Merchant Shipping Act" would be defeated. It would be equally disregarded were the entire proceeds of the sale of the ship devoted to a fund available exclusively to satisfy demands in respect of loss of life and personal injury. The statute does not give them any such priority. It provides for the concurrent establishment of two distinct funds in which it defines different rights.

To carry out the policy of the Act the proceeds of the sale of the ship in court must be treated as a realization *pro tanto* (as in fact they are) of the owners' statutory liability and distributed as such amongst the several claimants in the same proportions in which the full amount of that liability, if available, would have been distributed. The sum on hand for distribution will therefore be apportioned between the two funds—to one of them seven-fifteenths of it, and to the other the remaining eight-fifteenths. According to the rule laid down in *The "Victoria"*(2), and subsequently acted on in *The "Alma"*(3), and *The "Inventor"*(4),

(1) [1897] P. 178, 181.
(2) 13 P.D. 125.
(3) [1903] P. 55.
(4) 10 Asp. M.C. 99.

the former fund will be distributed *pari passu* amongst recognized claimants in respect of loss of life and personal injury, and, in respect of any deficiency, these claimants will share *pro ratâ* on the latter fund with the approved claimants in respect of loss of life and injury to property.

The judgment in appeal should be varied accordingly.

An order of the local Judge in Admiralty extending the time for filing claims until the 10th October, 1916, has been made the subject of a cross-appeal on the assumption that it determined that all claims which should be filed before the date so fixed would be *ipso facto* eligible for collocation in the distribution. The order does not so provide. Any claims filed pursuant to it must be adjudicated upon by the referee and will be open to all defences to which they are subject. The cross-appeal was misconceived and unnecessary.

Appeal allowed in part with costs of all parties out of fund.

Cross-appeal dismissed with costs.

Solicitors for the appellant: *Meredith, Holden, Hague, Shaughnessy & Heward.*

Solicitors for the respondents De Goss and others: *Gibsone & Dobell.*

Solicitors for the respondents Fabri and others: *Greenshields, Greenshields, Languedoc & Parkins.*

Solicitors for the respondents Bronken and others: *Ross & Angers.*

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*Mar. 11.

EDMUND A. ROBERT (DEFENDANT); APPELLANT;

AND

THE MONTREAL TRUST COMPANY (PLAINTIFF)..... } RESPONDENT.

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

Company—Subscription of stock—Misrepresentations—Acquiescence—Delay—Estoppel—Stock "to be issued"—Proof.

Held, Fitzpatrick C.J. dissenting, that in case of alleged misrepresentations made by the promoter of an incorporated company, a subscriber for stock must clearly prove that he has in fact been induced by such representations to buy shares, especially if he has kept silent after receiving numerous demands of payment and has failed to repudiate his contract for a considerable period of time after he had knowledge of the falsity of the representations.

Per Idington J. and *Semble* per Anglin J.—A mere statement, at the head of an underwriting agreement, as to the capital to be issued, does not imply that the subscriber will be under no liability to pay for his shares unless and until the amount so stated had been issued.

Per Anglin J.—Delay in repudiation after knowledge of the falsity of an inducing representation, especially in the case of a subscription for shares, may give rise to a presumption of acquiescence or of an election not to rescind.

Per Fitzpatrick C.J. dissenting.—In the case of an agreement to take shares in an incorporated company, the capital issued, if not equal to that proposed, must not at least be so reduced as to render the company incapable of accomplishing the avowed object of its existence.

APPEAL from a decision of the Superior Court of the Province of Quebec, sitting in Review at Montreal (1), affirming the judgment of Lafontaine J. at the trial and maintaining the action with costs.

The appellant subscribed for and agreed to purchase from J. A. Mackay & Co. one hundred preferred shares of the Canadian Jewellers, Limited, at 95% of the par

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

(1) Q.R. 52 S.C. 73.

value with 50% of the par value in bonus common stock of the company. It was also stipulated that the underwriting could be pledged or hypothecated with any banking institution or trust company as security for advances. Prior to the date of this agreement J. A. Mackay & Co. had borrowed from the respondent $131,103.10 and hypothecated the appellant's underwriting as collateral security for the advances already made and for further advances.

The action was brought by the respondent against the appellant to enforce payment by him of the amount of the shares subscribed and was accompanied by a tender and deposit of certificates.

The principal defence set up by the appellant was that his signature was procured by misrepresentations made to him by J. A. Mackay as to the amount of preferred shares and common shares "to be issued" and as to the jewellery businesses to be acquired by the new company.

J. E. Martin K.C. and *Thibaudeau Rinfret K.C.* for the appellant.

Geo. H. Montgomery K.C. and *W. Chipman K.C.* for the respondent.

THE CHIEF JUSTICE (dissenting).—The appellant agreed to take 100 shares of Canadian Jewellers, Limited, of the par value of $100 each at 95% of the par value with 50% of the par value in bonus common stock. The respondent sues in this action as assignee of the underwriting for $9,500 and interest.

The company was formed for the purpose of effecting a merger of jewellery businesses on a large scale but the promoters were unable to carry out their intentions.

The form of subscription signed by the defendant had the following heading:—

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Canadian Jewellers, Limited.

	Authorized Capital.	To be issued.
Preferred shares,.....	$2,500,000	$1,500,000
Common shares,.....	2,500.000	1,500,000

The amount of stock actually issued was $600,000 preferred and $671,000 of common.

Harry Timmis, the president of the company, who was the originator of it, says in his evidence:—

> We started out with the idea that we would make a very big company out of it, and that we would bring all the jewellery concerns that we could bring in on advantageous terms * * * The company unfortunately was not as strong as it should have been, because what I had originally planned had not been carried out.
>
> Q.—With all those concerns which I have mentioned to you which were to come in you would have had $1,500,000 preferred and $1,500,000 common? A.— Quite so.

It must be admitted that the purchaser is entitled to get substantially at any rate what he has bargained for by his contract. In the case of an agreement to take shares in a company, the capital issued, if not equal to that proposed, must at least be adequate for the purposes of the company. It would be impossible to enforce a contract entered into on the faith of the company having at least *primâ facie* a sufficient capital if this were so reduced as to render the success of the company's operations impossible and the loss of the purchaser's money certain.

Now the very nature of the scheme for the carrying out of which this company was organized called for a very large capital. Without it, it is obvious that whatever business they might be able to transact they could not be able to effect a consolidation of a number of the principal businesses in the jewellery trade.

The difference in this case between the capital to be issued and what was actually issued was not merely one of degree, did not merely involve the probability of the company being crippled for want of sufficient

capital, it rendered the company incapable of accomplishing the avowed object of its existence.

The underwriting contained a clause agreeing that

this underwriting may be pledged or hypothecated with any banking institution or trust company as security for advances.

The respondent's main contention is that the appellant is estopped as if the instrument were a negotiable security. I think, however, the doctrine of equitable estoppel which he invokes can have no application where the subject matter of the contract has never come into existence. It is not a question of the assignee being unaffected by equities between the vendor and purchaser. The purchaser cannot be expected to give his money for nothing; he is entitled to his part of the bargain and he is entitled to get substantially what he has agreed to purchase, not something essentially different and which may be of no value.

If I agree with a builder to put up a house for me for $20,000 and that he may pledge the contract for advances to enable him to carry out the work this does not mean that the builder can put the $20,000 in his pocket without doing any work and leave me to be sued for this amount by the lender of the money. It does mean, on the other hand, that I cannot, after the house has been built, claim to set off against the contract price a debt owing to me by the builder.

It would be difficult to lay down any general rules as to the rights and liabilities of the purchaser and the lender in these cases; they must, I think, depend upon the particular circumstances of each; that the effect of the pledge of the contract could ever be the same as the indorsement by the purchaser of a negotiable instrument cannot, I think, be maintained. The respondent's error is in regarding it as such and as being an absolute security regardless of the nature of the contract.

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The appellant's case has been prejudiced by his refusal or omission to answer the communications addressed to him by the respondent; but unless there was some obligation upon him to do so, his legal liability can hardly be altered in consequence. The respondent quotes from the case in this court of *Ewing* v. *Dominion Bank*(1), where it was said:—

> Where a man has kept silent when he ought to have spoken, he will not be permitted to speak when he ought to keep silent.

That is obviously assuming the obligation to speak or to keep silent.

Now what was the obligation in this case, if I am right in supposing that the company never offered the appellant, was never in a position to offer him, the shares which he had agreed to take? Was he not, strictly speaking, justified in doing nothing but waiting until this was done? Timmis, the president of the company, questioned as to the reduction of capital, says:—

> I don't know that we ever reduced. We have not yet carried out all our intentions.

And in respondent's factum it is said:—

> The reason for issuing a smaller amount was that the plans of the organizers were changed to suit the situation subsequently arising. The promoters' intentions had not yet been all carried out. Nothing would prevent the issue of further shares.

The appellant, we must suppose, is and always has been ready and willing to carry out his part of the bargain when the vendors offer him the shares for which he has subscribed.

It is true that

> if a man claims to rescind his contract to take shares in a company on the ground that he has been induced to enter into it by misrepresentation he must rescind it as soon as he learns the facts,

(1) 35 Can. S.C.R. 133.

but that is not this case in which the appellant is not suing but only seeks to rescind his contract as matter of defence to the action, if and so far as he does seek to rescind the contract.

It is going a great deal too far to say that his (the appellant's) failure to say or do anything amounts to approval of the statement of his indebtedness to the respondent contained in the letters.

And then when it is complained that the appellant has done nothing why has the respondent done nothing all this time beyond writing three letters, the failure to obtain an answer to which was certainly notice to them that they ought to take some action to insist on such rights as they supposed they had against the appellant? Even if there be no excuse to be made for the appellant there were laches on the part of the respondent.

I am disposed to think that the pleadings sufficiently cover the defence of the appellant but if it were necessary they ought to be amended.

For these reasons I would allow the appeal.

DAVIES J.—I would dismiss the appeal with costs.

IDINGTON J.—Inasmuch as it has not been made quite clear that the respondent actually changed its position or did anything except procure the certificate of stock tendered by this action, and bring the action on the faith of the underwriting contained in the appellant's subscription for stock now in question, I am inclined to hesitate before adopting the grounds of estoppel in the strict legal sense of the term used in the court below as entirely sufficient to rest the judgment upon.

In another and wider sense than the technical application of the term "estoppel" and which I will proceed

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to explain, the case may well be made to turn and the judgment be rested.

The appellant has entirely failed to make out any case of fraud or misrepresentation of an existing fact whereby he was induced to sign the contract in question. He merely, according to his own evidence, sets up that the thing he bargained for was not the thing that had been tendered him. In other words, he says he had been led to understand that the stock he was subscribing for was in a company of greater importance than the company that actually resulted from the promotion of Mackay and others. He says that because it was a company having only an issue of six hundred thousand preferred stock with an issue of six hundred and some odd thousand of common stock, instead of a company which had been hoped for of one million and a half preferred stock and one million and a half common stock, therefore he is relieved of his bargain.

I cannot accede to the proposition that as a matter of course the failure of realization of a man's expectations in this regard, apart from any express stipulation providing for such a condition of things as he expected, he can withdraw on account of a disappointment resting upon so little as appears in this case.

We have no such condition or stipulation existent as between the parties concerned but we are asked, as it were, to engraft same into or on to that form of contract which they chose to adopt. There is nothing to help in the form of contract except the words "to be issued" at the heading which I would read "authorized capital to be issued."

I cannot infer from the use of such terms in the place it occupies in the instrument and read in light of the attendant circumstances any such meaning as to

imply that in default of that expectation being realized the subscription for stock should be null and void.

Then we have it made clear by the evidence that there were no persons present at the making and signing of the contract except the appellant and Mackay. The latter swears positively that the conversation did not last more than five minutes, and that he did not use any language properly giving rise to any such expectations.

The appellant failed to contradict this, or swear that it lasted longer. His memory fails, he admits, to serve him either as to that or the express language which passed between them.

Now I take it that in weighing evidence of that kind and determining which of these two parties is right, that the man who acts in the way the appellant acted towards Mackay and towards the respondent in failing to answer one single word calling attention at different times, spread over many months, demanding payment, is not in a position to ask any court to accept his version of the understanding reached or such a construction as he seeks to put upon the transaction to which he subscribes his name, when that document as I hold neither expressly nor by implication bears it.

Common fairness and a straightforward mode of dealing with other men as well as a proper regard for the rights of others on the part of a business man, renders it imperative, in my opinion, that under the circumstances detailed in the evidence herein the appellant should have spoken promptly and decidedly and explained why he was failing to pay.

It may not be estoppel *in pais* as usually understood, but it is the kind of thing that precludes a man from imputing to another conduct or expressions of a misleading character, which he absolutely denies, when

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there is nothing in the documents that passed entitling him to take that position. I think the effect of such denial stands good under such circumstances as presented by this case and deprives appellant of any effective support for his understanding on which he rests his appeal.

And as to the ground of illegality of the common stock which he presents in his evidence, I fail to find it made good by anything in the case.

I, therefore, think that the appeal should fail with costs, and the judgment below be sustained.

DUFF J.—I think that the appeal should be dismissed with costs.

ANGLIN J.—On or about the 30th December, 1911, J. A. Mackay, president of J. A. Mackay & Co., Ltd., procured the signature of the defendant Robert to the agreement sued upon, which is as follows:—

Canadian Jewellers, Ltd.

	Authorized Capital	To be issued.
Preferred shares	$2,500,000	$1,500,000
Common shares	2,500,000	1,500,000

All shares of the par value of $100 each.

We, the undersigned, severally subscribe for and agree to purchase from J. A. Mackay & Co., Limited, preferred shares of the above company to the number and amounts set opposite our respective names. The price to be paid for said shares is 95% of the par value thereof with 50% of the par value thereof in bonus common stock of the company. The purchase price to be paid on the 15th day of September, 1912.

This underwriting may be pledged or hypothecated with any banking institution or trust company as security for advances. This agreement may be signed in counterpart and all counterparts taken together shall be deemed to be one original instrument,

Name of Subscriber.	Address.	No. of shares subscribed.	Total amount, of subscription.	Witness
(Sgd.) E. A. Robert	Montreal.	One hundred.	$10,000.00	(Sgd.) J. A. Mackay

The Canadian Jewellers, Limited, was incorporated by letters patent issued under the "Dominion Companies Act."

Prior to the 30th December, 1911, Mackay, who attended to its "financing" and the underwriting of its stock for the new company, had borrowed for that purpose from the plaintiff, the Montreal Trust Company, $131,103.10. On the 6th January, 1912, he hypothecated the defendant's agreement to purchase stock with the trust company as collateral security for the advances already made to him and for further advances. Further advances appear to have been made to Mackay after the 30th December, 1911. But, so far as appears, no advance was made after the 19th of April, 1912.

This action was brought by the Montreal Trust Company against Robert on the 21st of January, 1915, to enforce payment by him of the amount of his underwriting ($9,500), with interest thereon at 7% per annum from the 15th September, 1912, the action being accompanied by a tender and deposit of a certificate issued in the name of the defendant for 100 shares of the preferred stock and another certificate for 50 shares of the common stock of the Canadian Jewellers, Limited.

Apart from formal pleas, the defences set up are that the signature of the defendant was procured by misrepresentations made to him by Mackay as to the amount of preferred shares and common shares "to be issued" and as to the jewellery businesses to be acquired by the new company; that the shares tendered were part of a block of stock illegally issued by the Canadian Jewellers, Limited, without consideration, and for illegal secret profits and commissions and are not fully paid up and are of no value; and that the company has mortgaged its assets, with the assent of J. A. Mackay & Company, for $70,000 and has thus rendered its stock worthless.

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The last mentioned plea, probably demurrable, was not pressed.

The evidence does not support the plea of illegality in the issue of shares. J. A. Mackay & Company appear to have paid for those issued to them.

The company was in fact organized and has been carried on with a subscribed capital of only $600,000 in preference shares and $671,000 in common shares, and did not include two or three of the principal jewellery firms whose businesses the defendant claims it was represented to him would be acquired.

It may be noted that the defendant does not plead that it was a term or condition of his subscription that he should be liable thereon only in the event of and upon $1,500,000 in preference shares and $1,500,000 in common shares of the capital stock being subscribed for. The plea in this connection is solely one of misrepresentation. Had it been of the former character, however, in view of the provisions of the "Companies Act" (R.S.C. ch. 79) as to the commencement of business (sec. 26) and the allotment of stock and liability for calls thereon (secs. 46, 80, 132, 140), I should hesitate to hold that a mere statement at the head of an underwriting agreement as to the capital to be issued implies that it is a term or condition of the subscriber's contract that he should be under no liability to take or pay for shares unless and until the amount so stated has been subscribed for, or that his liability should cease if the scheme of issuing the amount of stock thus stated should be changed and the issue of a smaller amount determined upon. *Ornamental Pyrographic Woodwork Company* v. *Brown*(1); *Lyon's Case*(2); Buckley's Law of Companies (1902), 569-70; but see *Elder* v. *New Zealand Land Improvement Company* (3).

(1) 2 H. & C. 63. (2) 35 Beav. 646.
(3) 30 L.T. 285.

In the case of a company incorporated under that statute, a subscription contract intended so to restrict or qualify the subscribers' liability, must, I think, in view of its provisions above referred to, be couched in clear and explicit language. But it is unnecessary to pass upon a possible defence which has not been pleaded.

Neither is it pleaded that the shares for the price of which the defendant is sued are not the shares which he agreed to purchase, or that the company is not that a portion of whose stock he agreed to underwrite. That was the issue in *Windsor Hotel Co.* v. *Laframboise*(1).

Dealing with the case, therefore, purely as one of misrepresentation, it becomes material to consider the evidence given in support of that defence.

The testimony of the defendant is far from wholly satisfactory. Indefinite in his examination in chief, on cross-examination he probably deposed with sufficient distinctness and particularity to the making of the representation as to the amount of the stock to be issued, but he left quite vague and uncertain what he may have been told, if anything, as to the inclusion of the firms whose omissions he complained of. Mr. Mackay, called in rebuttal, distinctly denied having made the statement that the acquisition of the businesses of these firms had been or would be arranged for, but did not deny that he had made the representation as to capitalization. With Mr. Justice Martineau I am of the opinion that the latter is the only misrepresentation the making of which has been at all satisfactorily proved. The defendant, however, did not pledge his oath either that he had been induced to subscribe by this representation or that he would not have done so had it not been made. Under the circumstances of this

(1) 22 L.C. Jur. 144.

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case, especially having regard to the defendant's failure to disaffirm or repudiate his contract for at least two and a half years after he had full knowledge of the falsity of the misrepresentation he alleges, I think strict proof that he had in fact been induced by it to subscribe should be exacted. Art. 993 C.C.; 4 Aubry et Rau (1902), No. 343 bis. p. 504; Larombière, art. 1116, No. 3; 24 Demolombe, No. 175; *Morrison* v. *The Universal Marine Ins. Co.*(1); *Smith* v. *Chadwick*(2). His defence upon both the alleged misrepresentations, in my opinion, therefore fails.

But had he made a case which otherwise would clearly entitle him to avoid his contractual obligations (*Bwlch-Y-Plwm Lead Mining Co.* v. *Baynes*(3)), I incline strongly to the view that his delay in repudiating liability should, under all the circumstances, be taken to raise a presumption of acquiescence or confirmation—of an election not to avoid, which precludes his doing so. *Qui tacet consentire videtur.*

According to his own evidence, Mr. Robert made up his mind some time before the maturity of his underwriting on the 15th September, 1912, that he was not bound by it. He does not give more precisely the date when he learned of the falsity of the representations of which he complains. Although he was written to frequently—by the plaintiff, on the 14th September. 1912, the 13th December, 1912, and the 7th of August, 1913—and by J. A. Mackay & Company, on the 9th November, 1912, and the 5th of May 1914—pressing for payment of his subscription, he took no step to repudiate liability—he did not vouchsafe an answer to any of the letters so addressed to him. He simply allowed matters to rest in this position until after this

(1) L.R. 8 Ex. 197 at p. 206. (2) 9 App. Cas. 187 at pp. 195-200
(3) L.R. 2 Ex. 324.

action was begun in 1915. His first repudiation was that in his plea delivered on the 1st April, 1915. Under these circumstances he is, in my opinion, debarred from setting up the alleged misrepresentations as a defence. I think he would be so debarred if this action were brought by J. A. Mackay & Company or by the Canadian Jewellers, Limited, itself, as a transferee of his subscription; and his position is certainly not more favourable when sued by the plaintiff as pledgee for *bonâ fide* advances.

In the judgment of the Judicial Committee in *United Shoe Machinery Company of Canada* v. *Brunet* (1), (a case from the Province of Quebec, in which, however, the defence of misrepresentation was rejected because of positive acts implying acquiescence) it is formally laid down that in order to maintain a plea that he was induced by false representations to make the contract sued upon, a defendant must establish (1) that the representations complained of were made; (2) that they were false in fact; (3) that the person making them either knew that they were false or made them recklessly without knowing whether they were false or true; (4) that the defendant was thereby induced to enter into the contract; and (5) that immediately on, or at least within a reasonable time after, his discovery of the fraud which had been practised upon him he elected to avoid the contract and accordingly repudiated it. Lord Atkinson says:—

> Of these the last is the most vital in the sense that it is the condition precedent which must be fulfilled before the respondents can escape from the obligation of the contracts they have entered into, however fraudulent those contracts may be. A contract into which a person may have been induced to enter by false and fraudulent representation is not void but merely voidable at the election of the person defrauded after he has had notice of the fraud.

(1) [1909] A.C. 330.

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This rule in regard to voidable contracts has always been held to apply *ratione subjectæ materiæ* with particular force to an agreement to take shares in a company.

Lord Davey, in his judgment in *Aaron's Reefs* v. *Twiss* (1), says:—

> Lapse of time without rescinding will furnish evidence of an intention to affirm the contract. But the cogency of this evidence depends on the particular circumstances of the case and the nature of the contract in question. Where a person has contracted to take shares in a company and his name has been placed on the register, it has always been held that he must exercise his right of repudiation with extreme promptness after the discovery of the fraud or misrepresentation, for this reason: the presence of his name on the register may have induced other persons to give credit to the company or to become members of it.

Mellor J. in delivering the judgment of the Exchequer Chamber in *Clough* v. *London and North Eastern Railway Co.* (2), so often quoted with approval said, at p. 35:—

> So long as he (the person on whom the fraud was practised) has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind.
>
> And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive to shew that he has so determined.

We are not here dealing with an ordinary contract to acquire from a shareholder shares already issued in a company organized and carrying on business. The defendant's agreement was an underwriting contract. It is so characterized upon its face. He must have been fully aware that his subscription might operate as an inducement to others to take stock in the Canadian Jewellers, Limited, or to a company or person in the position of the plaintiff either to give credit to it or to a

(1) [1896] A.C. 273 at p. 294. (2) L.R. 7 Ex. 26.

person holding towards it the relation which J. A. Mackay & Company occupied, or to extend the term of such a credit, if already given. His position was not materially different in that respect from what it would have been had he made application for his stock directly to the company itself.

A person seeking to set aside a voidable contract to take shares in a company on the ground of misrepresentation must take steps for that purpose immediately on discovering the misrepresentation.

He must proceed with the very utmost promptitude possible in such a case.

Ogilvie v. *Currie*(1).

If a man claims to rescind his contract to take shares in a company on the ground that he has been induced to enter into it by misrepresentation, he must rescind it as soon as he learns the facts or else he forfeits all claim to relief.

Sharpley v. *Louth and East Coast Rly. Co.*(2).

It is impossible,

said Lord Cranworth in *Oakes* v. *Turquand*(3),

to allow a person who has taken shares and has gone on for nearly a year taking his chance of profit to turn round when the speculation has proved a failure and claim to be released on the ground that he was ignorant of something with which the least diligence must have made him acquainted.

Still more clearly must it be impossible where the case is one not merely of culpable ignorance, but of actual knowledge of the grounds of voidability.

As put by Mr. Justice Riddell, delivering the majority judgment in the Ontario Appellate Division in *Morrisburg and Ottawa Electric Rly. Co.* v. *O'Connor*(4), holding that repudiation of liability on a subscription for shares on account of matter entailing voidability must be made promptly after discovery of the facts,

(1) 37 L.J. Ch. 541.
(2) 2 Ch. D. 663 at p. 685.
(3) L.R. 2 H.L. 325 at p. 369.
(4) 34 Ont. L.R. 161.

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the subscriber is not bound, but may elect to approve or disaffirm—in short the contract is voidable and not void. It is wholly immaterial on what ground or for what reason it is voidable—the important matter is that it is so.

Compare the language of Lord Cairns in *Ogilvie* v. *Currie*(1), at the beginning of p. 546: See Art. 1000 C.C.

The man who has learned facts which entitle him to avoid a contract cannot be allowed to defer indefinitely the exercise of an election in which others are interested. The time must come when he will be taken either to have foregone that right or to have exercised it in favour of affirming. In the case of subscriptions for shares in a company, as in that of contracts of a speculative character, a comparatively short delay will ordinarily be conclusive: *Bawlf Grain Co.* v. *Ross*(2); *Directors of Central Rly. Co. of Venezuela* v. *Kisch*(3).

Viewed as a case of election, actual or presumed, prejudice to the plaintiff, to the Canadian Jewellers, Limited, or to its creditors or other shareholders would seem to be immaterial and irrelevant to the answer to the plea of misrepresentation. If, on the other hand, that answer should be regarded as one of laches, such prejudice may be a material element. From this point of view it may be that if the subscriber's delay in repudiating after having acquired knowledge of grounds of voidability has caused no prejudice whatever to the company, to its shareholders or to its creditors, it would be excusable. But where, as in the case at bar, the circumstances give rise to a strong probability that some such prejudice must have been occasioned, I think the burden will be on him to make out that case—always difficult and under ordinary circumstances practically impossible. Or it may be that he will be required to establish that under the actual circumstances no such

(1) 37 L.J. Ch. 541. (2) 55 Can. S.C.R. 232.
(3) L.R. 2 H.L. 99, at p. 125.

prejudice could have arisen. Nothing of the kind has been attempted here. Other subscriptions were hypothecated by Mackay with the plaintiff after that of the defendant had matured—some of them as late as February, 1913. Having regard to what appears to have been the course of business between Mackay & Co. and the plaintiff it would seem altogether likely that these subscriptions were procured after September, 1912. The plaintiff's loan to Mackay & Co. was allowed to run on. At the time of the trial it was slightly larger than at the end of December, 1912. It is impossible to say that these later subscriptions and this extended term of credit may not to some extent have been influenced by the fact that the defendant allowed himself to continue to be regarded as an underwriter liable to contribute $9,500 to the company's capital. That fact may likewise have affected the loaning of $70,000 to the company of which the defendant has complained.

Where a clear and gross case of laches has been made, such as the evidence here discloses, I very much doubt that the courts can be called upon to enter on the inquiry whether prejudice has or has not in fact resulted in any of the many directions in which it might be possible—an inquiry necessarily prolonged and far-reaching and as to the exhaustiveness of which the attainment of certainty must usually be impracticable. While I fully appreciate the force of the introductory observations of Sir Barnes Peacock upon the doctrine of laches in delivering the judgment of the Judicial Committee in *Lindsay Petroleum Co.* v. *Hurd*(1), I rather incline to the view that, in a case like that at bar, as in the case of a contract made with an agent to whom a secret commission has been paid, which we have had

(1) L.R. 5 P.C. 221, at pp. 239-240.

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occasion recently to consider fully in *Barry* v. *Stoney Point Canning Co*(1), the possibility of prejudice will itself be deemed conclusive. It was the obvious impossibility of any such prejudice that led to relief being given the defendant in *Aaron's Reefs* v. *Twiss*(2), the delay there alleged having occurred only after the company had declared his shares forfeited.

Lest it might be thought to have been overlooked, I should perhaps refer to *Farrell* v. *Manchester*(3), in which passages are to be found, notably one at p. 356, at first blush somewhat at variance with views I have expressed. That was a case where there had been prompt repudiation followed by some delay in suing for rescission. There were special circumstances which were held sufficiently to account for and to excuse this delay—and the case, it is said, at p. 359:—

> presents few of those characteristics that differentiate the usual stock cases cited from others regarding fraud entitling to rescission, so as to render each day's delay strong evidence of (absence of) that promptitude justice in some cases demands.

Mere lapse of time may import acquiescence amounting to affirmation. If great, it may, without more, do so conclusively: *Clough* v. *London & North Western Railway Co.*(4). Where the subject matter is highly speculative—where the possibility of others being affected is very great, a comparatively short time may suffice. A man entitled to avoid a contract cannot indefinitely withhold his election in order to exercise it as may ultimately prove advantageous to himself. Had the Canadian Jewellers, Limited, turned out a great success, as a subscriber for $10,000 worth of preference shares out of $600,000 worth issued, and of $5,000 worth of common shares out of an issue of $670,000 worth,

(1) 55 Can. S.C.R. 51.
(2) [1896] A.C. 273.
(3) 40 Can. S.C.R. 339.
(4) L.R. 7 Ex. 26, at p. 35.

Mr. Robert's position would have been much better than it would have been, with like success, had the issued capital been $1,500,000 preference and $1,500,000 common; and in that case we should have heard nothing of repudiation. He cannot be allowed to defer his repudiation for nearly three years, with full knowledge of the misrepresentation of which he complains, until satisfied that his interest lies in that direction, having meantime taken the full benefit of the chance of success of the venture.

Had the case at bar arisen in any of the other provinces of Canada, where English law prevails and there is no statutory prescription of the action of rescission for fraud, I should have been prepared to discard the defence of misrepresentation on the sole ground of delay under circumstances importing an election not to avoid, or the loss of the right to elect by acquiescence. The provisions of Art. 2258 C.C. (Art. 1304 C.N.),

> 2258.—The action (*s*) * * * in rescission of contracts for error, fraud, violence or fear are prescribed by ten years. This time runs * * * in the case of error or fraud from the day it was discovered

and the doctrine of the civil law as to the requisites of tacit confirmation (3 Baudry-Lacantinerie, "Des Obligations," Nos. 2024-5 and 2004-5) however are said to present obstacles to the application of this doctrine in the Province of Quebec. I assume Art. 2258 to be applicable at least by analogy to a defence of fraud. Yet we have the authority of the Privy Council in *United Shoe Machinery Co.* v. *Brunet*(1), that unreasonable delay in repudiation affords an answer to a defence of misrepresentation in Quebec. In *Guyon* v. *Lionais*(2), where Art. 2258 had been brought to their

(1) [1909 A.C. 330].

(2) 27 L.C. Jur. 94.

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attention, their Lordships took the same view. At page 104, they say:—

> The transaction * * * was one which, upon a suit brought in proper time, Dame Marguerite Roy might successfully have impeached on the ground of fraud.

At page 107, they continue:—

> The action was no doubt commenced within, though only just within, the legal term of prescription. But that does not in such a suit relieve a party from the consequences of his own acts or laches. A Court of Justice will not give its aid to a person seeking to set aside his own solemn deed of sale, if it appears that he has acquiesced in it for years, lying by, until by circumstances, and the expenditure of capital, the subject matter of the sale has greatly increased in value and new interests have been created in it. He must sue promptly, or explain the delay.

Lemerle in his Treatise on *Fins de Non Reçevoir* says at page 186:—

> Quiconque aurait gardé le silence dans une circonstance où il devait parler, sur une action qu'il devait approuver, pourrait, dans certains cas, être réputé avoir donné un consentement, une approbation susceptible d'opérer fin de non reçevoir.

And at page 189:—

> A-t-on gardé le silence sur une exception d'incompétence, de nullité, ou sur une demande susceptible d'être formée en première instance, ce silence est réputé approbation et emporte renonciation aux moyens qu'on a négligés.

No doubt, as put by Lord Wensleydale in *Archbold* v. *Scully*(1):—

> So far as laches is a defence, I take it that where there is a Statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than laches.

It implies an election to affirm or an abandonment of the right to elect to avoid. See too the language of Turner L.J. in *Life Association of Scotland* v. *Siddal*(2).

Moreover it would seem eminently desirable that a subscription for shares in a company should entail similar obligations and that the right to avoid or re-

(1) 9 H.L. Cas. 360, at p. 383. (2) 3 De. G.F. & J. 58, at p. 72.

pudiate it should be subject to the same conditions throughout Canada. All our companies are constituted and organized on a somewhat similar basis and shares in them are of the same nature in Quebec as elsewhere in Canada. Shares in the same company are very often underwritten or subscribed for in several provinces, including Quebec. The English idea as to the nature of the interest of the subscriber for shares or the shareholder and the incidents attached to it runs through all our companies' legislation. Many of the questions which arise in connection with the formation and administration of companies are determined in the Province of Quebec, as elsewhere in Canada, according to the principles established in the English courts. It would, I think, be most unsatisfactory if the right of a subscriber in Quebec for shares in a Dominion company to disaffirm his obligation to take or pay for them should endure for ten years after he had fully learned the facts which render that obligation voidable, whereas the like right of a subscriber in British Columbia or Ontario for shares in the same company would be unavailable to him should he fail to repudiate his obligation with the utmost promptitude reasonably possible after discovering its voidability. While I should deprecate any attempt to modify or affect any doctrine of the civil law of Quebec or an established construction of any legislation of that province by an introduction of English law or by adopting English views or practice merely for the sake of securing conformity, I incline to think that in regard to subscriptions for shares in companies, "in the absence of any legislation in force in Quebec inconsistent with the law as acted upon in England" and other provinces of Canada, and in the absence of any jurisprudence or established practice to the contrary, the courts of Quebec might well accept and apply

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the English rule imposing prompt repudiation as a condition of maintaining a plea of misrepresentation or granting the relief of rescission on that ground, and that while the right to repudiate on that ground may there be held not to be legally extinguished until the expiry of the limitation period prescribed by Art. 2258, the courts may decline to give effect to it in cases where that would be the attitude of courts administering English law. (*Cory* v. *Burr*(1). The considerations which require the highest degree of diligence in the repudiation of voidable subscriptions for shares in companies under the English law apply with equal force in the Province of Quebec: *Préfontaine* v. *Grenier*(2).

I am, for these reasons, of the opinion that Mr. Robert could not have successfully defended this action had it been brought by J. A. Mackay & Co. or by the Canadian Jewellers, Limited, as assignee of his agreement to take shares. The position of the present plaintiff is, if anything, more favourable.

I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Perron, Taschereau, Rinfret, Vallée & Genest.*

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

(1) 9 Q.B.D. 463, at p. 469. (2) (1907), A.C. 101, 110.

CHARLES GAGNON (DEFENDANT)... APPELLANT;

AND

VICTOR LEMAY (PLAINTIFF).....RESPONDENT.

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*Nov. 2.
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*March 11.

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

Sale—Contract—Nullity—Rescission — Payment — Default — Mise en demeure.

Where in a deed of sale or promise of sale, it is stated that such deed would become null and void *ipso facto without mise en demeure* if the buyer failed to make any payment in capital or interest at the specified dates, such stipulation is exclusively in the interest of the seller, who has the right to choose between the rescission of the contract or its execution, the obligation of the buyer remaining absolute and without alternative.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), confirming the judgment of the Superior Court, District of Montreal, and maintaining the plaintiff's action with costs.

On the 14th of June, 1910, a deed comprising promise of sale was passed between the parties, by which the appellant leased to the respondent for a term of ten years from the first of May, 1911, a certain lot of land. As a condition of said deed, the respondent reserved to himself the faculty to buy and the appellant bound himself to sell that lot for the price of $1,000 per acre, payable $5,000 on the date of the deed of sale to be passed and the balance $2,000 per year.

On the 2nd July, 1914, a deed of transfer was passed between the parties by which the respondent retroceded to the appellant all his rights belonging to him in virtue of the above deed of promise of sale,

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

(1) Q.R. 27 K.B. 59.

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in consideration of the payment of a sum of $60,000. This sum was payable $2,000 cash, $13,000 on the 17th of July, 1914, $5,000 on the 2nd of July, 1915, and $5,000 per year, with interest of 6% per annum.

The appellant paid to the respondent $2,000 cash and the payment of $13,000 due on the 17th of July, 1914; but failed to pay the instalment of $5,000 due on the 2nd of July, 1915, and $2,700 for interest.

The deed of transfer contained the following covenant:

"Si M. Gagnon faillissait à faire le premier paiement de treize mille piastres ou tout autre paiement d'intérêt et de capital, le présent transport sera nul *ipso facto*, sans mise en demeure, et la promesse de vente revivra en faveur de Mr. Lemay, dans toute sa vigueur. M. Lemay gardera le paiement de deux mille piastres ci-dessus dit fait comptant, ainsi que tout paiement subséquent, dans le cas où M. Gagnon se laisserait arriérer plus de trente jours dans aucune échéance de capital ou intérêt, et ce, sans mise en demeure."

Antonio Perrault K.C. and *J. W. Jalbert* for the appellant argued that, the above clause having put an end to the contract, the appellant was no more indebted toward the respondent.

Robert Tascherean K.C. for the respondent cited *Picard* v. *Renaud*(1); *Peloquin* v. *Cohen*(2); *Halcro* v. *Gray*(3), and *Pépin* v. *Savignac*(4).

THE CHIEF JUSTICE.—In this case, the appellant, in June, 1910, leased to the respondent a piece of property for ten years with a promise of sale; the purchase price was fixed at $30,000. In July, 1914,

(1) Q.R. 17 S.C. 353.
(2) Q.R. 28 S.C. 193.
(3) Q.R. 50 S.C. 350.
(4) Q.R. 51 S.C. 207.

the same property was reconveyed by the respondent to the appellant for the sum of $60,000, payable $2,000 in cash and the balance in instalments, on account of which the respondent received $15,000. The appellant having failed to pay the difference of $45,000, this action was brought to recover a further instalment due on the purchase price.

The appellant denies all liability on the ground that the promise of sale sued on contains a stipulation in these words:—

Si M. Gagnon faillissait à faire le premier paiement de treize mille piastres ou tout autre paiement d'intérêt et de capital, le présent transport sera nul *ipso facto*, sans mise en demeure et la promesse de vente revivra en faveur de M. Lemay, dans toute sa vigueur. M. Lemay gardera le paiement de $2,000 ci-dessus dit fait comptant, ainsi que tout paiement subséquent, dans le cas ou M. Gagnon se laisserait arriérer plus de trente jours dans aucune échéance de capital ou intérêt, et ce, sans mise en demeure.

The question to be decided is: What is the legal effect of this stipulation? There can, I think, be no doubt that of the whole contract it may be said:—

Les parties ont stipulé expressément qu'elles entendent faire un contrat de location, mais le rapport de droit, tel qu'il résulte objectivement des clauses de l'acte, correspond au contrat de vente, dont l'élement spécifique, transfert de propriété, se trouve réalisé.

S. 1888, 1, 87; D. 96, 1, 57; D. 91, 1, 271.

The appellant contends that the stipulation in question is a resolutive condition which, when accomplished, effects of right the dissolution of the contract; and that the words used evidence the intention that it was to operate for the benefit of both parties. On the other hand, the respondent submits that this is a special stipulation to the effect that the deed of sale is voidable but only at his, the vendor's, option, if the purchase price or any portion of it is not paid at the dates fixed, that is the *lex commissoria* of the Roman law.

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I am inclined to hold that the peculiar form in which the stipulation is expressed reveals an intention on the part of both the contracting parties to make a special agreement, the effect of which would be in case the purchaser failed in his engagements to put both parties back in the position in which they were at the date of the contract, the appellant purchaser forfeiting, however, all payments made on account up to the date of the breach.

The differences between the Quebec Civil Code and the Code Napoléon must be borne in mind when considering the effect of this contract. (Compare articles 1536 C.C., 1088 C.C., 1065 C.C., with 1184 C.N. and 1654 C.N.) Under the Quebec law the seller of an immovable cannot demand a dissolution of the sale of the immovable by reason of the failure of the buyer to pay the purchase price, unless there is a stipulation to that effect. A *lex commissoria* is never presumed. The rule of the French law is to the contrary.

It must also be borne in mind that, according to Pothier, Vente, vol. 3, No. 459, a *lex commissoria* does not entitle the vendor, in the absence of express stipulation, to rescind *ipso jure*. He can only bring an action to have the contract declared void and, until judgment is given in such action, the buyer may still save his position by tendering the money, notwithstanding that the term fixed for payment has elapsed. In a word, if the condition fails through the money not being paid by the date fixed, the contract does not become *ipso facto* void, but the vendor has the option of rescinding it. The reason why the vendor has the option of rescinding or adopting the contract is obvious. If the contract became *ipso facto* void on non-payment of the purchase money, it would always be in the power of the purchaser by withholding it to

rescind the sale from the moment of its conclusion and so to throw on the vendor the loss which would result from accidental destruction or damage occurring after delivery. If the condition is resolutive, the purchaser becomes owner of the property by delivery. He has all the ordinary rights of an owner and the loss falls on him if the property perishes before the condition is fulfilled. And in either case, whether the stipulation in question is a *lex commissoria* or a resolutive condition, in the absence of special agreement to the contrary, the avoidance of the contract entitles the purchaser to recover back any portion of the purchase money if it has been paid, subject always to claims for damages, revenues, etc. But here the contract does not say that the sale is voidable at the purchaser's option, the stipulation is that if the respondent fails to make any of his payments "le présent transfert sera nul *ipso facto*," the sale ceases to exist on the happening of the condition and then it provides against loss by the vendor. The promise of sale in his favour revives and the purchaser Gagnon forfeits all payments made on account of his purchase, $15,000.00.

I must confess that the language of the stipulation conveys to my mind the impression that the parties must have intended to make a special agreement to meet the very special conditions under which this agreement was entered into and producing results entirely different from those which would follow from a *lex commissoria*. *Vide* Beudant, "Effets de la Vente," pp. 196 and 197.

But as all the judges below and my colleagues here have reached a different conclusion, I submit to their better judgment.

Vide Pothier, vol. 3, No. 473.

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Idington J.

DAVIES J.—I would dismiss this appeal with costs.

IDINGTON J.—The intention of the parties so far as can be gathered from the contracts in question must govern. And the neat, though by no means simple, point raised herein is whether or not the nullification of the last contract between the parties as therein provided was intended to be dependent on the will of the vendor alone or on the will of either seeking to terminate it.

I cannot by elaboration help any one for the case as presented in the judgments below and in argument here has been considered from every point of view.

I need only say that if the appellant had in truth the rather improbable purpose in view of procuring the unusual right of a vendee to terminate the contract after he had paid one-fourth of the price, he would have been well advised in having had it expressed in less ambiguous language.

The point made by Mr. Justice Cross that the obvious right of the respondent to sue, within the thirty days specified for the vendee to save his rights, after default, is rather a formidable barrier in the way of construing the contract as appellant desires.

I admit the suggestions made in the appellant's factum in reply thereto are very plausible and worthy the consideration I have given them, but do not carry the question far enough or indeed beyond the region of ambiguity which stands in appellant's way.

It is not a case where authority can help us much for the meaning of one contract is rarely helped by a decision upon another though only varying slightly from the one which has been decided. In truth it is not the law but the fact which troubles us herein.

I think the appeal should be dismissed with costs.

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DUFF J.—I think the appeal should be dismissed with costs.

ANGLIN J.—I am of the opinion that this appeal should be dismissed for the reasons assigned by the Chief Justice of the Court of King's Bench (1). The fact, as pointed out by that learned judge, that art. 1536 of the Civil Code of Quebec makes a provision directly contrary to that of art. 1654 of the Code Napoléon, materially lessens, if it does not destroy, the value in Quebec of the French authorities cited in his very able argument and factum by M. Perrault. A construction of the clause on which the purchaser (appellant) relies that would enable him to terminate his contractual obligations by making default in fulfilling them could be justified only by terms admitting of no other interpretation.

The clause in question, if we omit from it the terms "*ipso facto, sans mise en demeure*" is the ordinary "*pacte commissoire*" of the French law, of which Casault J. in *Price* v. *Tessier*(2), said, at pp. 218-19:

"Le pacte commissoire," disent Aubry & Rau, vol. 4, par. 302, p. 82, "est la clause par laquelle les parties conviennent que le contrat sera résolu, si l'une ou l'autre d'entr'elles ne satisfait pas aux obligations qu'il lui impose."

La simple stipulation dans la vente, de sa résolution, faute de paiement, n'est, dans notre droit, qu'un pacte commissoire, auquel il manque la perfection de celui du droit romain, qui en faisait résulter la nullité de la vente; tandis que, avec nous, il ne comporte que le droit d'en demander la résolution en justice. Le Code Civil, article 1536, fait de ce pacte une condition de la demande en résolution de la vente des immeubles.

Dans notre ancien droit, cette condition de resolution était tacite, et la résolution, qu'elle permettait d'obtenir, devait être demandée en justice. Elle existe encore dans la vente des meubles. Mais, pour celle des immeubles, le Code Civil a mis fin à la résolution tacite, et la fait dépendre, faute de paiement, d'une stipulation spéciale qui est, comme je viens de le dire, le pacte commissoire. Ce dernier laisse subsister la vente jusqu'à ce que, sur poursuite, le jugement ait prononcé sa résolution, qui ne peut être demandée que par le vendeur.

(1) Q.R. 27 K.B. 59. (2) 15 Q.L.R. 216.

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The law as thus stated has been recognized in *Brisson* v. *Plourde*(1), by the Court of King's Bench; in *Picard* v. *Renaud*(2), by the Court of Review (Taschereau, Cimon and Archibald JJ.); in the judgment of Demers J., in *Halcro* v. *Gray*(3), affirmed by the Court of Review; and in *Pepin* v. *Savignac*(4). It may perhaps be noted that in the two latter cases the term *sans mise en demeure* occurred in the condition, but not the term *ipso facto*.

Under such a stipulation containing neither of these terms, where, as here, the contract is silent as to the place of payment, the debt is "*quérable*" and not "*portable*" (art. 1152 C.C.) it is necessary that the debtor should be put in default (*mise en demeure*) by a demand of payment at his abode, and the right of rescission can only be asserted by judicial proceedings. The clause is regarded merely as an expression (rendered necessary by art. 1536 C.C. in the case of contracts for the sale of immoveables) of a condition implied in other contracts by art. 1065 C.C., and as having the like effect(5). The seller alone can invoke it. It is a privilege or right of which he is at liberty to take advantage or not; and, until dissolution of the contract has been judicially declared, the debtor may avoid that consequence by fulfilling his obligation. Art. 1538 C.C. What then is the purpose and effect of inserting the terms "*ipso facto*" and "*sans mise en demeure?*" In my opinion the latter term is merely designed to dispense with the necessity for demanding payment at the debtor's domicile. It does not alter the nature of the stipulation or render it any the less a "*pacte commissoire.*" Such was the view maintained in *Halcro* v. *Gray*(3), and *Pepin* v. *Savignac*(4).

(1) I Rev. de Jur. 95.
(2) Q.R. 17 S.C. 353.
(3) Q.R. 50 S.C. 350.
(4) Q.R. 51 S.C. 207.
(5) 7 R. L. (N.S.) 471 et seq.

The purpose of the term "*ipso facto*" is to enable the creditor to assert the dissolution of the contract without being obliged to resort to the courts, and either immediately upon default, or upon the expiry of any stipulated period of grace, to deprive the debtor of the right to purge his default by payment under art. 1538 C.C. Requisite for these purposes, in accomplishing them these provisions are given operation and effect—the operation and effect which I think the parties must have intended. It is quite unnecessary, and, in my opinion, unwarranted, to attribute them to the extraordinary purpose of enabling the purchaser to relieve himself of his contractual obligations by making default in fulfilling them. They do not sufficiently, or indeed at all, express such an intention. They, therefore, do not change the nature of the facultative (potestative) condition in which they are found and make of it an absolute resolutive condition having the effect stated by art. 1088 C.C. It remains a provision inserted for the benefit of the vendor(1). Indeed the presence of the term "*sans mise en demeure,*" because of its utter inapplicability to the case of a purchaser asserting that by his default he has put an end to the contract, affords an additional reason for taking this view of the stipulation under consideration.

In at least two instances the courts have so construed clauses so nearly identical in terms with that before us that no real distinction between them can be suggested. In *Peloquin* v. *Cohen*(2), Mr. Justice Tellier held that such a clause confers the right of rescission on the vendor alone, and in *La Compagnie Impériale*

(1) 7 Mignault 137.

(2) Q.R. 28 S.C. 193.

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d'Immeubles v. *Collerette*, not reported but quoted *in extenso* in the factum of the respondent, Mr. Justice Panneton was of the same opinion. As stated by the learned Chief Justice of Quebec,

> La jurisprudence de la Cour Supérieure est à peu près unanime sur la question.

It is, I think, reasonable to assume that in inserting the clause in question the parties to the contract now sued upon meant it to have the effect which had been thus given to similar clauses in the jurisprudence of the province. No doubt such clauses have been placed in many contracts of sale in the belief that they would be given operation and effect in accordance with these decisions. We have it on the authority of such an experienced judge as Mr. Justice Cross that

> In conveyancing practice clauses such as the one in question have for many years been treated as giving a right of rescission to the seller but as not opening any right in favour of the buyer.

The wisdom of not overruling judicial decisions of some years' standing, where numerous contracts must have been made and moneys paid on the footing of the law as established by them, and of not breaking away from previous decisions upon the construction of a well known document in constant use for a number of years, even in cases where, were the matter *res integra*, a different view might have prevailed, is fully recognized in the English system of jurisprudence. *Palmer* v. *Johnson*(1); *Dunlop & Sons* v. *Balfour Williamson & Co.*(2). I cannot think that anything so mischievous as unsettling the law in regard to matters affecting rights of property should be countenanced by courts administering the civil law. That would seem to have

(1) 13 Q.B.D. 351, at pages 354, 357, 358.

(2) (1892) 1 Q.B. 507, at page 518.

been the view of the learned judges of the Court of King's Bench in the present case.

Appeal dismissed with costs.

Solicitor for the appellant: *J. W. Jalbert.*

Solicitors for the respondent: *Perron, Taschereau, Rinfret, Vallée & Genest.*

1918
*April 18
*May 7

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

AND

MAGLOIRE LARIVÉE (DEFENDANT). RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation—Fair market value—Generosity—Compulsory taking—10% allowance.

The Assistant Judge of the Exchequer Court, after reviewing the evidence, concluded: "Under all the circumstances of the case * * * a fair and generous market price for the area expropriated would be about eight to ten cents a foot, and to make it very generous compensation, I will make it ten cents a foot."

Held, that the element of "generosity" is not one which should enter into the arbitrator's or judge's consideration, when fixing the compensation to be allowed for compulsory purchase.

An allowance of ten per cent. of the award, for compulsory taking cannot be claimed as of right for all kinds of property and under all circumstances.

APPEAL from the judgment of the Exchequer Court of Canada, awarding, in expropriation proceedings taken by appellant, for the value of land expropriated, the sum of $47,080, being $39,800 for 398,000 square feet, $3,000 for two buildings on the property and $4,280, being 10% for compulsory taking. The Supreme Court of Canada, allowing the present appeal, reduced the amount to $34,840 Mr. Justice Davies was of opinion to reduce it to $22,900 and Mr. Justice Idington to $26,540.

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

Amyot for the appellant.

Belleau K.C. and *St. Laurent K.C.* for the respondent.

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

THE CHIEF JUSTICE:—I agree in the conclusion reached by Mr. Justice Brodeur and would allow the appeal in part with costs. Cross-appeal dismissed with costs.

DAVIES J.—This is an appeal from the judgment of Mr. Justice Audette of the Exchequer Court fixing the compensation to be allowed for a certain property of the respondent situate at Lauzon in the District of Quebec expropriated by the Crown.

The area of the land expropriated was 398,000 square feet and the compensation fixed by the learned judge was ten cents a square foot. There were two buildings on the property for which $3,000 was allowed. In all therefore $42,800 was allowed for the land and buildings and to this the learned judge added the sum of $4,280, being 10% for compulsory taking.

The appellant did not challenge the $3,000 allowed for the buildings or the interest allowance made. The sole questions were as to the allowance per foot to be made for the land and the 10% for the compulsory purchase.

The learned judge upon reviewing some of the evidence as to value concludes that

> Under all the circumstances of the case, taking into consideration that a large area is expropriated, a fair and generous market price for the same would be about 8 to 10 cents a foot, and to make it very generous compensation, I will make it 10 cents a foot.

In appellant's factum and in counsel's argument at bar five cents was submitted as the price which should be allowed.

Counsel for the respondent pressed certain offers which, it was stated in evidence by the defendant Larivée, had been made to him of $100,000 and other sums for the land expropriated.

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Davies J.

But the learned judge made no reference to these alleged offers evidently not considering them *bonâ fide.* Only one of the three parties who were said to have made offers was called as a witness (Lagueux), and his offer, if made at all, was after the expropriation had been made. From the report of the stoppage by the judge of the defendant's cross-examination, it was evident that he had concluded that the defendant's evidence, considering his age and infirmities, should not be accepted on the question of these offers. It appeared that if the other offers were made at all it was after the project of the dock had been determined on and its location fixed. Assuming their *bona fides*, they were mere speculative offers as to the compensation which might be allowed and not evidence at all of what, apart from the project of the dry dock, the market value of the land would be worth.

After considering all the facts, and evidence called to our attention, I have reached the conclusion that the offer of the appellant of 5 cents a square foot is a very reasonable and fair one and that the compensation allowed of 10 cents should be reduced accordingly.

I cannot see any grounds for allowing in a case such as this the 10% for compulsory purchase. The reasons which prevail and justify this 10% in many cases do not exist here and I would disallow this item.

Before concluding, I would again protest against "generosity" being an element entering into the arbitrator's or judge's consideration when fixing the compensation to be allowed for compulsory purchase. I am quite unable to find how much the learned judge added to the market value of the land taken in this case for generosity. He says a fair and generous market price would be about 8 to 10 cents a foot and to make it "very generous compensation" he would make it 10 cents.

I would respectfully submit that the market value of the property to the owner when taken is the true test of the compensation to be allowed excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired.

The element of generosity is not one which should enter into consideration in determining the compensation. If allowed, it would simply mean the addition to the market value of the land such sum as the arbitrator or judge might in the goodness of his heart think it desirable to add, and penalizing the party expropriating to that amount.

I would allow the appeal with costs, and reduce the compensation to 5 cents a square foot disallowing the 10% for compulsory purchase and confirming the judgment as to the value ($3,000) to be allowed for the house.

IDINGTON J:—The respondent bought some land in Lauzon in 1897 at sheriff's sale for $1,475, and in 1902 sold a lot thereout, of irregular shape, at a price which stated in argument, and not denied, would amount to two and a half cents a square foot.

The remainder of the land so bought by respondent which it is agreed by the parties amounts to 398,000 square feet, was expropriated in January, 1913, and the judgment of the Exchequer Court has awarded him therefor $47,880 including an estimated value for buildings of $3,000.

Deducting that estimate for buildings leaves $42,880 for the bare land.

I assume that the sheriff's sale may have been at a sacrifice price yet an award that gives the respondent who paid it thirty-two times as much for market price at the end of sixteen years is startling.

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Idington J.

I assume that the price of two and a half cents a foot for that sold in 1902 must be taken as the market value at that time. I cannot agree that the stipulation to build a good house was of such a character as to render the price named an untrustworthy guide to the value. Men buy land to build houses upon. And the purchaser in that instance had long and easy terms of payment with interest at 6% per annum.

It is alleged by respondent, however, that the sale had been bargained for two years before.

If I am right in assuming that price to have been the market value in 1902, or 1900, as alleged, then this award can only be maintained as correct by finding that such property in Lauzon had, within eleven years, or thirteen if the bargain was made two years earlier, more than quadrupled in market value. It was a town of three thousand population and, like many such, practically stationary, as Mr. Charland admits, but yet had increased to four thousand during that time. It had long had an important industry in the shipbuilding and repairing line. We are not told how many hands employed. Respondent's factum modestly says a considerable number of workmen are employed there. Another old industry is that of manufacture of trunks and boxes. A more recent establishment of the same kind is mentioned. These seem to tell all there is of sufficient importance to be called large or substantial industries.

The evidence of actual market value at the time of the expropriation is unusually unsatisfactory.

It seems almost impossible to get witnesses testifying to values as of a given date when speaking three or four years after the given date, and when there has been in the meantime some great impulse given to the apparent progress of a town and hence a sudden

rise in values, to bear in mind exactly what is wanted and distinguish accurately between past and present values. Even when the right question is put an ambiguous answer is given by one leading witness herein.

The respondent's witnesses in this case as a group hardly furnish an exemplary exception to the truth of these general observations. I am not surprised, therefore, to find that the learned trial judge has not accepted their opinions as his guide.

They have, besides their mere opinions, given a great many illustrations of transactions which, unfortunately, for one reason or another, can hardly assist us much in determining by comparison the market value of the property in question. And some of these the learned judge seems to assume might help to arrive at the truth.

I desire to test the matter by using the respondent's price for what he sold and another sale beside it.

Besides the part of the property sold by the respondent, there is one other transaction directly bearing upon the earlier value of that in question and that is a sale of lots in an adjoining plot, No. 6, said by Mr. Charland to be of substantially as good value as that now in question. It took place in 1905 and was a sale of twenty-nine lots at one cent per square foot.

Two slight difficulties arise in the way of possibly making too much use of this One is that the quality of the land is said by respondent to be inferior to that in question and that it has not the same advantage for needed drainage. The other is that the transaction was eight years prior to this expropriation.

Yet making all due allowance for the alleged difference in want of drainage facility, I think it is a fair index that property there had not increased since respondent's sale already mentioned, and of the value of property immediately beside that now in question.

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As a matter of common knowledge we know, or ought to know, that property in towns such as described and presenting no greater rate of increase than shewn, does not quadruple in value within eleven years.

Upon the advent of some great project likely to double the population very shortly, there may be found such rapid rises within very brief periods. But these exceptional cases can all be verified by clear and convincing testimony and the causes therefor explained. The extent to which these causes in any cases may have operated are also susceptible of lucid explanation.

We have no such evidence offered in this case. That presented of estimated value of the property in question has been so extravagant that the learned trial judge seems to have discarded it entirely.

I think he was right in doing so.

I cannot accept the theory that such properties as in question had quadrupled in value in Lauzon within eleven years. Much less can I accept opinion evidence which would require in some of the estimates put forward a rise in values based on such slow progress in the town that it would imply an advance in values of fifteen to twenty fold in eleven years, or even thirteen years. It rather seems to me that witnesses forget the actual foundations of real market values and the increase thereof.

At all events I cannot, in the absence of any better reasons than those given, accept such estimates, involving such rise in values as I have just pointed out.

There is also the municipal assessment for the property in question which was $2,100 for years 1906-1908 and 1910, then raised, in 1912, to $2,400, and after the expropriation was raised to $6,000.

Assuming that it did not comply with the law and did not represent actual values, yet there is little doubt in my mind but that it would be approximately on the same low level throughout the town. If I am right in that, curiously enough Mr. Lagueux gives a piece of evidence that when applied destroys his high estimate. It is this:

He tells of buying a property valued by the assessor at $2,000, and selling part for $3,000. And then says he would not give what is left for $5,000. Assuming from these figures the reasonable deduction that the witness does not draw, but I do, that four times the assessed value is what might be expected for the property, and apply that to the assessments of this property now in question, would fix the value of it at about $9,600.

And yet we are asked to maintain a valuation of $42,800 for land alone and houses at $3.000. and add 10% for the cruel taking of it.

I really cannot believe that the assessor for so many years assessed this property, of such an attractive character as Mr. St. Laurent so well and ably painted it to us, at one-twentieth part of its value, and then, when he raised it, only added, at the dawn of better days, $300.

But when those better days had come he could yet find it worth only $6,000.

The respondent was one of those men whom nothing could change after he had made up his mind not to sell, and hence some could well afford to practice the joke of offering him a hundred thousand dollars knowing he would refuse it.

I notice they did not venture to lay down the gold less a year's discount and give the respondent a

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Idington J.

fair chance, or succeed in inducing the learned judge to accept the words as representing a sincere reality.

In argument counsel for appellant pointed out that the learned trial judge had made an error regarding the price of some larger sales and thus in effect misdirected himself. I assume that would have been denied if incorrect, and I think it quite possible the error of calculation may have led to error in the judgment.

Another test of the intrinsic worth of the property and the demands for more house room, is the fact that the houses were used only in summer, although appellant says one of them had double windows and was fit to live in during winter.

The learned trial judge has not accepted the views of any set of witnesses and has come to his judgment from a survey of the general evidence in the case.

Following the same lines I cannot accept his conclusions as to the value of the land and would cut the allowance for latter down to one-half what has been allowed therefor, including such additional percentage as he has added to value he finds, and reduce the amount of the judgment to $26,540.

I would therefore allow the appeal with costs and dismiss the cross-appeal with costs.

ANGLIN J.—I concur with Mr. Justice Brodeur.

J. BRODEUR:—Il s'agit d'un appel d'un jugement de la Cour d'Echiquier accordant une somme de $47,080 pour l'expropriation d'un terrain appartenant à l'Intimé et dont le gouvernement avait besoin pour la construction d'une cale sèche à Lauzon.

Ce terrain comprend 398,000 pieds et la Cour inférieure l'a évalué à 10 sous du pied. La Cour a

accordé en outre 10% pour l'expropriation forcée (compulsory taking) et $3,000 pour les bâtisses érigées sur le terrain item. Il n'y a pas de difficulté quant à ce dernier item; il est reconnu que ce chiffre de $3,000 représente la valeur de ces bâtisses.

L'Intimé Larivée n'est pas satisfait du montant accordé pour la valeur du terrain lui-même et il demande per un contre-appel 50 sous du pied au lieu des dix sous qui lui ont été accordés.

Ce terrain représente une grande étendue de terre et a été acheté il y a quelques années par l'Intimé pour une somme assez modique. Il est incontestable que depuis il y a eu augmentation dans la valeur de la propriété en cet endroit. La preuve démontre que des terres d'assez grande étendue se sont vendues dans le voisinage pour être subdivisées en lots à bâtir. L'Intimé a prouvé que ces lots à bâtir s'étaient alors vendus jusqu'à 17 cents du pied. Mais l'honorable Juge de la Cour inférieure, et cela, je crois, avec raison, n'a pas voulu accepter ce prix de lots subdivisés pour établir la valeur marchande de la propriété de l'Intimé. Voici ce qu'il dit:

A number of sales were referred to in the course of the trial, and deeds in respect of a number of these sales were also filed of record.

With a few exceptions, most of the sales have reference to small building lots which sales represent no similarity to the piece of land in question in this case, which is composed of 398,000 sq. ft., and therefore would be a very misleading guide to follow.

However, from the evidence of promoters and real estate men heard as witnesses, it appears that large farms were bought, at Lauzon, not long before the expropriation, at three cents and four to five cents a foot when buying a large area; and, after passing through the usual process of promotion, by sale and re-sale to syndicates and companies at very large figures, compared with the original purchase price, these lands were afterwards placed upon the market and sold as small building lots at 14 and 17 cents a foot and perhaps more. It is not rational to use as apposite the value of these building lots, but it is the original sale for a large area that really offers similarity with the present case, and helps to reconcile and bridge the gap between the opinion evidence adduced by the plaintiff and the defendant respectively.

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Brodeur J.

Dans les circonstances, je crois que ces ventes en bloc constituent un meilleur guide pour déterminer la valeur de la propriété de l'Intimé que ces ventes de lots subdivisés.

D'un autre côté, la Couronne elle-même offre un prix plus élevé que celui payé pour les fermes mais moindre que celui payé pour les lots subdivisés.

L'Honorable Juge de la Cour inférieure a eu l'avantage d'entendre les témoins et il dit:

> A fair and generous market price for the same would be about 8 to 10 cents a foot, and to make a very generous compensation I will make it ten cents a foot.

Je comprends par cet extrait de son jugement qu'une somme de huit sous du pied serait une indemnité raisonnable. Je ne saurais, pour ma part, accepter le principe que ces indemnités doivent être basées sur une très grande générosité. Par conséquent, je considère que nous devrions réduire la compensation accordée à huit sous du pied.

Je suis d'opinion que l'appel devrait également réussir pour les 10% additionnels accordés par la Cour inférieure.

L'Intimé ne retirait qu'une somme de $285.00 de revenu par année sur cette propriété et il devrait s'estimer heureux de recevoir un capital de $34,840 qu'il pourrait placer facilement en bons de l'Etat ou autrement de manière qu'il retirerait de suite un revenu de près de $2,000 par année, c'est-à-dire près de sept fois plus que ce qu'il a aujourd'hui.

Il a été question d'offres de $100,000 qui auraient été faites à l'Intimé pour son terrain. L'une de ces offres aurait été faite par le témoin Lagueux; une autre par un nommé Légaré; et la dernière par un nommé Couillard.

M. Lagueux, dans son témoignage, nous dit qu'il

a fait ces offres en mai 1913 c'est-à-dire après l'expropriation. Quant aux offres de Couillard et de Légaré, elles sont rapportées seulement par l'Intimé lui-même. Or, le témoignage de ce dernier, qui est un homme âgé, a été jugé si peu satisfaisant que le juge a été obligé d'en interrompre la transquestion. On ne devrait donc pas y attacher d'importance. Quant à l'offre Couillard, il est incontestable que c'est après l'expropriation.

Pour toutes ces raisons, l'appel devrait être maintenu avec dépens de cette Cour et l'Intimé devrait recevoir comme indemnité

pour son terrain	$31,840.00
pour ses bâtisses	3,000.00
Total	$34,840.00

Le contre-appel devrait être renvoyé avec dépens.

Appeal allowed with costs.

Cross-appeal dismissed with costs.

Solicitors for the appellant: *Drouin & Amyot.*
Solicitors for the respondent: *Galipeault, St. Laurent, Gagné & Métayer.*

1918
*Mar. 5
*Mar. 25

JAMES SIMSON AND JOHN MACFARLANE (PLAINTIFFS)..... } APPELLANTS;

AND

EILEEN YOUNG (DEFENDANT)..... RESPONDENT.

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

Sale of land—Foreign vendor—Agreement for sale—Place of completion—Time essence of agreement—Extension of time—Waiver.

Y., residing in Ireland, through an agent in Calgary listed land there for sale with a real estate broker. An agreement by S. to purchase this land, signed by the broker for Y., provided for a part payment in cash to be forfeited to the vendor, and the contract to be null and void if the balance was not paid in one year, time to be of the essence of the contract. When the balance became due, March, 1914, S. went to the broker to complete the purchase but was told that the conveyance had to be sent to Ireland for execution and to return in six weeks which he did and found the situation the same. Subsequent inquiries succeeded no better and in December, 1914, he formally tendered the money to the broker and shortly after wrote to Y. at Belfast repudiating the agreement and demanding the return of the money paid under it. Receiving no reply, in January, 1915, he took an action for rescission and repayment of the money in which Y. by counterclaim asked for specific performance. In February, Y. tendered a conveyance of the land to S.

Held, that while no place was named in the agreement for completion of the purchase it was to take place at Calgary, and as Y. was to prepare the conveyance it was her duty to have it there for delivery to S. at the appointed time.

Held, also, that the assent by S. to the request of the broker to wait after the time of completion for the conveyance could not be considered an agreement for extension nor evidence of an intention not to rescind.

In the agreement the address of the vendor was given as Belfast, Ireland, instead of Dublin where she lived, and the vendee's letter of repudiation sent to Belfast was not delivered.

Held, Fitzpatrick C.J. dissenting, that this and other circumstances absolved the vendee from the duty of giving notice fixing a reasonable time within which the purchase must be completed or the contract be at an end.

Held, per Anglin J.—The stipulation in the agreement that "time shall be the essence of this agreement" was binding on both parties though the vendee alone was to be penalized for its non-observance.

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

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SIMSON v. YOUNG.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta(1) reversing the judgment on the trial in favour of the plaintiff.

The material facts of the case and the circumstances on which the issues depend will be found in the above head-note.

Geo. H. Ross K.C. and *Barron* for the appellants. The vendor was to prepare and tender the conveyance and her default as to this precludes her from setting up the vendee's default as to payment. *Foster* v. *Anderson*(2), *per* Anglin J. at p. 574.

In a contract such as this if either party make default specific performance will not be decreed. *Steedman* v. *Drinkle*(3), *Brickles* v. *Snell*(4).

The provision that time should be the essence of the agreement applies to both parties. *Foster* v. *Anderson*(5).

The tender of the conveyance was too late to have effect. *In re Head's Trustees*(6).

The contract was to be carried out in Calgary and the vendor's duty was to be in a position to complete the purchase there. *Tasker* v. *Bartlett*(7), at p. 363.

J. A Ritchie and A. B. Mackay for the respondent. The broker had no authority to do more than procure a purchaser. See Bowstead on Agency (5th ed.) pp. 79 and 101.

Plaintiffs by conduct waived the rights to claim that time was the essence of the agreement. See

(1) 10 Alta. L.R. 310.
(2) 16 Ont. L.R. 565.
(3) [1916] 1 A.C. 275.
(4) [1916] 2 A.C. 599.
(5) 16 Ont. L.R. 565; 42 Can. S.C.R. 251.
(6) 45 Ch. D. 310.
(7) 59 Mass. 359.

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SIMSON v. YOUNG

The Chief Justice.

Drinkle v. *Steedman*(1), *Macarthur* v. *Leckie*(2), *McDonald* v. *Garrett*(3), at p. 611.

THE CHIEF JUSTICE (dissenting).—The respondent is a married woman resident in Ireland; she had a brother, one Robinson, who, prior to the occurrence leading up to this action, was for some time in Calgary, engaged in the office of Messrs. Wilkinson & Boyes, real estate agents in that city. Probably through this brother of hers, though I do not think the fact appears from the record, Mrs. Young contracted for the purchase of the city lots in question in this suit; at any rate, he listed them for resale with Messrs. Wilkinson & Boyes. It was, of course, a speculative purchase.

Mr. Wilkinson approached the appellants who were then carrying on business as building contractors in Calgary and eventually effected a sale which was carried out by the agreement of the 8th of March, 1913. The appellants paid the $1,550 on the execution of the agreement to Wilkinson who applied it in payment of the balance of the purchase money still due to Mrs. Young's vendors. Robertson had by that time returned to England.

On or shortly before the 1st March, 1914, the date for completion of the purchase, the appellant, Simson, went to Wilkinson and offered to give him a cheque for the balance of the purchase money if he had the transfer there. Wilkinson replied that he had not got the transfer but would have to write to Ireland; he said he would make out a transfer and send it along, it would be back in five or six weeks. Simson returned in six weeks but Wilkinson said he had had no reply. Simson subsequently continued his inquiries of Wilkinson but always with the same result.

(1) [1916] 1 A.C. 275. (2) 9 Man. R. 110.
(3) 7 Gr. 606.

On or about the 3rd December, 1914, Simson went with his solicitor to see Wilkinson and made a tender of the balance of the purchase money but Wilkinson was still without the transfer. Thereupon, on the 7th of the same month the appellant's solicitors wrote a letter to the respondent, formally repudiating the agreement and on the 15th January, 1915, the present action was begun. On the 15th February, 1915, the respondent's solicitor tendered a transfer of the property.

The judgment of the Appellate Court proceeds on the ground that the appellants were bound to communicate with the respondent personally before attempting to rescind. I do not think this can be supported; where a payment has to be made there is a distinction between the obligation in case the party to whom it is to be made is out of the country; thus in Viner's Abridgment, Tender, G. 4, we read:—

> If the obligee, etc., be out of the realm of England, the obligee, etc., is not bound to seek him or to go out of the realm unto him; and because the feoffee is the cause that the feoffor cannot tender the money, the feoffor shall enter into the land as if he had duly tendered it according to the condition. Co. Litt. f. 210 b.

See also *Hale* v. *Patton* (1), and *Dockham* v. *Smith*(2). The rule of the civil law is, where, as in this case, the sale is of a definite ascertained thing on credit and the place of payment is not agreed upon by the contract, then the payment must be made at the place where the subject matter was at the time the contract was entered into. Arts. 1152 C.C. and 1533 C.C.

The vendor being out of the Dominion was, I think, bound to appoint someone to whom payment could be made.

That does not, however, dispose of the matter. The purchasers clearly waived the condition for com-

(1) 60 N.Y. 233 at p. 236. (2) 113 Mass. 320.

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pletion of the purchase on the date originally fixed. They were, as they themselves say, willing to complete at any time up to the first days of December, 1914; if they then came to the conclusion that the matter had been allowed to stand over long enough they were allowed to give notice of this to the vendor and name such reasonable time within which the purchase must be completed or, failing that, the contract be at an end. Yet immediately, that is on the 7th December, they gave notice to put an end to the contract. This I do not think they could do. If they had given a notice fixing such a date for completion as would allow of communication with the vendor in the meantime, then, if they had obtained no satisfaction by the appointed time, they would have been justified in withdrawing from the agreement; but they could not, after allowing the matter to remain open till December, suddenly demand immediate completion and on failure to obtain it put an end to the contract; this, of course, more especially under the circumstances when to their knowledge the vendor was residing in a distant country.

In the case of *Taylor* v. *Brown*(1), Lord Langdale M.R. said:—

> The question which has been discussed in this case is, whether the defendant remains under any obligation to perform the agreement. He says he does not, and that he has ceased to be under any obligation from the 13th of July, 1836. Now, as I have before stated, where the contract and the circumstances are such that time is not in this court considered to be of the essence of the contract—in such case, if any unnecessary delay is created by one party the other has a right to limit a reasonable time within which the contract shall be perfected by the other. It has been repeatedly so considered in this court; and where the time has been thus fairly limited, by a notice stating that within such a period that which is required must be done or otherwise the contract will be treated as at an end, this court has very frequently supported that proceeding; and bills having been afterwards filed for the specific performance of the contract, this court has dismissed them with costs.

(1) 2 Beav. 180.

The appellants not having attempted to give any notice, it is unnecessary to decide to whom notice could have been given under the circumstances. It is, however, to be noted that the whole transaction so far as the appellants were concerned was conducted on behalf of the vendor through Wilkinson. The vendor's brother, admittedly her agent, was in his office, listed the property for sale with him on his return to England and left with him instructions for carrying out the sale. Wilkinson received the first payment on account of the purchase money and applied it in payment of the purchase money due to Mrs. Young's vendors, completed her title and sent the certificate of title to Robertson, who, he supposes, turned it over to the respondent; he prepared the transfer to the appellants and sent it for Mrs. Young's execution. When the respondent did at last think of taking any steps in the matter it was to Messrs. Wilkinson & Boyes that her husband wrote on the 12th September "to know why the appellants had not paid the balance of the purchase money." She had the reply which Mr. Wilkinson wrote to her husband stating that he had prepared and sent the transfer for her execution; that the money had been tendered to him when originally due and was available upon surrender of the transfer. It was not until the 15th February, 1915, that the tender of the transfer was made. The respondent at no time gave to the appellants or evidently to Mr. Wilkinson himself the slightest intimation that he was not authorized to act on her behalf in the matter. I do not think it can be doubted that he was so authorized and I do not think the respondent could under such circumstances he heard in any court to repudiate his authority.

Certainly the position would have been very different if the appellants had given to Mr. Wilkinson

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notice calling for the completion of the purchase at a date within a reasonable time. They, however, gave no such notice either to the respondent or any one else on her behalf.

It is not without some regret that I arrive at these conclusions, because I think that the respondent was much to blame for the delay. She had had the agreement for a year and it provides that the transfer is to be prepared by the vendor. She is therefore not entitled to say, as she does in her affidavit, that Mr. Wilkinson's letter was the first intimation she had received of any transfer requiring execution by her. Moreover, it is common knowledge that a conveyance of some sort by a vendor is required on every sale of lands, more so in the United Kingdom than in this country. That she was really aware of this fact is shewn by her previous statement in the affidavit that

> shortly before the balance of the purchase money became payable under the said agreement, my husband wrote to my brother to remind him of the fact and to arrange that the sale should be completed.

Though, as she says, repeated letters to her brother met with no response, the time for completion was allowed to go by and nothing was done until the 12th September, when her husband wrote to Mr. Wilkinson "to know why the appellants had not paid the balance of the purchase money." Though Mr. Wilkinson's letter was received in October, 1914, it was not until the 15th February following that the transfer was tendered, within two weeks of a complete year from the date when it should have been ready.

The appellants under the circumstances could, I do not doubt, have claimed damages for the delay. Damages can be recovered by a purchaser from his vendor for delay in completing the purchase occasioned by the vendor not having used reasonable diligence to perform

his contract. *Jones* v. *Gardiner*(1). The appellants, however, have treated the contract as at an end and I do not see therefore how they can recover anything.

The appeal should, I think, be allowed to the extent that the appellants are not liable to pay interest on the balance of the purchase money; but otherwise the judgment should be confirmed. There should be no costs of the appeal.

IDINGTON J.—This is an appeal from the judgment of the Appellate Division of the Supreme Court for Alberta, directing, under the circumstances I am about to set forth, specific performance of an agreement to purchase some land in Calgary.

The respondent, who lived in Ireland, having an agreement for purchase of said land listed it for resale with one Wilkinson carrying on in Calgary the business of a real estate agent.

He sold it on her behalf to appellant for $3,150 of which $1,550 was paid him in cash and the balance with interest at 8% was to be paid a year later.

The agreement was reduced to writing dated 8th March, 1913, and executed in duplicate by appellants and said Wilkinson, who signed his own name, writing thereunder the words "for Eileen Young."

He does not say whether or not he sent the duplicate copy he signed to respondent, or any one for her. He does say that the other two copies were sent to respondent in Dublin to have her execute them and that they were returned executed, "and one was handed to Mr. Simson and one was sent to Dublin to Mrs. Young."

Simson, the appellant, denies ever seeing such second copy and the learned trial judge seems sceptical of Wilkinson's recollection of the facts relative thereto.

(1) [1902] 1 Ch. 191.

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I agree with him in that regard without doubting in the slightest the integrity of Mr. Wilkinson who seems to have given his evidence fairly.

The execution or non-execution of such second agreement is not of the slightest consequence in my view, but the attendant circumstances are of some value.

The respondent was described in the first writing as of Belfast, Ireland, but how in the second we know not.

If she saw herself so described and it was not according to the fact, how did she come to sign such a misleading document?

And if "one was sent to Dublin to Mrs. Young" how could she imagine, or her husband imagine, that a transfer was not required?

The document is not a long one and has plainly written therein that she was to have a transfer prepared.

Passing these curious incidents the appellant Simson went with the money to meet the second and last payment, to Wilkinson's office, either on the 1st March, 1914, when it was due, or the day before, and offered to pay him same.

He replied that he had not the transfer and preferred Simson to keep the money till it arrived, and assured him there would be no interest running upon the money in the meantime.

He mentioned to Simson that he had sent a transfer for execution. Indeed Simson seems to think he mentioned doing this twice, but Wilkinson only speaks of sending it once, about two weeks before the money was due.

He further says that that was sent to Robinson, a brother of respondent who had, whilst in Calgary, been her agent in listing the land with him (Wilkinson) and was the medium of the communication through

whom the terms of sale had been settled by a cabling of messages that passed in the first few days of March, 1913, before Wilkinson signed the agreement.

Robinson seemed indifferent for some reason or other that remains unexplained.

Appellants were remarkably persistent and patient in waiting for the transfer and jogging Wilkinson's memory.

On the 13th October, 1913, Wilkinson wrote the husband of respondent at Dublin, Ireland, explaining what had transpired as above stated and urging a return of transfer duly executed.

Respondent tells in her affidavit that the letter was received on the 28th October, 1914. One would have supposed that it should, under the circumstances, have occurred to respondent or her husband to go to a solicitor or notary in Dublin and get him to draw up a transfer, get it executed and returned forthwith to Calgary, or at all events to acknowledge the receipt of the letter and explained or given excuse for the delay. Nothing of the kind happened.

After twelve days wasted in some useless and fruitless inquiries as to Robinson (which ended nowhere that we are told of) it occurred to respondent's husband to write solicitors in London to act on her behalf with a view to the completion of the sale. And they, on the 13th January, 1915, sent her a duplicate transfer which she actually executed before a notary public on the next day.

When or how that was sent to America is not explained but evidently, if Wilkinson is correct, in March or April following he had a letter from respondent. Nor is there any explanation of why it took from the 7th of November till the 13th of January for London

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solicitors to prepare a transfer for which less than an hour's labour is needed.

Meantime appellants' wonderful stock of patience had become exhausted and they consulted a solicitor in the beginning of December, 1914, who seems to have advised and brought about a tendering of the money to Wilkinson who could do nothing. He says, speaking of things at that stage "I am quite well satisfied that if the title was there they would have paid."

The solicitors prepared and, on the 7th December, 1914, on behalf of appellants, mailed a letter to respondent repudiating the contract on account of her failure to deliver title, although appellants had repeatedly tendered the money and demanded the same. They, by same letter, demanded a return of the money already paid and of the taxes which they, the appellants, had paid as the agreement bound them.

Copies of that were mailed to respondent and to Wilkinson but brought no response. Wilkinson got his but evidently, by reason of the respondent's treatment of his appeals to her husband and brother, could do nothing.

Respondent's copy had been addressed to Belfast which, according to the agreement, was quite proper and was returned as uncalled for.

The appellants, after a six weeks' wait, instituted an action on the 15th January, 1915, for recovery of the moneys paid and so demanded to be returned.

The service of that on respondent on the 1st of February, 1915, seems to have prompted some response.

The defence to the declaration consists of a denial of its allegations and an averment of willingness and readiness at all times to fulfil the contract, followed by a counterclaim asking for specific performance of the agreement.

This the court below, has, as stated above, granted.

The question raised thereby is whether or not a remedy which cannot be got by a suitor seeking relief, to use the oft-quoted language of Lord Alvanley M.R., "unless he has shewn himself ready, desirous, prompt and eager" is open to one conducting her business in the manner of respondent.

I cannot think so. And when we examine the agreement and consider the duties cast thereby in express terms upon respondent to observe same, there is no excuse which is presented that should avail her in seeking to enforce such a remedy.

The agreement specifically provides that the "transfer shall be prepared by the vendor at the expense of the purchaser."

The appellants were entitled to have that ready for delivery in Calgary (and not in Ireland) to them upon payment of the balance of the purchase money.

The case does not permit of giving effect to the side issues raised, as excuses for the gross failure on respondent's part.

The defence alleging readiness is unfounded in fact.

The suggestion that appellants knew they were contracting with a vendee in Ireland loses all its force when the fact that Wilkinson (her local agent) seemed to be so held out by the vendee as possessing the power to receive about half of the purchase money and apply it in the way he did which was far beyond the usual power of a mere real estate broker.

The presumption was that he would be continued and be duly authorized, or armed, when the time came, with an effective transfer, ready to complete the sale when the time came.

Be all that as it may, I have no doubt the vendee, under such circumstances, is not bound to go either to

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Ireland or China to present the payment and demand the transfer in any case. I confess I have been unable to find any decisions expressly dealing with such a situation and am not surprised at the absence of an illustration on the part of any suitor.

The general principles of law governing the respective duties and rights of debtor and creditor do not indicate such contention as maintainable in any ordinary case, much less in a case dependent upon the application of the principles governing cases of specific performance.

Again the express language of the agreement provides as follows:—

> Time is to be considered as the essence of this agreement, and unless the payments are punctually made at all times and in the manner above mentioned, these presents shall be null and void and of no effect and all moneys paid thereon shall be absolutely forfeited to the vendor, and the vendor shall be at liberty to peaceably re-enter upon and resell the said land, together with all the buildings thereon, without notice to the purchasers, and purchasers covenant not to remove any buildings whatsoever that may be erected on said land.

I construe this clause as making time the essence of the agreement.

The subsequent part of the clause after the word "agreement" probably was intended for another sentence, but however that may be it in no way impairs the force of the express language declaring that

> time is to be considered the essence of this agreement.

It is further to be observed that there was only one payment to be made and that the transfer was to be ready to deliver contemporaneously with that payment and impliedly thus bound the vendor to observe the necessity of being ready, otherwise the vendee could not safely pay.

In that view the decisions of the court above in the case of *Brickles* v. *Snell*(1), and *Steedman* v. *Drinkle*(2),

(1) [1916] 2 A.C. 599. (2) [1916] 1 A.C. 275.

seem to put an end to the contentions set up herein by first depriving the party in default, in a time of the essence agreement, of any right to specific performance and in the next place by giving the right to the purchaser to recover the moneys paid on account of the purchase.

The suggestion that appellants, by listening to the appeal of the agent of the respondent to await return of the transfer sent for execution, waived this provision or any right under the agreement, does not seem to me entitled to any very serious consideration.

They did nothing and said nothing and merely acted the part of unusually fair minded men desirous of avoiding litigation or appearance of sharp practice or attempting to evade their obligations. All they did or submitted to was conditional and limited to the time needed to get a reply to the letter which they were assured had gone forward with a transfer to be filled up and executed.

See the decision of Jessel M.R. in *Barclay* v. *Messenger*(1), holding that an express enlargement of the time was not, unless fulfilled, a waiver.

The case sometimes does arise where the vendee or vendor, as the case might be, has entered into a more or less complicated arrangement for carrying out the completion of a sale and very properly have been held estopped thereby from breaking off abruptly the due execution of the mutual arrangement and falling back upon time being of the essence unless they gave due notice of such intention.

Then they would be required to fix a term or specify that within a reasonable time they would do thus and so as the agreement entitled them.

The peculiarly amusing feature of this case is the

(1) 22 W.R. 522; 43 L.J. Ch. 449.

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argument in respondent's factum which disclaims Wilkinson as an agent of respondent and then falls back upon what happened between appellants and this man on the street or off the street when destitute of any sort of authority to represent the respondent.

How can she avail herself of anything passing between strangers? I am not at all sure, though coming from the respondent in support of her claim it is absurd, but that the facts, if fully investigated, would have borne out the suggestion that Wilkinson had no standing as representative of anybody. Assuredly appellants assumed they were dealing with one respondent had held out as her agent.

Then alternatively I am of the opinion that even if there is no effect to be given the clause as to time being the essence of the agreement, yet on general principles by the failure of the vendor to prepare and tender within a reasonable time the transfer she was to have prepared, she has lost her right to specific performance, especially under the conditions of a speculative market such as had developed in Calgary.

She seemed to have had no regard for others, or consideration for the situation, however cruel it might have been, in which her conduct for nearly a year might have placed the vendees.

It is no answer to say that in this instance as things turned out it might not have made much difference to appellants. Not even they can perhaps yet guess whether or not, had the respondent's transfer been got on 1st March, 1914, the result would have been better for them or otherwise.

The question is whether or not a vendor, situate as respondent was, is entitled by law to treat vendees, situate as these appellants were, in relation to the

bargain in question, as she has done and still claim specific performance.

I submit with some confidence she is not, even if time had not been of the essence of the contract, but much more so when she insisted on having so rigourous a term imposed upon the vendees under circumstances which could only relate to one payment when her transfer was to be ready for delivery.

I have treated the case thus far as relative to the validity of the judgment for specific performance. I think not only is that the true test of the right to appeal, and succeed in such an appeal, but also incidentally a good test of the appellant's right to treat the contract as rescinded, as they did in repudiating it and bringing this action.

If the situation created by respondent's conduct is such a breach of the contract as to disentitle her to specific performance thereof, then, if not before, she becomes clearly liable at common law for the breach of the contract in failing to have the transfer ready for delivery at the time named and to repay the money paid her or paid on faith of her contract, as to meet the tax bills, for example.

She has no answer to such a claim unless in equity of which the right of specific performance is the test.

Thus, I submit, rescission with all its incidents is in the net result of the operation of law and equity but the counterpart as it were, to the claim for specific performance.

Such, I submit, is the net result of the latest development of the law as exemplified in the cases I have cited above.

The counsel for respondent claimed that the mistake in the agreement in describing the respondent as of Belfast which evidently misled appellants in address-

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ing the notice of renunciation to her there, could have been rectified by an inspection of the transfer to her of the land in question in the registry office. And he seems to have tendered a certificate of title to prove this, but it does not appear in the printed case and I am assured by the officer in charge of the exhibits that no such document is on file.

In my view of the law governing the rights of the parties to the agreement, the result cannot be affected by the mistake, but if anything could be expected to flow from the possibility of the registry being inspected, proof should have been given of the fact.

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

ANGLIN J.—The plaintiffs sue for the rescission of a contract to purchase some building lots in Calgary because of the vendor's default in making ready to complete the contract on the date fixed by it and for many months thereafter. The defendant resists that action and counterclaims for specific performance, alleging in excuse of her own default that the plaintiffs did not apprise her of their readiness to carry out their purchase and pay the balance of their purchase money.

The trial judge granted rescission, holding that the plaintiffs had done all that could reasonably be expected of them and that the defendant was clearly and inexcusably in default. The Appellate Division reversed this judgment on the ground that the plaintiffs had failed to make reasonable efforts to inform the defendant of their readiness to complete, that her duty to convey would have arisen only when they had done so, and that she had always been ready, eager and willing to carry out her contract.

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I would add to the statement of the material facts given in the opinion of Mr. Justice Stuart(1), merely that the agreement provided that the transfer or conveyance should be prepared by the vendor at the expense of the purchasers and should be delivered to the latter "immediately" upon payment of the second and final instalment of their purchase money. If not overlooked, these two features of the contract would seem not to have been given the weight to which they are entitled in the Appellate Division.

Moreover, between the 1st of March, 1914, the date fixed by the contract for closing the sale, and the 15th of January, 1915, when this action was begun, there had been a most material change in the desirability of the property and in the position of the plaintiffs. They were a firm of builders and required the land for use, at first as a stone cutting yard, and eventually as a site for an apartment block which they proposed to erect. After March, 1914, building ceased in Calgary and the plaintiffs had no further use for the land. They dissolved partnership shortly afterwards. War began in August, 1914. At the date of the trial (April, 1916) one of the former partners had enlisted for service overseas and the other was residing in Scotland. It is obvious that to compel the plaintiffs now to take and pay for the property would entail upon them substantial hardship, although probably not such as would in itself have afforded a defence to an action for specific performance (Fry, on Specific Performance, 5th ed., pars. 418-9, 426-7; 27 Hals. Laws of England, Nos. 61 and 65) had the defendant been entirely free from fault—had she done everything that could reasonably be expected of her

(1) 10 Alta. L.R. 310.

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towards carrying out her contractual obligation and enabling the plaintiffs to fulfil theirs. Yet the hardship, such as it is, is a circumstance that may be taken into account in so far as the granting or withholding of specific performance may be in the discretion of the court. *Harris* v. *Robinson*(1), *Colcock* v. *Butler*(2), at pages 313-4; Fry, at page 19.

Notwithstanding that the provision of the contract that "time shall be of the essence of this agreement" is followed by a statement of the consequences of default by the purchasers, I am not disposed to accept the view that it should therefore be held to apply only to the purchasers' obligation. I prefer to give to the words "of this agreement" their literal and natural meaning covering the contractual undertakings of both parties, and to assume that the silence of the contract as to the consequences of default by the vendor merely indicates an intention that they should be such as the law imposes. *Foster* v. *Anderson*(3), *Seaton* v. *Mapp*(4).

It is contended however that the plaintiffs by their visits to and inquiries of Wilkinson, notwithstanding his lack of authority to represent the defendant, manifested an intention not to rescind because of her unreadiness to complete punctually on the 1st of March, 1914, with the result that the contract should be treated as if the condition as to time being of its essence were eliminated from it. *Kilmer* v. *British Columbia Orchard Lands*(5), as explained in *Steedman* v. *Drinkle* (6), at pages 279-80. The case at bar differs from the *Kilmer Case*(5), however, in that there was in that case

(1) 21 Can. S.C.R. 390.
(2) 1 Desaussure 307.
(3) 16 Ont. L.R. 565, at pp. 568-70; 42 Can. S.C.R. 251.
(4) 2 Coll. 556, at p. 564.
(5) [1913] A.C. 319.
(6) [1916] 1 A.C. 275.

a definite extension of time by agreement—a new contract as to the time of performance (*Goss* v. *Lord Nugent*(1), at pages 64-5; *Earl Darnley* v. *London, Chatham and Dover Railway Co.*(2), at page 60, discussed in Ewart on Waiver Distributed, at pages 133-6; see, however, *Morrell* v. *Studd and Millington*(3)), in which the stipulation making time of the essence was held not to apply. Here there was no alteration by express contract of the time fixed for performance, and under the circumstances, I think a parol agreement for an extension should not be implied from the conduct of the parties, as it was in the *Morrell Case*(3).

But it is said there was an election by the purchasers not to rescind their contract for the vendor's default but to continue it in force and that the right to take advantage of the stipulation as to time being of the essence having been thus relinquished, that term was in effect eliminated. Whether there could be such an election binding upon the purchasers without communication of it to the vendor; (*Scarf* v. *Jardine*(4), at pages 360-1; see discussion by Mr. Ewart in his Treatise on Waiver Distributed, at pages 88 and *seq.*); whether the letter from Wilkinson to the vendor's husband of the 13th of October should be regarded as such a communication; whether there was not a mere waiting or a suspension by the purchasers, when they found themselves unable to make a tender for their purchase money and were probably in uncertainty as to their legal position, of an exercise of their rights; (*Clough* v. *London & North Western Rly*(5), at page 34; *Moel Ship Co.* v. *Weir*(6)), but unequivocal conduct evidencing an election to treat the contract as unaffected by the vendor's

(1) 5 B. & Ad. 58.
(2) L.R. 2 H.L. 43.
(3) [1913] 2 Ch. 648.
(4) 7 App. Cas. 345.
(5) L.R. 7 Ex. 26.
(6) [1910] 2 K.B. 844, at p. 855.

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default, are interesting questions upon which I find it unnecessary to express a definite opinion in this case. While strongly inclined to think that an election not to insist upon the right to terminate the contract for the vendor's default is not sufficiently established, I shall proceed on the assumption that it is.

As Mr. Justice Stuart has well said:

> The whole dispute has arisen on account of a considerable delay on the part of the defendant in furnishing to the purchasers the title as agreed at the time agreed.

The chief issue is as to where responsibility for that delay should rest.

Upon the facts in evidence I entertain no doubt whatever that the failure to carry out the contract on the date fixed and for many months thereafter is entirely attributable to the neglect of the defendant, resident abroad, to provide for the fulfilment of her obligation to be in readiness to convey at the date fixed for closing by either coming herself to Calgary or nominating a representative there clothed with the necessary authority to receive the purchase money and to deliver a transfer, and furnished with the means of carrying out his mandate and notifying the purchasers of such appointment, and in having allowed the mistake of an agent, whose acts she adopted, in misstating her address in the agreement of sale (Belfast instead of Dublin) to remain unrectified. Indeed in the peculiar circumstances of this case, had the vendor's address been correctly given, I gravely doubt that it would have been incumbent on the plaintiffs to seek her out and notify her that they were prepared to make payment before she would be required to put herself in readiness to deliver to them the transfer to which they would be entitled "immediately" upon payment.

With respect, I fail to find in the record evidence

warranting the view expressed in the Appellate Division and said to be "the turning point of the case" that, when the plaintiffs "really wanted to find her (the defendant) they were quite able to do so." On the 7th of December, 1914, they mailed a letter addressed to her at Belfast, Ireland—the address given in the contract, and there is nothing to shew that in doing so they did not act in perfect good faith. How their solicitors learned in January, 1915, that her correct address was Dublin does not appear. It may be surmised that they discovered it by examining the transfer to her registered in the Land Titles Office. The fact that they did so scarcely warrants the assumption that the plaintiffs themselves could readily have ascertained the correct address months before, or that they were remiss in having failed to do so. I rather agree with the learned trial judge that the purchasers "acted in good faith" and tried to "locate * * * the vendor and failed."

Moreover, the defendant was apprised by Wilkinson's letter of the 13th October, 1914, received by her on the 28th, that the purchasers had "tendered money against documents" to him on or prior to the 1st of March. (Incidentally it may be remarked that this shews the understanding of the man who prepared the agreement of the purchasers' conception of their rights and their attitude.) Yet no tender of a transfer was made to them until the 15th of February, 1915—a month after this action was begun, a fortnight after the service of the statement of claim on the defendant, and eleven and a half months after the date fixed by the agreement for completion. Nor was there any communication before the 15th of February, 1915, to the purchasers of their vendor's intention to carry out her contract. The delay from the 28th of October to the 15th

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of February was, under the circumstances, in my opinion unreasonable, making every proper allowance for difficulties of communication.

The obligation of the purchasers to pay and that of the vendor to deliver a transfer were to be performed at the same time. They were dependent undertakings. The circumstance of the vendor's residence abroad as well as the form of the contract make it clear that the consideration moving each party was performance by the other and not a mere promise. The purchasers looked to obtaining the actual transfer of the land on payment and not merely a remedy more or less adequate against their vendor. A vendor seeking to enforce liability upon the purchasers' obligation under such a contract must shew punctual performance or an offer to perform his own undertaking although it be not certain that he was obliged to do the first act. 1 Wm's. Saunders (1871 ed.) 566. In addition to cases there cited reference may be had to *Large* v. *Cheshire*(1), and *Marsden* v. *Moore*(2). Especially is this so where the remedy sought is specific performance. The plaintiff must shew that he was "ready and prompt" as well as "desirous and eager." *Millward* v. *Earl Thanet*(3); *Mills* v. *Haywood*(4), at page 202; *Wallace* v. *Hesslein*(5), at page 174; Fry (5th ed.), 457.

Even if, upon a construction of the contract most favourable to her, the vendor, had she been present in Calgary personally or by agent, might have been entitled to defer having the transfer prepared until actual payment or tender of the balance of the purchase money, and, by delivering it on the same or the following day or even within a day or two thereafter,

(1) 1 Vent. 147.
(2) 4 H. & N. 500.
(3) 5 Ves. 720 *n.*
(4) 6 Ch. D. 196.
(5) 29 Can. S.C.R. 171.

might have met the requirement that delivery of it should be made "immediately" upon payment, the agreement certainly did not contemplate that the purchasers should, after paying their purchase money, be obliged to wait for their transfer until it could be obtained from Ireland, remaining for a month or longer without title and with a right of action against a "foreigner" as their only security.

In my opinion the place of performance of this contract, no other being stipulated in it, was at Calgary. The ordinary rule of English law that a promisor is bound to seek his promisee, if ever applicable to a case where there are mutual obligations to be fulfilled concurrently, only governs

> where no place of performance is specified either expressly or by implication from the nature and terms of the contract and the surrounding circumstances.—7 Halsbury, Nos. 857-8.

Here all these circumstances as well as the nature and the terms of the contract furnish unmistakable indicia that the intention of the parties was that performance should take place at Calgary. The contract was entered into there. *Weyand* v. *Park Terrace Co.*(1). In making it the vendor acted through an agent resident there. It concerned land there. The transfer was to be delivered immediately upon payment of the balance of the purchase money. Title would pass to the purchasers only on the registration of the transfer in the Registry Office there. (6 Edw. VII. ch. 24, sec. 41.) Mr. Justice Stuart, who spoke for the Appellate Division, seemed inclined to the opinion that the purchasers were entitled to have the actual delivery of the transfer and payment of their purchase money take place contemporaneously in the Registry Office itself, citing Hogg on "Ownership and Incumbrance of

(1) 202 N.Y. 231; 25 Am. & Eng. Ann. Cas. 1010.

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Registered Land" at page 187. In view of the provisions of the "Land Titles Act" already adverted to, not a little may be said for that view (see Williams on Vendor and Purchaser (2nd ed.) 1186)—but it is unnecessary to determine the point in the present case.

Yet, although of the opinion that

> the purchasers were not bound to go to Ireland and pay her (the vendor) the money there

and that

> the Land Titles Office at Calgary was the only place where they could safely part with their money,

that learned judge thought they were

> bound to communicate with her and notify her that they were ready and that if she did not produce title within a reasonable time the agreement would be repudiated.

In the first place the presence of the vendor in person or by authorized agent at Calgary being necessary for the fulfilment of the purchasers' duty to pay or tender their purchase money (if to do so should be regarded as a condition of the vendor's obligation to put herself in readiness to transfer the land), its performance would be excused by her absence. Comyn's Digest, "Condition," L. 5. The giving notice of intention to rescind if completion should be delayed beyond a named reasonable time having likewise been made impracticable by the act of the vendor's agent in stating a wrong address in the agreement (the only information the purchasers had) and her subsequent neglect to rectify that error, she cannot insist on that condition of the right of rescission, ordinarily applicable where time is not of the essence originally or has ceased to be so. A notice addressed to her at Belfast would in fact have been futile, as is proved by the return of letters sent to that address. Although the purchasers did not know that it would have been so, the vendor cannot

complain because they did not attempt to give her a notice there. *Lex neminem cogit ad vana seu inutilia.* The giving of notice of intention to rescind having been thus rendered impossible through the fault of the vendor, the purchasers were not bound to wait indefinitely for her to fulfil her contract.

Having regard to all the circumstances, the nature of the contract, its terms, the failure of the vendor to put herself in readiness to carry out her obligation, the fact that time was originally of the essence and probably remained so, and if not, that notice of intention to rescind unless the contract should be completed within reasonable time could not be given owing to fault ascribable to the vendor, that her delay both before and after she became aware of the purchasers' readiness to complete was gross and inexcusable, and that if obliged to take and pay for the property now the purchasers would be subjected to great hardship—I am, with respect, of the opinion that this is not a case for specific performance and that the right to rescission has been established. No doubt the granting of rescission does not ensue as of course because the relief of specific performance is denied; *Gough* v. *Bench*(1). The circumstances sometimes make it proper to leave the parties to their common law remedies. But if, as seems probable, time continued to be of the essence of the contract, the plaintiffs' right to rescission is unquestionable. If, on the other hand, time ceased to be of the essence of the contract, having regard to the circumstances, I think the purchasers are entitled to be placed in the same position as if they had duly given notice of intention to rescind should the vendor fail to deliver a transfer within a named reasonable time. Since they

(1) 6 O.R. 699.

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have paid a substantial sum on account of purchase money, recovery of which they would otherwise be obliged to seek by way of damages, and are themselves free from blame, equity and an application of the maxim *ut sit finis litium*, alike require that rescission and the return of the money paid on account of the purchase price and for taxes should be decreed.

The circumstances, however, are not such as warrant a judgment for damages beyond the return of the money paid with interest. Indeed with rescission the plaintiffs are probably better off than they would have been had the defendant carried out her contract.

The judgment of the learned trial judge should be restored and the appellants should have their costs in this court and in the Appellate Division.

BRODEUR J.—The appellants should succeed. They have done all in their power to carry out the agreement in question and to complete the sale. On the other hand, the respondent was too late to claim specific performance, since the purchaser had then rescinded the contract.

For reasons given by my brother Idington, I would allow the appeal with costs of this court and of the Appellate Division and I would restore the judgment of the trial judge.

Appeal allowed with costs.

Solicitor for the appellants: *H. C. B. Forsythe.*
Solicitors for the respondent: *Lent, McKay & Mann.*

THE NORCROSS BROS. COMPANY (DEFENDANT) ..... } APPELLANT;

AND

DAME MARIE A. GOHIER (PLAINTIFF)..... } RESPONDENT.

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*Mar. 6.
*April 15.

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

Damages—Employer's liability—Accident due to a thing under his care—Presumption of fault—Onus probandi—Art. 1054 C.C.

Held, Idington J. dissenting, that in an action claiming damages for the death by accident of an employee the sole fact that the death was caused by an inanimate thing under the care of the employer creates a presumption of fault against him, which he must rebut.

Per Idington J. dissenting:—The effective cause of the accident was the negligence of the respondent's husband.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Court of Review, which had reversed the judgment of the Superior Court, District of Montreal, and maintained the action.

The trial judge found that the death of the respondent's husband was ascribable solely to his own imprudence, the Court of Review decided that he was entirely free from blame; and the Court of King's Bench was of the opinion, Cross J. dissenting, that the damages, assessed at $8,000 by the Court of Review, should be apportioned on account of contributory negligence.

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

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

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Lafleur K.C. and *Crépeau K.C.* for the appellant.
St. Germain K.C. for the respondent.

LE JUGE EN CHEF:—Dans la présente cause, appel est interjeté d'un jugement rendu par la cour du Banc du Roi de la province de Québec. L'action que l'Intimée avait intentée en recouvrement de dommages-intérêts pour réparation du préjudice que la mort de son mari lui a causé, fut renvoyée par le tribunal de première instance. La Cour de revision infirma ce jugement; mais sa décision fut modifiée par la cour du Banc du Roi, et c'est de ce dernier jugement qu'il est fait appel.

La preuve a bien établi que le défunt était à l'emploi de l'appelant comme sous-contremaitre au moment où il fut tué, et il est également admis que sa mort fut causée par la plate-forme d'un monte-charge dont l'appelant se servait pour exécuter les travaux auxquels le défunt était employé.

Le seul fait que cette mort a été causée par une chose inanimée sous la garde de l'appelant crée une présomption de faute à l'égard de celui-ci, gardien de cette chose (art. 1054 C.C. par. 1). En d'autres termes, il suffit que la demanderesse prouve que l'accident a été causé de la manière alléguée, pour que le gardien de l'objet en question devienne de plein droit responsable. Il n'échappe à cette responsabilité que s'il peut prouver que le fait générateur du dommage provient d'une cause qui lui est étrangère. La jurisprudence française est formelle là-dessus, et les juristes les plus autorisés ont énoncé ce principe de droit avec une précision qui ne laisse aucun doute:

Dans le cas d'un accident causé par un objet inanimé, aujourd'hui la jurisprudence française considère que l'article 1384 (qui correspond à l'article 1054 plus haut cité) crée une présomption de faute à l'égard du gardien de cette chose inanimée et, en conséquence, elle fait peser sur lui la charge de la preuve. Il ne suffira pas au défendeur d'établir

qu'il n'a commis aucune négligence, ni imprudence, il devra prouver que le dommage provient du cas fortuit, soit de la force majeure, soit de toute autre cause étrangère—v.g. de la faute de la victime ou de celle d'un tiers, en un mot, il faudra qu'il précise le fait générateur du dommage subi par son adversaire.

D.P. 1908. 1. 217.
D.P. 1909. 1. 73—Note de Planiol.
S. 1910. 1. 17—Note d'Esmein.
S. 1913. 2. 257.
D.P. 1913. 2. 80.
S. 1913. 2. 164.
Gaz. Pal 7 février 1914.
Vide D.P. 1913, 1. 427.
Laurent, vol. 20, p. 475.
Planiol, vol. 2, No. 930.
Esmein, Notes—1910. 1. 17.
Saleilles—Revue de jurisprudence, 1911.
Colin et Capitant, vol. 2, 291.

Dans un mémorandum que mon prédécesseur, Sir Elzéar Taschereau, avait préparé pour expliquer le sens des articles 1053 et 1054 du Code Civil de la province de Québec, nous lisons à la page 2:

La distinction à faire entre 1053 et 1054 est patente et s'impose d'elle-même à leur simple lecture. Sous l'article 1053, point de responsabilité sans preuve d'une faute personnelle du défendeur et d'un dommage en résultant; sous 1054, responsabilité d'un dommage causé par une chose ou sans faute de son *gardien* ou par une faute inconnue au demandeur en indemnité, mais *présumée* contre le *gardien*, celui qui en avait la garde.

L'article 1054 ne serait qu'une répétition de 1053 s'il exigeait la preuve d'une faute. Or, les codificateurs n'ont pas voulu dire deux fois la même chose, pourvoir deux fois aux mêmes cas. C'est pour ajouter à 1053, non pour le répéter, qu'ils ont édicté 1054. Et n'appliquer 1054 qu'au cas d'une faute par celui qui a la garde d'une chose, c'est lui faire répéter 1053. En d'autres mots, ce n'est que parce que 1053 ne couvre pas le cas d'un dommage causé par une chose sans faute prouvée que 1054 a été jugé nécessaire. Là où il y a faute, *cadit questio;* 1054 est alors inutile, n'a pas d'application; le dommage causé *par la faute d'une personne* n'est pas un dommage causé *par une chose* dans le sens de l'article. Les codificateurs l'ont dit, et ils sont juridiquement censés avoir voulu dire ce qu'ils ont dit: "Toute personne est responsable du dommage causé par les choses qu'elle a sous sa garde." Pouvaient-ils s'exprimer en termes plus explicites?

S'obstiner à ignorer ce que le législateur a dit pour étayer des controverses doctrinales sur ce qu'il a voulu ou n'a pas voulu dire conduit infailliblement à l'hérésie.

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A la page 10 de ce mémorandum, Sir Elzéar Taschereau insiste de nouveau sur le fait qu'il y a faute présumée:

> Résumons.—La responsabilité du dommage causé par une chose sous l'article 1054 est fondée sur une faute de la personne qui en avait la garde, mais cette faute est présumée, et le demandeur en indemnité n'a pas à la prouver.
>
> Conséquemment, il n'a, par exemple, qu'à prouver ses dommages et le fait qu'ils ont été causés par une chose alors sous la garde du défendeur pour obtenir jugement quand le défendeur ne comparait pas, ou pour le mettre sur la défensive s'il a comparu.

Prenant donc pour acquis que telle est la loi qui détermine la responsabilité dans le cas d'un accident causé, comme celui-ci, par un objet inanimé manifestement sous le contrôle ou la garde du défendeur ou de ses employés, le seul fait qu'il est survenu un accident crée de plein droit la présomption de faute et le chef d'entreprise, en cette seule qualité, est responsable des conséquences qui en résultent. Dans la cause qui nous est soumise, nous n'avons en conséquence qu'à nous demander si l'appelant propriétaire a fait la preuve qu'il n'était pas responsable du fait générateur du dommage.

Examinons la preuve au dossier. La compagnie appelante avait été chargée de la construction d'un édifice à l'angle des rues Ste-Catherine et Peel, dans la cité de Montréal. A chaque étage de l'édifice en construction, elle avait placé un contremaître pour y conduire les travaux et y exercer une surveillance générale. L'édifice comptait en tout dix étages, et le défunt était employé comme contremaître au quatrième.

Pour élever les matériaux à la hauteur où ils devaient être employés, la compagnie appelante se servait de monte-charge. A chaque extrémité du corps principal de l'édifice, qui donnait sur la rue Ste-

Catherine, une aile s'étendait vers le nord. Entre ces deux ailes se trouvait un espace vide (well) dans lequel on avait installé quatre monte-charge. Les deux les plus rapprochés du corps principal étaient mus par la vapeur, et les deux autres par l'électricité. L'accident a été causé par un des monte-charge électriques.

Ces monte-charge fonctionnaient dans une charpente à jour et, à chaque étage, une passerelle avait été fixée dans une des fenêtres des ailes pour y donner accès. L'entrée en était protégée par une pièce de bois mobile et, en sus, par un madrier solidement cloué aux montants de la charpente en travers de l'ouverture, à environ cinq pieds de hauteur du plancher de la passerelle.

Le moteur électrique, au rez-de-chaussé, était sous la garde d'un mécanicien. Il est même dit dans la preuve que ce mécanicien avait soin des quatre monte-charge. Mais étant donné le principe sur lequel je m'appuie pour juger cette cause, il n'y a pas lieu de faire plus que de mentionner ce fait. Les cables de traction étaient fixés à deux tambours au rez-de-chaussée et actionnés par le moteur électrique. Des marques de peinture blanche le long des cables servaient à indiquer à quel étage se trouvait le monte-charge après avoir quitté le rez-de-chaussée. Lorsque le monte-charge était requis à un certain étage, le mécanicien en était averti par une sonnerie électrique. Voici, d'ailleurs, comment on explique, dans le factum des appelants, le système de signaux que la compagnie avait adopté pour avertir le mécanicien Wood:—Sur le montant de la charpente, à la gauche de l'ouverture donnant accès au monte-charge, se trouvait un bouton de sonnerie electrique. En pressant ce bouton, on

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faisait sonner une cloche placée tout près du poste du mécanicien au rez-de-chaussée.

De plus, personne n'avait le droit de donner un signal pour faire mettre le monte-charge en mouvement, à moins d'être à l'étage où il stationnait à ce moment-là. Cette règle ne souffrait d'exception que lorsque le monte-charge stationnait au rez-de-chaussée. En conséquence, si un homme au quatrième étage avait besoin du monte-charge stationnant—disons au troisième étage—il lui fallait descendre à cet étage pour donner le signal voulu, ou bien demander à quelqu'un alors au troisième étage de donner ce signal à sa place. Les instructions à cet égard étaient très formelles, et avaient pour but d'empêcher que le monte-charge ne quittât l'étage où il stationnait, si ce n'est sur le signal d'une personne se trouvant sur le même étage.

J'appuie tout particulièrement sur ce point des règlements qui régissaient la manoeuvre du monte-charge, parce que, selon moi, l'accident provient de ce que le contremaître Rice a crié, du neuvième étage, à Robillard qui travaillait au quatrième, pour lui demander le monte-charge avant qu'il eût atteint le quatrième.

Après avoir donné à toute la preuve l'étude attentive que nécessitent les jugements contradictoires des cours inférieures, j'en suis arrivé à la conclusion que le système que le compagnie avait adopté pour la manoeuvre du monte-charge eût comporté assez de sécurité pour les employés, si toutes les instructions eussent été strictement observées jusque dans les moindres détails. Mais, comme le fait remarquer le surintendant général Hutton, c'était une erreur pouvant entraîner des conséquences fatales que de sonner d'un autre étage que celui où stationnait le monte-charge pour le faire mettre en mouvement, et c'était une

erreur non moins funeste, comme dans le cas qui nous occupe, que de crier pour demander le monte-charge alors qu'il était en mouvement. Il est manifeste que l'accident ne serait jamais survenu si le signal eût été donné à l'étage où stationnait le monte-charge, ou lors qu'il se trouvait au rez-de-chaussée. L'accident est dû au fait que Rice cria à Robillard de lui faire parvenir le monte-charge, alors que le monte-charge était en mouvement et n'avait pas encore atteint le quatrième étage. Cet appel détourna l'attention de Robillard de son travail, et il omit de donner le signal pour avertir le mécanicien d'arrêter le monte-charge au quatrième.

Si nous mettons de coté le témoignage de Desjardins—et je m'accorde avec le juge de première instance dans sa façon d'apprécier le témoignage de cet homme en ce qui concerne les circonstances de l'accident,—nous devons admettre que le défunt commit une imprudence en passant la tête à l'intérieur du puits pour répondre à l'appel de Rice, et qu'il se rendit coupable de négligence en omettant de donner en temps voulu le signal pour faire arrêter le monte-charge au quatrième. Mais si Robillard omit de donner le signal qu'il se proposait sans doute de donner, et s'il introduisit sa tête dans le puits pour mieux répondre à Rice, la faute en est, en partie du moins, à l'appel de Rice qui détourna l'attention de Robillard de son ouvrage et le força à se déplacer. Vu les conditions des lieux et le système en vigueur pour commander la manoeuvre du monte-charge, cet appel de Rice constitue un acte qu'aucune circonstance ne justifie, et une imprudence inexcusable dont il convient de tenir la compagnie responsable.

En effet, pour assurer à ses employés la protection voulue, la compagnie était tenue d'organiser des conditions d'emploi telles que les ouvriers pussent ac-

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complir leur travail en sécurité. Dans le cas présent, cette sécurité dépendait principalement du système en vigueur pour commander la manoeuvre du monte-charge. Celui qu'on avait adopté comportait selon moi, je le répète, une sécurité suffisante, pourvu que toutes les instructions à cet égard fussent observées avec une rigoureuse exactitude et une fidélité absolue. Mais, dès que l'accident peut être raisonnablement attribué à une opération défectueuse ou irrégulière du système de manoeuvre, ou à une faute d'omission ou de commission de quiconque accomplit un travail dont la compagnie doit répondre, la compagnie est de ce fait tenue responsable.

Prenant en considération toute la preuve au dossier, j'estime que l'appelant n'a pas rempli d'une façon satisfaisante l'obligation qui lui incombait, en vertu de la loi, de détruire la présomption de sa responsabilité, et que, bien qu'il y ait négligence et imprudence de la part du défunt, l'accident est attribuable aussi à l'intervention de Rice au moment où le monte-charge était en marche à destination du quatrième étage. Laurent, que nous avons cité plus haut, est formel sur ce point:

La faute la plus légère est une cause de responsabilité.

Le contre-appel offre des difficultés assez difficiles à trancher. Mais, après avoir longuement étudié toute la preuve, comme je l'ai déjà dit, je n'y trouve pas matière à infirmer la décision rendue par la cour du Banc du Roi.

Pour toutes les raisons sus-dites, je me prononce eu faveur du renvoi de l'appel et du contre-appel avec dépens.

IDINGTON J. (dissenting):—I incline to agree with the opinions expressed in the court below, and entertained,

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I understand, by some of my colleagues, that there was negligence on the part of the appellant in not having supplied a better system of signalling, and controlling the movements of the elevator, than the one in use. I am unable to see as clearly as they do the relation of such defect to the accident in question as the determining cause thereof. I agree with Mr. Justice Cross that the effective cause of the accident was the negligence of the deceased in placing his head where it should not have been under any such circumstances as presented, in any view of the evidence. I cannot find as much to justify or excuse his doing so as seems to have been held insufficient in the case of *Canadian Pacific Railway Co.* v. *Fréchette*, in the Judicial Committee of the Privy Council (1), where the brakesman was held disentitled to recover by reason of his imprudence in going between the cars, when moving, to uncouple them. Indeed the court above, in order to reach its conclusion in that case, had to discard the verdict of a jury which had found contributory negligence on the part of the defendant appealing, whilst in this case the learned trial judge expressly relieved the appellant from any blame which could be said to have contributed to the accident.

I agree with him in his conclusions.

I cannot, having regard to the respectively attendant consequences, either in fact or law, distinguish between the case of a man imprudently getting, without excuse, in the way of a freight car when moving horizontally, and that of one doing so when it is moving perpendicularly, and therefore think the appeal should be allowed with costs.

ANGLIN J.:—There has been in this case a remarkable diversity of judicial opinion as to the proper conclusions

(1) [1915] A.C. 871.

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to be drawn from the evidence. The learned trial judge found that the death of the plaintiff's husband was ascribable solely to his own imprudence; the Court of Review that he was entirely free from blame and that his death had been caused by fault on the part of the defendant; the Court of Appeal that faults of both contributed to cause the accident and that the damages, assessed by the Court of Review at $8,000, should therefore be apportioned. Mr. Justice Cross, dissenting, would have restored the judgment of the learned trial judge.

If the story told by the plaintiff's witness Desjardins should be accepted, as it was by the Court of Review, the conclusion based upon it by that court would be unassailable. But his testimony had been rejected by the learned trial judge as "*invraisemblable*," and the same view of it was also taken unanimously in the Court of Appeal. I am not satisfied that it is clearly wrong.

On the other hand, the fault attributed to the defendant by the majority of the learned judges of the King's Bench—its failure to provide an electric enunciator in the engine room—while somewhat canvassed in the examination of one witness at the trial, does not appear to be covered by the allegations of negligence in the plaintiff's declaration. I therefore—not without diffidence—venture to question the advisability of founding a judgment against the defendant upon the absence of an enunciator as a specific proven defect in its installation. Yet the conclusion reached in the Court of Appeal should, I think, be upheld on broader grounds not open to this objection.

Notwithstanding an allusion in the first *considérant* of the judgment of the Court of Review to the fact that the plaintiff's claim is founded upon arts. 1053

and 1054 C.C., the presumption of fault on the part of a person who has under his care a thing which causes damage arising under Art. 1054 is not invoked by it in support of the defendant's liability. With deference, however, that seems to me to be the basis on which the present defendant's responsibility, if it exists, must rest. At all events, in the absence of satisfactory affirmative proof of definite actionable fault on its part, this seems to me to be the point from which the inquiry into its responsibility should begin.

It is common ground that the unfortunate Robillard's death was caused by the defendant's elevator, and, if not common ground, it is indisputable that the elevator was under its control and care and was being used for its purposes and profit. The case, therefore, falls within the very terms of the first paragraph of art. 1054. For reasons fully stated in *Shawinigan Carbide Co.* v. *Doucet*(1) (to which I refer merely for convenience and to avoid repetition), I am of the opinion that the responsibility created by that article rests upon a presumption that an injury caused by an inanimate thing is attributable to fault on the part of the person under whose care it is—*presumptio juris, sed juris tantum et non de jure*—and therefore rebuttable.

I have had no reason to change the view also expressed in the *Shawinigan Case*(1) that the exculpatory provision of the sixth paragraph of art. 1054 does not apply to the first paragraph thereof but is confined in its application to paragraphs 2-5 inclusive. It is because of its nature and its consequences that I regard the presumption of fault on the part of a person having the care of a thing that causes damage as rebuttable.

(1) 42 Can. S.C.R. 281, at pp. 334 et seq.

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This is the view taken of it by the modern French authorities cited by my lord the Chief Justice.

In the case at bar it is not necessary to determine whether, in order to rebut the presumption of fault thus raised, a defendant is obliged to establish that the injury complained of was due to pure accident, *vis major*, or some other cause not imputable as a fault to him. D.P. 1909. 1. 73. He must, no doubt, meet and overcome the presumption of fault. D.P. 1914, 1. 303. He must prove that the injury was not caused by any negligence or misdeed attributable to him. Owing to the inherent difficulty of proving a negative such as this and the necessarily exhaustive character of the evidence requisite to establish it, a defendant will in many cases find himself compelled to specify and prove affirmatively the precise cause of the injury. Although not attempting to do this directly, should he succeed in demonstrating that the injury happened without any fault imputable to him, he will in most, if not in all, instances in so doing establish indirectly that it must be ascribed to pure accident, *vis major*, or some other cause not imputable as a fault to him. D.P. 1913. 1. 427, 428, 430.

In the case at bar, however, far from demonstrating that the defendant is entirely free from blame, the evidence rather suggests (if indeed it falls short of *primâ facie* proof) that the lack of an electric enunciator was a material defect in the defendant's installation and also that the call of Rice to Robillard when the ascending elevator was approaching the fourth floor, calculated as it was to distract the latter's attention and to cause him to overlook giving the necessary stop signal, contributed to bring about the unfortunate occurrence and amounted to a fault attributable to the defendant. If its system of signalling permitted such

a call to be given at that moment, it would seem to have been dangerously defective; if it did not, Rice, its servant, was culpably negligent in giving it.

No doubt the unfortunate Robillard's own imprudence materially contributed to his death, and cannot be wholly excused because he may have been distracted by Rice's improper call from the ninth floor. But upon the record before us it is, in my opinion, equally impossible to say that the presumption of fault *dans locum injuriæ* on the part of the defendant, arising under art. 1054 C.C., has been satisfactorily rebutted. I would for these reasons dismiss both the appeal and the cross-appeal.

BRODEUR J.:—Il s'agit d'une action en dommages instituée par l'Intimée pour un accident dont son mari a été la victime lorsqu'il était à l'emploi de la compagnie défenderesse appelante. Elle allègue que le décès de son mari, Charles-Edouard Robillard, a été causé par la chose du patron et qu'il y avait eu faute de la part de ce dernier. L'appelante pretend que l'accident a été causé par la faute de Robillard lui-même.

La Cour Supérieure a renvoyé l'action et a maintenu la prétention du patron. La Cour de Revision a renversé ce jugement et a décidé que le patron devait être tenu responsable parce que l'accident était dû à sa faute. La Cour d'Appel a décidé qu'il y avait eu faute commune et a réduit de moitié les dommages qui avaient été accordés à la demanderesse par la Cour de Revision.

La Compagnie Norcross appelle de ce dernier jugement et il y a contre-appel de la part de la demanderesse.

Voici dans quelles circonstances l'accident a eu lieu:

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La compagnie Norcross était à construire un édifice de neuf étages à Montréal. Afin de faciliter le transport des matériaux, elle avait temporairement relié les deux ailes de l'édifice au moyen de plate-formes qui correspondaient avec les neuf étages et elle avait installé des ascenseurs. Il y avait à chaque étage un bouton électrique par lequel on pouvait appeler ces ascenseurs; mais cette sonnerie était des plus primitives et ne pouvait indiquer à celui qui avait à mettre les ascenseurs en mouvement l'étage où il devait les faire arrêter.

Robillard travaillait au quatrième étage et, ayant eu besoin de l'ascenseur, il a sonné. L'ingénieur en charge, le nommé Woods, qui était au soubassement, a alors mis l'ascenseur en mouvement. Pour faire arrêter cet ascenseur au quatrième étage où il se trouvait, il fallait à Robillard sonner de nouveau juste au moment où l'ascenseur se trouvait près de cet étage.

Ici il se présente dans la preuve une divergence très importance. Le témoin Desjardins, qui était à coté de Robillard, dit que ce dernier a sonné et que l'ascenseur est arrêté; mais qu'à peine était-il arrêté, qu'il est reparti de suite sans ordre de leur part; et alors Robillard aurait eu la tête écrasée par l'ascenseur et aurait été tué instantanément. D'un autre coté, Woods, l'ingénieur, dit que l'ascenseur n'a pas arrêté au quatrième étage et qu'on n'avait pas sonné pour le faire arrêter. Il contredit donc formellement le témoignage de Desjardins; et, sur ce point, il est corroboré par le témoin Rice, qui était à un étage supérieur et qui observait les mouvements de l'ascenseur, vu qu'il en avait besoin lui-même.

L'Honorable Juge qui présidait au procès a accepté de préférence la version des témoins Woods et Rice. D'ailleurs, Desjardins lui-même avait signé une dé-

claration après l'accident que Robillard n'avait pas sonné pour faire arrêter l'ascenseur au quatrième étage; et pour expliquer cette contradiction entre son témoignage et sa déclaration antérieure il a simplement dit qu'il n'était pas sous serment quand il a fait cette déclaration. S'il a jugé à propos de dire d'abord une chose fausse, il s'ensuit que son témoignage est bien affaibli et qu'il ne doit pas être accepté, surtout quand il est formellement contredit par deux autres personnes.

Le Cour de Revision a cependant préféré accepter la version de Desjardins, en disant, entr'autres choses, que ce dernier était absolument désintéressé, tandis que les deux témoins, Woods et Rice, avaient intérêt à rejeter la responsabilité sur Robillard, vu qu'autrement ils seraient eux-mêmes en faute; le premier, Woods, pour ne pas avoir arrêté sa machine, et l'autre pour avoir appelé Robillard d'un étage supérieur et l'avoir induit à mettre la tête dans le puits de l'ascenseur pour répondre à son interpellation.

Après avoir lu et relu attentivement la preuve, je suis porté à croire que la théorie la plus probable de l'accident est que Robillard n'aurait pas eu le temps de retirer sa tête du puits quand il répondait à l'interpellation de son compagnon de travail, vu que ces ascenseurs marchent très vite.

La Cour d'Appel n'a pas accepté non plus la version de Desjardins; mais elle a trouvé qu'il y avait eu faute commune de la part de l'employé et du patron, le premier en mettant sa tête dans un endroit si dangereux, et le dernier en n'ayant pas une sonnerie qui aurait indiqué à l'ingénieur l'étage auquel l'ascenseur devait arrêter.

Nous n'avons pas de preuve sur la valeur d'un système plus perfectionné que celui en usage; mais il y a lieu de présumer que le coût en aurait été très faible

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et qu'il aurait bien mieux valu à la compagnie faire les frais de cette dépense additionnelle que d'avoir à dépendre sur la prévoyance et la conduite des nombreux employés qu'elle devait avoir dans cet édifice.

D'ailleurs, à qui aurait incombé le fardeau de cette preuve?

L'accident est dû au fait que Robillard a été frappé par un ascenseur, c'est-à-dire par une chose dont son patron avait la garde. La présomption de la loi est que, suivant les dispositions de l'article 1054 du Code Civil, il y a eu faute de la part de celui qui avait la garde de cette chose-là.

Cette question de présomption a fait le sujet d'intéressantes discussions dans la doctrine et dans la jurisprudence pendant les dernières vingt années en France.

En 1896, la Chambre Civile de la Cour de Cassation a déclaré que la responsabilité du propriétaire d'une chose était écrite dans l'article 1384 du Code Napoléon, qui correspond à notre article 1054, et qu'elle était engagée du moment que les constatations du juge du fait repoussaient le cas fortuit et la force majeure.

Dalloz 1897-1-433.

Le Premier Président de la Cour de Cassation, M. Ballot Beaupré, disait en 1904, à la célébration du Centenaire du Code Napoléon, que cette décision était la consécration du risque professionnel. (Le Centenaire du Code Civil, p. 33.)

Cette décision de 1896 de la Chambre civile de la Cour de Cassation ne paraissait pas cependant à plusieurs auteurs avoir la portée que quelques autres voulaient y voir; et il faut bien admettre que l'imprécision des termes dont elle s'était servie pouvait autoriser cette divergence d'opinion. Cependant les adhésions assez nombreuses et assez formelles de la part

des tribunaux d'appel à la théorie du risque professionnel, ainsi qu'on le voit dans les décisions suivantes,

Dalloz, 1900-2-289,
Dalloz, 1904-2-257,
Dalloz, 1905-2-417,
Dalloz, 1906-2-249,

pouvaient nous laisser voir le prélude d'une consécration formelle de la part de la Cour de Cassation. Aussi, en 1908 (Dalloz, 1908-1-217), la Cour de Cassation décidait que

l'article 1384, alinéa Ier, C.N. en disant qu'on est responsable du dommage causé par le fait des choses qu'on a sous sa garde établit une présomption de faute. Mais cette présomption doit céder devant la preuve de la faute exclusive de la victime.

Et cette jurisprudence a été toujours suivie depuis.
Dalloz, 1909-1-73,
Dalloz, 1910-1-17,
Dalloz, 1913-1-427,
Dalloz, 1914-1-303,

Les auteurs qui, à la suite de Planiol, avaient d'abord combattu cette théorie de la présomption de la faute s'y sont définitivement ralliés et aujourd'hui la seule divergence d'opinion qui paraît exister dans la doctrine ne porte que sur la manière dont cette présomption peut être rejetée.

Dans la présente cause, le patron a tenté de prouver que l'accident était dû à la faute de la victime. Il me paraît qu'en effet Robillard a été coupable d'une imprudence; mais cette faute n'a pas été la seule qui ait contribué à l'accident.

Le patron n'a pas repoussé la présomption de faute qui avait été mise à sa charge. Il y aurait donc eu faute commune. Et la Cour d'Appel a donc bien jugé en divisant les dommages entre les deux parties et son jugement devrait être confirmé.

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L'appel et le contre-appel sont renvoyés avec dépens.

Appeal dismissed with costs.

Cross-appeal dismissed with costs.

Solicitors for the appellant: *Elliott, David & Mailhiot.*
Solicitors for the respondent: *St. Germain, Guérin & Raymond.*

LAURA BLANCHE ARNOLD AND OTHERS (PLAINTIFFS). . . . . } APPELLANTS;

AND

THE DOMINION TRUST COMPANY, EXECUTOR OF THE ESTATE OF W. R. ARNOLD, AND ANDREW STEWART, LIQUIDATOR OF SAID COMPANY (DEFENDANTS) . . . . . } RESPONDENTS.

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*Feb. 25.
*April 15.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Life insurance—Benefit of wife—Declaration in writing—Will—Identifying policy—R.S.B.C. [1911] c. 115, s. 7—"Winding-up Act"—Leave to appeal.

By sec. 7 of the "Life Insurance Policies Act" of British Columbia a man may "by any writing identifying the policy by its number or otherwise" cause a policy of insurance on his life to be deemed a trust for the benefit of his wife for her separate use.

Held, per Davies and Anglin JJ., Fitzpatrick C.J. *dubitante*, Idington J. *contra*, that such declaration in writing may be made by will as the legislature of British Columbia, when enacting this provision, must be presumed to have adopted the judicial construction of similar legislation in the Province of Ontario.

A. by his will bequeated to his wife "the first seventy-five thousand dollars collected on account of policies of life insurance."

Held, DAVIES J. *contra*, that said devise was not a writing "identifying the policy by its number or otherwise" as required by sec. 7 of the Act and said sum of $75,000 did not enure to the benefit of A.'s wife.

After the death of A. his wife brought action against the Trust Company, executor of his will, and said company's liquidator under a winding-up order to recover $75,000 out of the proceeds of life policies collected by the executor. On appeal from the judgement of the Court of Appeal in said action.

Held, Idington and Brodeur JJ. dissenting, that the case was not one subject to the provisions of sec. 106 of the "Winding-up Act" and leave to appeal was not necessary.

Judgment of the Court of Appeal (35 D.L.R. 145) sustaining that at the trial (32 D.L.R. 301) affirmed.

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

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APPEAL from a decision of the Court of Appeal for British Columbia(1), affirming, by an equal division of opinion, the judgment at the trial(2), in favour of the defendants.

The action was brought to recover the sum of $75,000 bequeated to the appellant by the will of her husband, W. R. Arnold. The questions raised on the appeal were, first, whether or not leave of the court or a judge as provided by sec. 106 of the "Winding-up Act" was necessary; secondly, whether or not the declaration in writing required by sec. 7 of the "Life-Insurance Policies Act" can be made by will; and thirdly, whether or not the devise identified the policy under the provisions of sec. 7. These questions are fully dealt with in the above head-note.

S. S. Taylor K.C. for the appellant. Any declaration in writing satisfies the requirement of sec. 7. A will is a writing and a declaration made by will is sufficient. *Orange* v. *Pickford*(3), at page 365; *McKibbon* v. *Feegan*(4).

The designation of all the policies on testator's life identifies the policy otherwise than by number. *In re Lynn*(5); *Beam* v. *Beam*(6); *In re Harkness*(7); *In re Roger*(8).

Lafleur K.C. for the respondents. The declaration cannot be made by will. *In re Watters*(9).

As to identification of the policy see *MacLaren* v. *MacLaren*(10).

THE CHIEF JUSTICE.—At the hearing of this appeal an application was made by counsel for the respondent

(1) 35 D.L.R. 145.
(2) 32 D.L.R. 301.
(3) 4 Drew. 363.
(4) 21 Ont. App. R. 87.
(5) 20 O.R. 475.
(6) 24 O.R. 189.
(7) 8 Ont. L.R. 720.
(8) 18 Ont. L.R. 649.
(9) 13 Ont. W.R. 385.
(10) 15 Ont L.R. 142.

to quash the appeal for want of jurisdiction. The ground put forward was that the respondent company being in liquidation, no appeal could, under secs. 22 and 101 of the "Winding-up Act," be brought without leave of the Court.

In my opinion, this was founded on a misconception of the nature of the action; it is not one against the company or the liquidator properly speaking but only as executor of Wm. Arnold deceased. It involves the construction of the will of the deceased. In such an action it cannot be decided what the plaintiffs can recover against the liquidator as such but only what part of the estate of the deceased which can be so recovered the plaintiff is entitled to. If there are two persons each claiming to be entitled under a will the liquidator as executor may be a necessary party to a suit to determine their rights but it must obviously be a matter of indifference so far as the company is concerned which of the two is entitled. I have been assuming that the estate of the deceased would only have a claim on the assets of the company in liquidation but of course if there were specific trust funds in the hands of the liquidator as executor the case would be very much stronger. The matter is complicated by the plea which the defendants have put in that the estate of the deceased is insolvent and that they are creditors against it, but clearly the fact that they may have such a defence could not be any ground for preventing the action being brought against them as executors.

Therefore I am of opinion that the action is not one which is within the prohibition of the "Winding-up Act" at all, and no leave being required, the application against the jurisdiction fails.

I am of opinion that the appeal must be dis-

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missed on the ground that the will makes no such declaration of a trust as sec. 7 of the "Life Insurance Policies Act," R.S.B.C., ch. 115, calls for. This section enables a man to declare that a policy effected on his life is for the benefit of his wife and children, but here we have nothing but a bequest to the testator's wife of $75,000 out of the monies which may be collected on account of policies of life insurance.

It is suggested that "the Act should receive such fair, large and liberal construction and interpretation as will best ensure the attainment of its object," but this does not help us, for apart from the fact that the courts ought, if possible, to place such construction on every Act as will best ensure the attainment of its object, I think the object of this Act is, broadly speaking, to enable a man during his lifetime to make out of his earnings a provision for his family which shall be beyond his own or his creditors' reach. I do not think it was intended to enable him to retain his insurance as his own absolute property even after his death and under cover of the special protection afforded by the Act upon distinct conditions bequeath the proceeds, which may be the whole of his estate, in fraud of his creditors. This involves to a certain extent the question into which I do not wish to enter whether the declaration called for by the Act can be made by will.

The Chief Justice in his reasons for the judgment appealed against says:

> assuming the will to be such a writing as is contemplated by the Act.

I gather from this that he probably shares the doubts which I certainly entertain whether a will is such a writing as the statute contemplates.

The only case in which the point seems to have received much consideration is one before the Ontario

courts in which province the statute is similar to the one in British Columbia. In *McKibbon* v. *Feegan*(1), a majority of the court concluded that the declaration could be made by will but Osler J. dissenting, delivered what appear to me to be weighty reasons for holding the contrary view.

It is not necessary to decide this point in the present case because as I have said I do not find that the will identifies any policy by its number or otherwise as the statute requires.

Since writing the above, my attention has been called to a newspaper report of a decision of Chief Justice Meredith, in the Province of Ontario, in the matter of the will of John Wesley Monkman, a soldier who was killed on active service. The learned Chief Justice held that a postcript to the will, though it may not be valid as part of the will, is a sufficient declaration for the purposes of the "Insurance Act."

This is a step further in the liberal construction and interpretation of the Act. The writing could be no declaration during the life of the deceased and as a general rule at any rate the law does not recognize any testamentary disposition made otherwise than by will.

DAVIES J. (dissenting):—This appeal coming on for hearing, respondent moved to quash on the ground that leave to appeal had not been obtained under sec. 106 of the "Winding-up Act" and that such leave was necessary to give this court jurisdiction.

I am of the opinion that the sections of this "Wind-up Act" relating to appeals are, as expressed in the 101st section of the Act, confined to

orders or decisions of the court or a single judge *in any proceeding under this Act.*

(1) 21 Ont. App. R. 87.

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This appeal from the judgment of the court of final resort in British Columbia is one conferred upon litigants by the "Supreme Court Act" itself and is not, in my opinion, a "proceeding" under the "Winding-up Act" requiring the leave of a judge before being taken, but an ordinary appeal from the final judgment of a court of last resort in the province in an action originating in a superior court. Leave to bring that action in the first instance was obtained under the 22nd section of the "Winding-up Act." Thereafter the litigants had their statutory right of appeal under the "Supreme Court Act." I think, therefore, the motion to quash for want of jurisdiction fails and must be dismissed with costs.

The question to be decided on the appeal is whether the sum of $75,000, being part of the proceeds collected from life insurance on the life of William Robert Arnold, deceased, belongs to the appellants who are the widow and infant children of the deceased or constitutes part of his general estate.

The determination of that question depends first upon the construction to be given to sec. 7 of the "Life Insurance Policies Act" of British Columbia (R.S.B.C. [1911] ch. 115).

The Act itself is entitled

An Act to secure to wives and children the benefit of life insurance and to regulate and prohibit insurance without an interest in the life of the insured.

The 7th section, upon the construction of which this appeal depends, provides that where an assured

by any writing identifying the policy by its number or otherwise

makes

a declaration that the policy is for the benefit of his wife or of his wife and children or any of them, such policy shall enure and be deemed a trust for the benefit of his wife for her separate use and of his children or any of them according to the intent so expressed and declared.

The deceased Arnold made a declaration in his will that the first $75,000 collected on account of his life insurance policies should be for appellant's benefit.

If the declaration required to be made by the statute can be made by will, then the only question remaining is whether or not the testator has complied with the statute in the matter of identifying his policies.

Mr. Lafleur for the respondent contended that the statutory declaration required could not be made by will, and even if it could that this will had failed to identify the policies of insurance.

I am not able to agree with either contention. The British Columbia statute is in all material points of its 7th section which we have to construe substantially the same as sec. 5 of the Ontario Act, 47 Vict. ch. 20, securing to wives and children the benefits of insurance, while sec. 8 of the former statute is substantially the same as sec. 6 of ch. 136 of the R.S.O. 1887, as amended by 53 Vict. ch. 39, sec. 6.

By a series of judicial decisions in the Province of Ontario, including those of the Court of Appeal of that province, before the British Columbia legislature enacted the statute in question, it had been decided that the words "any writing" included a last will, and I think it must be assumed what when the legislature of British Columbia enacted the statute in question they did so with the knowledge of the judicial interpretation which had been authoritatively placed upon the Ontario statute on that point and with the intent that such interpretation would be followed in British Columbia.

I may say that, while the question is one not free from all doubt I agree with the conclusion the courts of Ontario had reached that the words "any writing" in the section in question included a will.

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As to the question whether the will in this case sufficiently identifies the policies of insurance, I am of opinion that it does. I cannot accept the argument that the maxim *ejusdem generis* should be applied to the language of the statute, and that the words

> any writing identifying the policy by its number or otherwise

should be construed so as to limit the identification to something akin or similar to the number of the policy. On the contrary, I think that any language which sufficiently identified the policy or policies so as to prevent any mistake being made with respect to the declaration of trust would be sufficient. In the case now before us, the words of the testator's bequest were

> The first $75,000 collected on account of policies of life insurance I give to my wife, Laura, etc.

There were ten insurance policies on Arnold's life in force at the time of his death amounting to $425,000 and of this sum $207,054, it is stated, had been collected. It does seem to me, alike on authority and principle, that the terms of the above bequest are sufficient to comply with the statute. The object of requiring identification of the policy or policies with respect to which a declaration of trust in favour of testator's wife or children might be made was to insure such certainty as would avoid any trouble or dispute as to the particular policy or policies of insurance as to which any such declaration applied. Any language insuring this result, however general, would, in my judgment, suffice. "The first $75,000 collected on account of policies of life insurance" means, of course, the testator's life insurance; and in my opinion, embraces all of testator's life insurance and does not leave any doubt as to testator's meaning or the sources from which the fund he was creating for his

wife and children was to come. His object was to make a declaration of trust with respect to a specific portion of that life insurance for his wife and children. I am unable to appreciate the distinction attempted to be drawn between a bequest of *all* of his policies of insurance, which under the Ontario authorities, would undoubtedly be sufficient and a bequest of a specific amount "first collected on account of those policies." The question to my mind is: Has language been used so identifying the policies as to place the question of their identity beyond doubt? I cannot see how the limitation of the amount as to which the declaration of trust was applicable, namely, the first $75,000 collected out of testator's policies could affect the identification of the policies from which the amount was to be collected. The fact was proved that at his death Arnold had ten life policies in force. The $75,000 was declared to be the first $75,000 collected from those policies. There could be no doubt in my judgment as to the identity of the policies out of which the fund declared to be in trust for the widow and children was to come. It is true that fund might come from one or more of these ten policies but that possibility cannot alter the fact that the language of the bequest covered and identified each and all of the policies as those from which the fund bequeathed might come. It would be a narrow construction which determined that, although the words of the bequest covered and included all of the policies and so identified them, nevertheless as the $75,000 might be collected out of one of the $100,000 policies or two of them, that fact operated to destroy the identification.

The fund $75,000 testator settled on his wife and children was to be the first $75,000 collected on any or all of the policies but each and all of the policies were

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identified as being the sources or one of the sources from which the $75,000 might come. Nor can I see that because one or more of the companies which issued the policies resisted payment successfully of the amount insured, such fact could affect the question of identification. The argument would be equally strong if he had identified the policies by their numbers.

I agree with the conclusion of Martin J. who, after citing several of the Ontario cases, says:

> It is but a short easy and logical step from these cases, where all of the policies or only one policy are or is dealt with, to this case.

My conclusions are therefore that we have jurisdiction to hear and determine this appeal; that the words of the statute "any writing" embrace and include a last will of a testator; and that the testator has in the present case sufficiently identified the policies out of which the fund he desired to settle upon his wife and children was to come. I would therefore allow the appeal and direct judgment to be entered accordingly for the plaintiff.

IDINGTON J.—I think this appeal should be dismissed with costs. I am of the opinion that the motion to quash the appeal should have prevailed.

The action was begun after the Trust Company, respondent, had been put in liquidation by an order under the "Winding-up Act."

Presumably sec. 22 of that Act, which prohibits the institution of any suit against a company after a winding-up order is made

> except with the leave of the court and subject to such terms as the court imposes,

was duly observed. No such order, however, appears in the case now presented for our consideration. If it was properly obtained then the whole litigation is

a proceeding under the Act. But if it was not obtained the whole proceeding is void and there can be no appeal allowed to help one so acting.

It is provided by sec. 101 of the Act that except in the North West Territories, any person dissatisfied with an order or decision of the court or a single judge in any proceeding under the Act may, by leave of a judge of the court, appeal therefrom.

Three classes of cases are made thus appealable. One is if the question to be raised on the appeal involves future rights; another if the decision is likely to affect other cases of a similar nature in the winding-up proceedings; and a third if the amount involved in the appeal exceeds five hundred dollars.

Sec. 102 provides for such appeals being carried to the respective appellate courts of the provinces named.

Sec. 103 provides for cases in the North West Territories being allowed an appeal to this court by leave of a judge thereof.

Sec. 106 is as follows:—

106.—An appeal, if the amount involved therein exceeds two thousand dollars, shall, by leave of a judge of the Supreme Court of Canada, lie to that court from:

(*a*) The Court of Appeal for Ontario;

(*b*) The Court of King's Bench in Quebec; or

(*c*) a superior court *in banc* in any of the other provinces or in the Yukon Territory.

No leave to appeal this case from the Court of Appeal for British Columbia has been given.

Having regard to the care taken by Parliament in the foregoing enactments for safeguarding any estate in liquidation under the "Winding-up Act" from becoming involved in unnecessary litigation and the

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consequent delays and expenses thereof, I have no doubt that it intended to limit appeals to this court in the way provided by this sec. 106.

If that was not its purpose in thus enacting, it puzzles one to understand what conceivable object could have been had in view; for the two thousand dollar limit named would cover almost any conceivable case and enable the parties concerned to come here by virtue of the provisions of the "Supreme Court Act" without special leave.

To hold, as I understand the ruling directing the argument to proceed would mean if adhered to, opening the way to appeals here in any litigation the judge in charge of the winding-up proceedings may, as I presume he did herein, permit; whenever the amount in controversy or thing involved in any way of a claim against the company or its liquidators reaches the limit set by the "Supreme Court Act" for the particular province in which the litigation may have been permitted.

It was suggested in argument that the restriction in sec. 106 upon appeals here was designed to be applied in cases of a proceeding under the Act.

That is answered by the express language of the sec. 106 which contains no such language as to support the argument.

There is, I submit further, no litigation with the company or its liquidator which can be permitted except by virtue of sec. 22 and everything permitted thereunder is a proceeding under the Act in the language used in sec. 101.

On the merits of the questions raised in argument, I am of the opinion that the "Life Insurance Policies Act" (R.S.B.C. 1911, ch. 115) by its section seven never was intended to cover any case of a bequest by will or indeed any revocable instrument whatever.

The first sentence of that section is as follows:—

7. In case a policy of insurance effected by a man on his life is expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, or in case he has heretofore indorsed, or may hereafter indorse, or by any writing identifying the policy by its number or otherwise has made, or may hereafter make, a declaration that the policy is for the benefit of his wife, or of his wife and children, or any of them, such policy shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the intent so expressed or declared; and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate when the sum secured by the policy becomes payable; but this shall not be held to interfere with any pledge of the policy to any person prior to such declaration.

It is expressed in the most imperative terms that in such cases, thus defined, the policy

shall enure and be deemed a trust * * * according to the intent so expressed,

and so long as any object of the trust remains the money payable

shall not be subject to the control of the husband or his creditors, or form part of his estate.

It was obviously designed that the declaration should be irrevocable and once made should not only protect the objects of the trust but also protect the husband making it from the importunities or pressure of creditors.

It is urged that the Act in question herein was copied from an Ontario Act of the like import and that the Court of Appeal for that province upheld an appointment or declaration made by will. That decision does not bind us. With unfeigned respect for the court which so decided I cannot follow the decision. I prefer the reasoning of Mr. Justice Osler who dissented therefrom. Indeed I may be permitted to adopt the views he expressed and forbear enlarging further on that aspect of the case.

Even if I could accept any revocable instrument such

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as a will continues to be until the maker of it is dead, there seems to me insuperable obstacles in appellant's way, in the adherent nature of the will in question.

He fails to identify the policy or policies upon which it might operate. The ascertainment thereof is left to the chances of the development of circumstances that cannot arise until some weeks after the testator's death. For there could be no payment of any policy until after probate had been obtained by the respondent Trust Company, or someone in its place, after its renunciation.

Moreover, no part of the bequest is made payable to the appellant by any insurance company but it forms part of the estate and is payable out of the estate. The language of the section expressly prohibits that sort of thing.

Sec. 15 of the Act provides for the appointment by the husband of a trustee or trustees to receive the money but that is very far from what was done in this case.

And I may add that the express provisions of that section for the nomination by a husband or father by his will of such trustees, seems to me instead of helping the appellant in her argument for the declaration required by sec. 7 being possible by will destroys the argument.

If the legislature had ever contemplated such a thing surely it would have so expressed itself.

The purpose it had in view in enacting sec. 7 could not be accomplished by any will or other revocable instrument. But some of those purposes could be promoted by adding the nominating power in sec. 15, without encroaching in the slightest degree upon the permanence and sanctity of the trust that had been created by virtue of sec. 7.

ANGLIN J.—The respondent moved to quash this appeal on the ground that the leave of a judge of this court to bring it was necessary under sec. 106 of the "Winding-up Act" (R.S.C., ch. 144), and was not obtained. This contention rests on the view that, owing to an order for the winding-up of the defendant Trust Company, executor of the insured, having been made before this action was begun, "leave of the court" to commence it was required and was obtained under sec. 22 of the "Winding-up Act." The like leave to proceed with the action, had it been already commenced before the winding-up order was pronounced, would have been necessary. The court disposing of an application for leave under sec. 101 determines whether the pending or proposed action is one which should be permitted to go on—whether having regard to the nature of the action and all the circumstances the interests of justice will be better served by allowing it to proceed, or, when that is possible, by requiring that the subject matter shall be dealt with by the judge or officer charged with the winding-up in the course of the proceedings before him. When the leave is given the action is brought or proceeds in the court in which it is instituted subject to whatever incidents, including rights of appeal, the law attaches to it. The granting of this leave, whether it be to bring an action or to proceed with one already brought, does not make of it a "proceeding under this Act" within the meaning of sec. 101 of the "Winding-up Act." By "any proceeding under this Act" is meant a proceeding in the winding-up itself, *e.g.*, the making of the winding-up order, or the allowance or disallowance of a creditor's claim, or the determination of the liability of a contributory by the judge or delegated officer under whose direction the liquidation is carried on. The right of

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appeal in this action is conferred not by the "Winding-up Act," but by the "Supreme Court Act;" and it is the ordinary appeal given by the latter Act from a final judgment of a court of last resort in the province in an action which has originated in a superior court. The motion to quash therefore fails.

The right of the plaintiff to the $75,000 insurance money in question as a preferred beneficiary under the "Life Insurance Policies Act" (R.S.B.C. [1911] ch. 115) is contested on three grounds—that a will is not a "writing" within the meaning of sec. 7 of the statute by which a declaration of trust for preferred beneficiaries may be made; that the testator did not purport to declare such a trust, but merely to make a bequest or give a legacy to his wife; that the will does not identify the policy or policies "by number or otherwise" as sec. 7 requires.

The material part of sec. 7 of the British Columbia statute, first passed in 1895 (ch. 26), is a reproduction of sec. 5 of the Ontario Act to secure to wives and children the benefit of insurance, enacted in 47 Vict. as chapter 20, and carried into the R.S.O., 1887, as chapter 136. Sec. 8 of the British Columbia statute is substantially, and so far as material, a reproduction of sec. 6 of ch. 136 of the R.S.O., 1887, as amended in 1890 by 53 Vict. ch. 39, sec. 6. It had been decided by the late Chancellor Boyd, in *Re Lynn* (1), and again in *Beam* v. *Beam*(2), that a will is a "writing" within the Ontario section; and in *McKibbon* v. *Feegan*(3), these decisions had been approved by the Court of Appeal (Hagarty C.J.O. and Maclennan J.A., Osler J.A. dissenting). I think it must be assumed that the legislature of British Columbia was apprased

(1) 20 O.R. 475. (2) 24 O.R. 189.
(3) 21 Ont. App. R. 87.

of the judicial interpretation that had been thus definitely placed on the statutory provision under discussion when it adopted it in 1895, and that it intended that that interpretation should be followed in British Columbia. *Casgrain* v. *Atlantic and North West Rly. Co.*(1), at page 300; see also authorities collected in Maxwell on Statutes, 5 ed., at p. 500, and in 27 Hals. Laws of England, at p. 142. The "Interpretation Act" of British Columbia (R.S.B.C. 1897, and 1911) does not contain a provision excluding the application of this well-established rule of statutory construction such as we find in the R.S.C. [1906] ch. 1, sec. 21 (4) and in the R.S.O. [1914] ch. 1, sec. 20. Without expressing any view as to what should have been the construction of the British Columbia statute had the matter come to us as *res integra*, I am of the opinion that we must now act upon the assumption that the construction placed upon the similar provision of the Ontario Act was intended by the legislature of British Columbia to be that which should be given to sec. 7, and that a will, if otherwise in compliance with the requirements of that section, must therefore be deemed a "writing" within its purview.

In numerous cases in Ontario dispositions by will in the form of bequests or legacies of insurance have been held to be sufficient as declarations to meet the requirements of the statute. The *Lynn Case*(2) and *McKibbon* v. *Feegan*(3), already cited, *Re Cheeseborough*(4), and *Book* v. *Book*(5), are instances. Once it is accepted that a declaration under the statute may validly be made by will, I think it follows that words of bequest or gift are sufficient in form. It would scarcely

(1) [1895] A.C. 282.
(2) 20 O.R. 475.
(3) 21 Ont. App. R. 87.
(4) 30 O.R. 639.
(5) 32 O.R. 206; 1 Ont. L.R. 86.

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accord with the liberal construction which should prevail in the interpretation of this legislation and would have a deplorably unsettling effect were we to hold otherwise and overrule now decisions that have stood unchallenged for twenty-five years and must have been acted upon very frequently since they were pronounced.

The question as to the sufficiency of the identification of the policies is in a different position. Induced no doubt by the desire to render as far-reaching as possible the scope and operation of what they deemed remedial legislation—to advance the remedy which it was designed to provide—the courts of Ontario have apparently refused to apply the well-known *ejusdem generis* and *noscitur a sociis* rules to the construction of the words "or otherwise" in the phrase

> by any writing identifying the policy by its number or otherwise.

They have held that where a testator had but one policy a bequest to a preferred beneficiary of his property "including life insurance" should be treated as a declaration under the statute sufficiently identifying that policy. *Re Harkness*(1); *Re Watters*(2). There are indications in the decided cases that a bequest of a definite portion of the proceeds of the testator's life insurance might be deemed sufficient where he had but a single policy. It has also been held that where there were several policies a bequest of

> all my property real and personal and including life insurance policies and certificates

(*Re Cheeseborough*(3); see, too, *In re Cochrane*(4)), would satisfy the statute as to policies in force at the time of the making of the will and not made payable to named beneficiaries. Probably the most recent de-

(1) 8 Ont. L.R. 720.
(2) 13 Ont. W.R. 385.
(3) 30 O.R. 643.
(4) 16 Ont. L.R. 328.

cision in *Re Monkman and Canadian Order of Chosen Friends*(1), goes further than any that preceded it. But in no reported case, so far as I am aware, has it been held that, where the testator has several policies, a bequest of a sum smaller than their gross amount to be paid out of his insurance or to be charged upon it, without any further identification of the policies to be so affected, is a good declaration of trust under the statute.

In going as far as they did in order to attain the purpose of the legislation under consideration, the courts of Ontario have, I think, reached, if they have not overstepped, the limit of what the legislature intended to permit when it prescribed, as a condition of the efficacy of "any writing" designed to take life insurance out of the assets available to satisfy creditors and make of it a trust fund exclusively for beneficiaries of the preferred class, that such "writing" should identify the policy or policies so dealt with "by number or otherwise." Any method of identification, however widely different from identification by number, has apparently been treated as sufficient.

But the decided cases have not gone the length of entirely dispensing with identification and that, I fear, would be the result of holding sufficient a mere charge by will of an amount representing a fraction of their face value upon all a testator's life insurance consisting of numerous policies. With respect I cannot accept Mr. Justice Martin's view that to do so would be to take "but a short, easy and logical step from these cases," *i.e.*, those already decided. Assuming that the identification prescribed is to be found in all of them, it would be the step from identification of some kind to no identification at all.

(1) 14 Ont. W.N. 29.

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In the case at bar, the insurance, consisting of ten policies, two of them for $100,000 each, amounts in all to $425,000, of which $207,054.54 has been collected. The bequest is of

> the first $75,000 collected on account of policies of life insurance.

The first $75,000 collected might come entirely out of one of the $100,000 policies or it might come partly out of the proceeds of several policies. The policies might be paid in full in a single payment or only by instalments. Some might be found wholly uncollectable. The executors might proceed more promptly in making proofs of claim to one company than to another. The diligence or the readiness in meeting claims against it of one company might be greater than that of another. Upon some or all of these contingencies would depend the source or sources from which the $75,000 first collected would come, and the determination of what assets would be taken out of the estate and what would be available for creditors. It is, in my opinion, impossible to say that under such circumstances there has been any identification whatever of the policy or policies, the whole or part of which is to form the subject of the statutory trust for the preferred beneficiary. However ready or even anxious we may be to give to a statute designed

> to secure to wives and children the benefit of life insurance,

such construction as will tend to effect that purpose, we may not entirely dispense with the identification which the legislature has seen fit to prescribe. To do so would be to legislate, not to construe.

I am, for these reasons, of the opinion that this appeal fails and must be dismissed with costs. The appellant, however, is entitled to her costs of the unsuccessful motion to quash which should be set-off against the costs of appeal to be paid by her.

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BRODEUR J.—A motion to quash the appeal has been made by the respondent on the ground that this appeal has been taken without leave by a judge of this court.

The present action has been instituted by the appellant to claim a sum of $75,000, being part of the proceeds from life insurance of her husband, William Robert Arnold. The question to be decided in the case is whether that sum of $75,000 belongs to the preferred beneficiaries of the deceased or constitutes part of his general estate.

When the action was instituted against the Dominion Trust Company, which had been appointed executors of the will of Arnold, a winding-up order had been made against the company, and under the provisions of sec. 22 of the "Winding-up Act (ch. 144, R.S.C.), the leave of the Supreme Court of British Columbia was obtained.

When the appeal came up before this Court, no leave was obtained, and it was contended by the respondent that the appeal should be quashed because no such leave was obtained.

Sec. 106 of the "Winding-up Act," says that

> An appeal if the amount involved therein exceeds $2,000 shall by leave of a judge of the Supreme Court of Canada lie to that court from (a) the Court of Appeal in the Province of British Columbia.

The appellant, on the other hand, claims that such leave is only required in proceedings under the "Winding-up Act," and that the present action does not refer to any such proceedings.

I see that no such distinction as alleged by the appellant is to be found in sec. 106; that section seems to be of a general nature. It is of importance that proceedings against a company being wound up should be expedited with rapidity, and it is also to be found in

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the general economy of the "Winding-up Act" that legal proceedings should not be taken unless by leave of the courts.

It is stated in sec. 18 that proceedings might be taken in any action against a company.

Sec. 22 provides, as I have already said, that no action might be instituted, except with the leave of the court and the same requirements are exacted in the case of appeals. Once the winding-up order has been given all the legal proceedings are under the control of the courts and must be instituted only with the leave of the courts.

In those circumstances, I have come to the conclusion that, the appellant having failed to obtain leave from a judge of this court before proceeding, the appeal should be quashed.

We have already decided in the case of *Ross* v. *Ross*(1), that the appeal to the Supreme Court of Canada given by sec. 106 of the "Winding-up Act" must be brought within 60 days from the date of the judgment appealed from and that after the expiration of the sixty days so stated neither the Supreme Court of Canada nor a judge thereof can grant leave to appeal.

As the respondent has not made his motion within the time prescribable by the rules he should be entitled to the costs of his motion only.

Appeal dismissed with costs.

Solicitors for the appellants: *Taylor, Harvey, Stockton & Smith.*

Solicitors for the respondents: *Cowan, Ritchie & Grant.*

(1) 53 Can. S.C.R. 128.

ELIZABETH BARRON, ADMINISTRATRIX AD LITEM OF JOSEPH S. BARRON, DECEASED (PLAINTIFF) ..... APPELLANT;

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*Feb. 25, 26.
*Apr. 15.

AND

ROBERT KELLY AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Sale of land—Inducement to purchase—Fraudulent misrepresentation—Rescission—Waiver—Action for deceit.

B. purchased some lots in land laid out for a town site having been assured by the agent of the real estate brokers who had charge of the sales that residents of an adjoining town had bought largely and a firm of railway contractors had also purchased lots. Having discovered that the first statement was untrue he, through his solicitor, wrote to the brokers enclosing money for payment on his purchase, and stating that he was completing it in order not to lose what he had already paid but that he did not waive his right to reparation for deceit and intended to bring action therefor. Later he discovered that the statement of purchase by the railway contractors was also false. In an action claiming rescission and, in the alternative, damages for deceit.

Held, Idington J. dissenting, that by the above-mentioned letter, and by making subsequent payments, and offering to exchange some of the lots purchased for others B. had elected not to rescind and the discovery later of the second false representation did not entitle him to rescission as it was of the same nature as, and a fact of, the first.

Held, also, Fitzpatrick C.J. dissenting, that he was entitled to damages for deceit. *Campbell* v. *Fleming* (1 A. & E. 40) and *Boulter* v. *Stocks* (47 Can. S.C.R. 440) discussed.

Judgment of the Court of Appeal (24 B.C. Rep. 283) reversed.

APPEAL from a decision of the Court of Appeal for British Columbia(1), affirming the judgment on the trial in favour of the defendants.

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

(1) 24 B.C. Rep. 283; 37 D.L.R. 8.

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The material facts are stated in the above headnote.

Geo. H. Ross K.C. and *Barron* for the appellant. As to misrepresentation and the effect of a false statement on the contract, see *Smith* v. *Chadwick*(1), *Nash* v. *Calthorpe*(2), *Shepheard* v. *Bray*(3), and *Macleay* v. *Tait*(4).

The court may reverse on matters of fact even against the findings of two courts below. *Bloomenthal* v. *Ford*(5), *Hood* v. *Eden*(6), at page 483, and *Polushie* v. *Zacklynski*(7).

Deceit is established and if rescission cannot be ordered the plaintiff is entitled to damages. *Derry* v. *Peek*(8).

S. S. Taylor K.C. for the respondents.

THE CHIEF JUSTICE (dissenting).—The appellant in the year 1898 was resident in Dawson City, where he carried on "the clothing business, the jewellery and optician business, the pawn shop business, lending money too;" in fact, making money any way he could. His attention was first called to the townsite of New Hazelton by the usual flaming advertisements by which a land boom is started. Through the local agent in Dawson he eventually selected and purchased the lots in respect of which he now claims damages, on the ground that he was induced to purchase them by misrepresentation.

The record is a terribly voluminous one, but I have read through all the evidence. The purchase,

(1) 20 Ch.D. 27.
(2) [1905] 2 Ch. 237.
(3) [1906] 2 Ch. 235.
(4) [1906] A.C. 24.
(5) [1897] A.C. 156.
(6) 36 Can. S.C.R. 476.
(7) 37 Can. S.C.R. 177; [1908] A.C. 65.
(8) 14 App. Cas. 337.

I have no doubt, was a speculative one. It is true that the appellant says that on account of his health he was obliged to leave Dawson City and was looking for a place where he could set up business and make his home, but I do not think he ever regarded New Hazelton as other than the merest possibility of such. Perhaps if the town had grown up with the phenomenal rapidity of Dawson City he might have moved there as well as to Calgary, where he went some three or four years later, or to any other place.

Really the only substantial misrepresentation put forward in the statement alleged to have been made to him is that many lots in the townsite had already been sold when as a matter of fact they had not been. He has got hold of a nice expression of which he makes repeated use to the effect that he wanted to buy lots in a town and not a piece of prairie at all. This, however, does not accurately represent the facts, because all that he contracted to buy was land within the site of a projected town and he only thought that he had good reason to hope that a town was going to spring up on this site.

I agree with the trial judge that even on the plaintiff's evidence, which is all that was heard, there is no proof of any intentional misrepresentations made to him and further that any such misrepresentations, if made, were not the inducements which caused him to buy. But, in any event, this, in my opinion, is not a case in which a court of appeal would be justified in reversing the judgment of the trial judge unless upon some clear ground of error shewn. A mere opinion, formed as it must be without the advantages of hearing the evidence of the plaintiff and his witnesses ought not to prevail against the conclusion at which the trial judge has arrived without the least hesitation. It is purely a

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question of fact that is involved; no one could do more than form an opinion and no one can be in as good a position as the trial judge to draw a fair conclusion from the evidence given before him. The present appeal being from a decision of the provincial Court of Appeal confirming the judgment, its reversal in this court would be the more open to objection.

It is perhaps immaterial to point out that a judgment for the plaintiff in this case would involve a good reason for setting aside quite innumerable similar transactions. It seems only common knowledge that those entering on such speculations cannot expect the sober accuracy of expression to be looked for in ordinary and proper business dealings. Enterprises which are held out as promising great fortunes in brief time and with no trouble must always have their attendant risks and uncertainties. It is not for the courts to scrutinize such contracts closely with a view to trying to find a ground for affording relief to those who have lost their money recklessly embarking it in such wild speculation.

I would dismiss the appeal.

DAVIES J.—After hearing the arguments of counsel and reading the evidence to which they called our attention I have reached the conclusion that this appeal should be allowed and the case should be remitted back to the court to have the damages for deceit assessed. This conclusion is the same as that reached by the dissenting judge, McPhillips J., in the Court of Appeal.

The action was one brought by the plaintiff appellant, to rescind certain agreements made by him with the defendants (respondents) for the sale to him of certain lots of land and in the alternative for damages in respect of misrepresentations made by the defendants

to the plaintiff which induced him to agree to purchase the lots.

The specific misrepresentations alleged were that certain lots in the business section of the townsite of New Hazelton, in which townsite the lots the plaintiff agreed to purchase were situated, were sold to residents of the town of Hazelton which nearly adjoined the townsite of New Hazelton and that certain blocks of lots in the same townsite were sold to Foley, Welch & Stewart, well known as large railway contractors. That as a fact these representations were false and known to the vendors to be so and that they were inducing causes of the plaintiff's purchase.

The conclusions I have reached after the argument and reading of the evidence called to our attention were that these representations were false to the knowledge of the plaintiff's agent who carried out the sale and were inducing causes of the plaintiff agreeing to purchase.

On this branch of the case I did not entertain any doubt. The only doubt which arose in my mind was whether or not the plaintiff, after learning of the fraud practised upon him, had deliberately elected not to rescind the contract but to claim damages for the deceit which had induced him to purchase.

I think the letter of plaintiff's legal adviser of the 6th of March, 1914, and the payments of the purchase money made concurrently with that letter and afterwards conclusive evidence that the plaintiff with full knowledge of the gross fraud practised on him had elected to affirm the bargain and confine his claim to damages for the deceit.

But it is argued by the appellant's counsel that though the plaintiff should be held to have had knowledge of the gross fraud practised upon him in the false

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representations made to him as to the sales of other lots knowledge of the full extent of that fraud was not known to him and was not discovered till afterwards. In other words, that while he ought to be held to have known when the letter was written and his election made not to rescind, that the representations as to the purchase by the residents of Old Hazelton of the lots they were represented to have purchased were false and fraudulent, he did not then know and did not discover till after the letter was written that the representations as to the purchase by the railway contractors, Foley, Welch & Stewart, were also false and fraudulent.

His conclusion was that the discovery of the fact that Foley, Welch & Stewart had not purchased when made by him entitled him to withdraw his previous election and to rescind.

I am not able, however, to accept this argument. The false representation as to the purchase made by Foley, Welch & Stewart was only one of several incidents comprising the fraud, and it is not necessary, as Lord Denman says in *Campbell* v. *Fleming* (1), that a party

> must know all the incidents of a fraud before he deprives himself of the right of rescinding.

As Patteson J. says at p. 42 of the report of that case:

> This new discovery can only be considered as strengthening the evidence of the original fraud and it cannot revive the right of repudiation which has once been waived.

It is obvious, I think, that whether a new discovery of false representations after the purchaser has elected to affirm the contract must be treated as a mere incident in the fraud or may be determined as justifying revival of the right of repudiation must depend upon the facts of each case and that it is impossible to lay

(1) 1 Ad. & E. 40.

down any definite rule which should govern every case. Much will depend upon whether the several misrepresentations were inter-related or connected. See *Ex parte Hale*(1). In the case of *Boulter* v. *Stocks* (2), decided by this court some years ago, in which the case of *Campbell* v. *Fleming*(3), was distinguished, it was held that an act which, under ordinary circumstances, would be held to amount to an affirmance of a contract to purchase a farm, did not under the circumstances of that case disentitle the plaintiff to rescission. The discovery that the acreage of the farm was very greatly less than the acreage represented by the seller when the contract was entered into was not related to, or connected with certain other representations as to the farm being free from noxious weeds, and as to there being a certain number of apple trees in the orchard. After the representations as to the absence of noxious weeds had been made, and the purchaser knew of their falsity he nevertheless gave a lease of the orchard and thus affirmed his contract to purchase the farm. Afterwards he discovered an enormous discrepancy between the acreage of the farm as represented to him when he purchased it and its actual acreage (some 46 acres), and sought on this ground to rescind the contract. The court held he was not estopped from doing so by his lease of the orchard and its affirmance of his contract to purchase. There was no inter-relation or connection between the representations as to the noxious weeds and the orchard trees and the acreage of the farm and it by no means followed that knowledge of the falsity of the representations as to the noxious weeds and the orchard trees would necessarily have led the purchaser to a

(1) 55 L.T. 670.
(2) 47 Can. S.C.R. 446; 10 D.L.R. 316.
(3) 1 A. & E. 40.

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positive assurance that he had been the victim of a fraud and that the whole contract had been a deception.

Now with respect to the appeal before us it does appear to me that there is a direct connection between the representation that some of the lots in the townsite had been sold to a number of the inhabitants of Hazelton and other blocks of the land to Foley, Welsh & Stewart. It was the fact of the sales that was the controlling factor and I do not think it can be successfully argued that after discovery that none of the lots represented as having been sold to the residents of Hazelton were so sold and the deliberate affirmance notwithstanding of his contract of purchase by Barron that he should be permitted, because he later discovered that another alleged purchaser of part of the townsite represented as having purchased blocks of land therein had not done so, can now enable him to repudiate his election to seek compensation by way of damages for deceit and instead obtain rescission of the contract.

That conclusion does not affect, of course, the plaintiff's right to recover damages for deceit, and I would therefore allow the appeal and remit the case to the court in British Columbia for the assessment of such damages as plaintiff may have sustained by reason of the deceit practised upon him, with costs in all the courts.

IDINGTON J.—The appellant is the administratrix of the estate of her late husband Joseph D. Barron, who in his lifetime claimed that he had been induced, by material misrepresentations, to buy from respondent Kelly, town lots in a subdivision by him of a section containing six hundred and forty acres which he named

Hazelton, and sought herein for the rescission of each of the contracts so induced, or alternatively, for damages.

There had long been established a Hudson Bay Company trading post known as Hazelton, some few miles from this section.

The line of the Grand Trunk Pacific Railway did not touch Hazelton, but passed through said section.

As the work of construction of that railway developed it seemed to tempt different sets of speculators to try and found new towns in the district. The respondent Kelly called his subdivision "New Hazelton."

Some of those interested in the said railway company made another subdivision a few miles further west and called it "South Hazelton." Another adjoining respondent's was projected by someone who called his the "Hammond Townsite of Hazelton."

These rival projects developed a struggle for the establishment on each site of the railway station to serve that district.

The respondent Kelly brought the claim on behalf of his subdivision before the Railway Commission, and won out. That Board directed, in December, 1911, that a station should be established on his said section 882.

The subdivision thereof shewed only two streets of a hundred feet in width. Both ran from east to west. One called 9th Avenue was near the centre of the section and hence likely to become the more important one. It was thus made clear that he planning the townsite expected one or both to be leading thoroughfares in the place.

Respondent Kelly had at an early stage entrusted the entire management of the selling of lots in New

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Hazelton thus planned (except some blocks to be presently referred to) to his co-respondents Clements & Heyward, real estate brokers in Vancouver.

Immediately the decision of the Board was published the firm of Harvey & McKinnon telegraphed from Hazlewood to Clements & Heyward to have a large number of the lots on said Ninth Avenue reserved for them.

It is not now pretended in argument or evidence, that they had bought all the lots so reserved, or were supposed to have done so. Yet all the lots so reserved, and many more reserved for other agents elsewhere to sell, were marked on plans distributed for the information of prospective purchasers, by a pencil stroke intended to represent them as sold.

The firm of Foley Bro., Welch & Stewart, prominent railway contractors, occupied three blocks of the subdivision whilst carrying on their work of railway construction. It is not explained upon what terms they so occupied them but no one seems to pretend that they had ever in fact purchased them, yet they were all marked off by the pencil stroke as sold.

These blocks were never given Clements & Heyward for sale and Heyward says he really did not know what the arrangement with Kelly was under which they were so occupied or why so marked off. One Firth, a general broker in Dawson, in the Yukon, applied to Clements & Heyward for information, and by their reply of 5th February, 1912, was offered the agency in Dawson for selling lots in the subdivision. He responded on the 23rd February, 1912, by telegraph, accepting the agency as follows:—

> Letter fifth received. Agency accepted. Reserve Blocks Ninety, Ninety-one, Hundred two. Forward blue print, literature, full instructions, information business section.

They replied same day by letter which contained the following:—

Reply to your wire of even date, we are mailing you a B-P of New Hazelton, Sub-division 882, Section Two, with all the lots sold to date marked off. We are unable to reserve for you the blocks you name in your telegram, but you can look over the B-P and it will give you an idea what lots you can sell and upon receipt of your application we will immediately confirm same if not already sold.

The merchants and residents of "Old" Hazelton are grouping along 9th Avenue in such blocks as 93, 92, 91, 90, 89, 104, 102, 101, 100 and 99. The blocks 119, 120 and 121, are where the Foley, Welch & Stewart Company have their headquarters located. This will give you an idea of how the town is being formed. The station we fully expect will be erected on the south side of the railway, very close to the centre, somewhere near Templeton or Laurier Streets.

On the back of this letter there was written as follows:—

Blocks marked off with an X are B.C. Government Reserves and not on the market. Lots marked with a stroke thus / are sold. Blocks 119, 120 and 121 are held by the Foley, Welsh and Stewart Company, Railway Contractors' headquarters.

The advertisement sent by them to Firth for distribution carried on these misrepresentations by such statements as the following:—

Nearly all the business men and residents of the old town of Hazelton and vicinity are investing in the "KELLY" Townsite, and they are well pleased with the decision of the Commissioners. Read this telegram, which we assure you is genuine, and the number of lots since sold to them, who know what they are buying, proves its sincerity:

"Hazelton, B.C., Dec. 20, '11.

"Clements & Heyward,

"Vancouver, B.C.

"Old Hazelton people delighted Railway Commissioners' decision. Will wire long list of sales tomorrow.

"HARVEY & MCKINNON."

* * *

BIG LOCAL SALE.

During the past week practically every person in town has purchased lots in New Hazelton. Every day Harvey & McKinnon have wired sales to Vancouver. The business men have taken from one to six lots in what will be the business district, and they are now taking lots in other parts of the town for residential and speculation purposes.

The latter will be a strong feature here in the summer and many

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lots will be turned over at a good profit. The old town is very enthusiastic now that the Railway Commission has settled on the one town.

Armed with such authority and adequate means and methods of carrying out by fraudulent misrepresentation the sale of lots Firth, at that time I think innocent thereof, approached the deceased Barron, who then and for twelve years or more had carried on business in Dawson, made money and come to desire a less severe climate, and negotiated with him on the basis of the representations he had been thus instructed to contain the truth. He explained to deceased and other possible purchasers the several kinds of marks on the plans, and assured them that those marked with the stroke which stood for sold had already been sold. He succeeded in selling to him by virtue thereof and the respective isolations of Dawson and New Hazelton being such as to render investigation impossible if prompt action was to be taken.

The picture of so many actual sales and that so rapidly and especially to many of the people of Old Hazelton who alone of all men must know best the possibilities and probabilities of this newly-founded centre of trade and commerce, indicated that it was prompt action the situation demanded, or nothing.

The prompt result as designed and hoped for by means of said misrepresentations was got in the several agreements, now in question, alleged to have been thereby induced.

The facts were clearly proven by the books of the respondent Kelly that there had, when the deceased Barron made his first purchase, only been sold some 30 lots out of one hundred and fifty-five represented in manner aforesaid as sold.

The learned judge, during the cross-examination of the first witness called for the defence, an-

nounced that he saw no use prolonging the trial inasmuch as he had come to the conclusion that the deceased Barron was not induced by any of said misrepresentations to make the purchases he did, and dismissed the action accordingly.

The learned judge credited him with being honest in giving his evidence but presumed to find that

> the inducements which led Mr. Barron to buy were the rosy inducements held out as to the future.

I am unable to accept such a theory. Not only is it expressly controverted by the sworn testimony of deceased but it is quite inconsistent with the ordinary judgment of men of business, such as deceased was, in venturing to buy that of which they know little or nothing. The rosy inducement of a real estate advertisement counts for little with them compared with alleged concrete facts as they were in this instance assured to have taken place.

Deceased had been in Dawson since 1898, without once getting out of the Yukon and was dependent, for aught one can see in the evidence, solely upon the general intelligence of men he met there, or newspapers, and upon the representations of the respondents. To assume that such a man would be so foolish as to discard the express statements by respondents of what many other men, including those on the spot, thought of the future, and evidenced by their actual purchases, and rely solely upon the airy nothings put forward at the same time, in the publications of these same respondents, is not, I respectfully submit, a correct method of reasoning or one upon which to found a judicial judgment.

Perhaps the most potent factor governing the conduct of men in every walk of life, and especially in regard to subjects respecting which they know or can

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know but little, is their information of what other men, confronted with the like problems they have to solve, have done or are doing relative thereto. Even Firth, whose later conduct relative to the matters in question is not entirely commendable in some respects, discloses in his correspondence how highly improper he thought it would be to represent to possible purchasers lots as sold when they were not in fact sold, in his evidence testifies as follows:—

Q.—At that time Mr. Barron had a great deal of faith in the townsite? A.—Yes, we all had.

Q.—And was enthusiastic about it, from the information he had and from the literature which you supplied him? A.—Yes.

Q.—And from the sales which were apparently taking place there? A.—Oh, yes, I presume, everything.

Q.—If a town is selling rapidly it is a great inducement to purchasers to invest? A.—It is, it has its influence, yes.

He certainly had the commonsense view of the influence and inducement of previous rapid sales. The callous indifference of respondent Heyward to the consequences of such an act as marking, on the maps which he put in Firth's hands to be used in procuring purchasers, blocks as sold when not a lot therein sold, is well illustrated by his evidence given in examination for discovery as follows:—

Q.—That would be misleading to an intending purchaser, to find a block marked sold, when it was not sold? A.—That is up to them, I don't know how misleading it might be to somebody, but we never intended it to be misleading.

This attitude, of the man directly responsible for the wrong done by issuing such misrepresentations to catch possible purchasers, is not in my view improved by his swearing to the incredible statement that he did not intend it to be misleading. Why did he use such methods? He pretends in such explanation as given elsewhere in his examination that these markings were mere reservations which might possibly result in

future sales. But his instructions quoted above, to Firth as a new agent when an entire stranger to the whole business, and to him, were unqualifiedly positive that the lots so marked were sold. It seems to me impossible to justify or excuse in law such conduct.

I see no reason to doubt the story of the deceased that he accepted as true the gross misrepresentations in question and that but therefor he would not have made a single one of the purchases in question.

The only difficulty in the case I have ever had during or since the argument herein, is whether or not the deceased should be held to have elected by the letter of Mr. Congdon to respondents Clements & Heyward, dated 6th March, 1914, wherein he enclosed a post office order for $196.00 on account of purchase price of lots named and said:—

> I have further to advise you that although Mr. Barron is completing his purchase rather than lose the money already paid on the purchase price before he learned of the false and fraudulent representations made to induce him to purchase, he does not waive his right to insist on reparation for the deceit practised upon him, and proposes to bring an action on account thereof.

They in reply of 23rd March, 1914, point out that he had evidently made a mistake by including all the lots named and assumed he only intended to pay on lot 11, block 144, due March 21st, 1914, and add:—

> This is as per a/c mailed from here to Mr. Barron on Feb. 17th last.

They proceed to apply the money accordingly to the one lot so named and ask "Is this correct?"

The account so referred to is not in the case. Nor do I find therein any reply to this letter.

The letter proceeds to reply to the charge of "fraudulent representations" by saying it had been answered by a letter to Mr. Firth of the 17th, and asking him and Mr. Barron to see that letter.

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I think it is not possible in light of the construction thus put upon Mr. Congdon's letter to those to whom it was addressed to hold it as any election relative to the numerous other contracts in question herein.

So far as the exact expression of the letter goes it is to be observed that it uses the singular number both as to "purchase" and "purchase price" and hence cannot, in any view, by itself be taken as a definite election as to other contracts. And by reason of its ambiguous character when closely examined and illuminated by the respondent's reply, does not seem of as much value in way of election as at first blush I was disposed to attach to it; even as to any single lot.

Moreover, turning to respondents' pleadings I find the only claims made thereby in respect of waiver or election are as follows:—

(23) The plaintiff has waived the said alleged misrepresentations and has elected to retain the said lots and each of them. Particulars of said waiver and election are as follows:

(*a*) He paid money on account of the purchase price after having knowledge of the alleged misrepresentations.

(*b*) He offered the said lots for sale after knowledge of the alleged misrepresentations.

(*c*) He applied to the defendants to exchange the said lots for others in the said New Hazelton Townsite after he had knowledge of the alleged misrepresentations.

The defendants therefore ask that this action be dismissed with costs.

Obviously the pleader did not attach much importance to the Congdon letter by itself as containing any definite election, and I do not think we should invest it with an importance he failed to find in it. Of course as a piece of such evidence as there may be supporting the pleading it is entitled to due weight. I cannot find that deceased ever had that knowledge, charged in the pleading, of the fraud practised upon him by the misrepresentations which I have referred to above, until after he had made his payment on account, by

the remittance of $840 as third payment on lots 1, 2, 3, and 4, Block 97, New Hazelton, on 31st March, 1914. That was the last payment he made. The times for payment extended over four years from the date of each purchase. Then and prior to that time of said remittance he had nothing more that a shrewd suspicion derived from newspaper intelligence as to the progress or rather want of progress in way of building on the lots which had been marked as sold, and a possible purchase from or offer by respondents to sell two or three of the numerous lots which had been marked as sold.

No prudent man would think of repudiating contracts as fraudulent, and launching into a sea of litigation, upon such slender basis as deceased had up to then been furnished with. The case of two or three lots sold since he bought might have been susceptible of many explanations when the facts were investigated which would dispel all suspicion of fraud and want of progress in way of building might also have had another explanation.

What deceased did was, in October, 1913, to draw Firth's attention to the fact that he was desirous of obtaining a site on Ninth Avenue to build upon, and proposed exchanging therefor some of what he had bought from respondents.

Firth wrote on the 7th October, 1913, making them the suggestion, but got no reply. They pretended it never was received but there is reason to doubt the truth of such denial. But if true, then that proposal of exchange can hardly be counted in support of the pleading. There is nothing in the evidence of his complaining then of his suspicions.

On the 30th December following he wrote the

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respondents Clement & Heyward again proposing an exchange and at the same time telling them as follows:—

It was represented to me, and to others in Dawson through your agent and literature that 9th Avenue, from Laurier to Pugsley Street, was all sold, but Block 97; so I bought that and more.

Had the truth been told me, I would not have bought a dollar's worth of property in New Hazelton. On October 7th I called on your agent and told him that I wanted to exchange some lots and to write to you.

I am positive that he wrote. I have never heard anything from you since.

Now, I do not want to get into litigation, I will try and settle it between ourselves.

These seem to be the proposals for exchange referred to in the above quoted pleadings.

I am unable to understand why such a proposal so framed as this and avowedly to avoid litigation should be held a definite election to retain what the deceased had been entrapped into buying.

Even then he had no more than suspicion to go upon. On the 3rd March, 1914, Firth wrote them two letters, one dealing briefly with some other matters besides the Barron business, and at length in regard to that, in which he closes as follows:—

Now I certainly would like to have you try and arrange some satisfactory deal with Mr. Barron, as he is determined that if this is not done he will commence suit to recover the money paid on the grounds of misrepresentation, and this, as you know, would stir up a lot of trouble and harm, and if it can be avoided within reason I certainly would advise it to be done.

The other letter marked "confidential" dealt at length with Barron's claim. He begins by intimating Barron was preparing a case against them and warning them against giving information to a party he named, and said was a confidential adviser of Barron. This is very suggestive of the confidence Firth had that Barron was far from being possessed of any actual knowledge of the real facts. Later in same letter he says:—

Personally, I do not believe that Mr. Barron has any case at all, for I cannot bring myself to imagine that a firm of your standing would deliberately mark off any portion of a townsite map as being sold when such was not so.

In passing I may remark what a commentary this expression furnishes of Firth's opinion, as a business man, of the worthless nature of the argument put forward that seeks to justify or excuse the fraudulent course of conduct pursued.

He urges a settlement. He ends by suggesting the reply should be of a duplex character. One sheet he wants to be confidential and the other so worded that, if necessary, it could be shewn to Mr. Barron.

He evidently was suspicious like Barron of what might be disclosed. He also was ignorant as he of the actual facts. He had not the callous courage of respondent Heyward who could answer as he did in evidence quoted above.

If Firth was ignorant and groping in the dark, even at that late date, how can we impute to Barron greater knowledge and say that the Congdon letter was written with that knowledge which would make it an effectual election? That was written only three days later. I see no reason to doubt the evidence of the deceased that it was not until he had, within a month thereafter, received a reply dated 30th March, 1914, to an inquiry of his dated 4th March from the publisher of the Omineca "Herald," published at New Hazelton, telling that on Ninth Avenue, so far as he could learn, there had been no lots sold between Pugsley and Laurier Streets until recently, that he really became possessed of some actual reliable information of the magnitude of the misrepresentations conveyed by the respondents' plans, marking as sold the central properties so marked. Then he was told by Mr. Congdon that if he had known what was thus disclosed he should

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have advised against his sending the remittance above mentioned. He seems accordingly to have decided to pay nothing more.

In short he seems thereafter to have awaited results. I can see nothing, therefore, in support of the grounds pleaded as defence set forth above. And the advertisement and its reason as explained by deceased is in itself not worth labouring with.

The respondents took no action to recover the next payment when due.

In August, 1915, he left the Yukon and on his way out learned that none of the lots in the three blocks partly occupied by Foley Bros., Welch & Stewart, as above mentioned, had been sold though as already stated marked off on the plans as sold.

This action was started shortly afterwards. I think he has sufficiently answered the plea of having waived the right to rescission or (perhaps more correctly designated) of having made an election to abide by his purchases.

Indeed it rested upon the respondents to prove knowledge on his part of the fraud when doing anything such as they charge as an election in order to entitle them to succeed in such defences as set up under that head. This they have failed to establish.

Mere delay or laches as has been often said short of falling within the Statute of Limitations is no bar to an action for rescission. It may be and often has been found so coupled with acts which have induced the vendor to change his position, or with circumstances which in themselves evidence knowledge and election, as to disentitle him seeking rescission to claim such relief.

It was in substance said in the judgment of the Judicial Committee of the Privy Council in the case of

the *Lindsay Petroleum Co.* v. *Hurd* (1), and in like manner re-affirmed by the judgment of Lord Penzance in the case of *Erlanger* v. *New Sombrero Phosphate Co.* (2), that the contract having been induced by fraud and he defrauded, having the right to repudiate it when, if ever, it became a question in defence against the assertion of such a right, whether or not his refraining from doing so, had not waived his right or elected to abide by the contract, that the burden of proof of knowledge of the fraud and time of acquiring same rested upon the party setting up such a defence.

Lord Cairns who doubted the decision of the majority in the latter case did not dissent from such proposition but pointed out these things on the surface, as it were, which might be held to constitute knowledge at the outset or shortly after.

In like manner a shareholder in *Whitehouse's Case*(3) having observed a discrepancy between the articles of association and the prospectus and withdrawn, yet paid thereafter a call, could not be held entitled on later discovering another discrepancy, to claim relief, because evidently the whole means of knowledge lay in the documents which he had first relied on and must have read.

Again in this case the respondent Kelly counterclaimed for specific performance and was adjudged so entitled.

I am of the opinion that the courts below erred both in the refusal to rescind and in directing specific performance.

I cannot assent to the view of the law taken below, except by Mr. Justice McPhillips who held deceased was entitled to damages.

(1) L.R. 5 P.C. 221. (2) 3 App. Cas. 1218, at p. 1230.
(3) L.R. 3 Eq. 790.

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Derry v. *Peek*(1), had, I respectfully submit, when relied upon herein, been misapprehended. *Derry* v. *Peek*(1), clarified the law of deceit and obliterated some judicial refinements. Fraud, however, still remains fraud. That decision neither changed the moral law nor enabled men who deliberately or recklessly committed a fraud to free themselves from the charge by swearing they did not intend to mislead, nor yet did it absolve from liability the honest and ignorant principal whose trust had been such as to enable him he trusted as his agent to succeed in bringing into their respective coffers the money of others.

If I could not see my way to granting rescission I should certainly hold the appellant entitled to damages.

I need not pursue that inquiry for the claim to damages is made only alternatively and not cumulatively as it was and maintained in the recent case of *Goldrei, Foucard & Son* v. *Sinclair*(2).

I think the appeal should be allowed with costs throughout, the contracts be rescinded and the money paid by deceased repaid with interest.

ANGLIN J.—A plaintiff claiming relief in respect of a contract on the ground that he was induced to enter into it by fraudulent misrepresentation, who has failed to convince either the trial judge or a majority of the judges of a provincial appellate court that he is entitled to judgment, can rarely hope to succeed on a further appeal to this court. The difficulty of demonstrating in such a case that there has been clear and manifest error in the findings of both the lower courts—the *sine qua non* of a reversal—is always very great and usually insuperable. Nevertheless, when convinced that such

(1) 14 App. Cas. 337. (2) [1918] 1 K.B. 180.

error has been demonstrated, our duty to reverse and to give the judgment which the provincial appellate court should have given is unquestionable. The right of appeal to this court is upon questions of fact as well as upon those of law. *Hood* v. *Eden*(1).

In the present case the evidence of the making of the representations that practically all the lots on 9th Avenue for half a mile had been sold to residents of Old Hazelton, and that lots on Pugsley Street for a like distance and the blocks 119, 120 and 121 had also been sold is so overwhelming, their misleading effect is so obvious and their materiality so clear that—I say it with all due respect—upon none of these points does there seem to be the slightest room for doubt. That there was actual dishonest intent is, I think, abundantly proved; that there was "what in the view of a Court of Equity amounts to fraud" (*Dimmock* v. *Hallett*(2)), is beyond question. No good purpose would be served by detailing or discussing the proof. I would merely remark that if one were disposed to question the plaintiff's story, notwithstanding its corroboration in material particulars by other witnesses, Firth's letter of the 3rd of March, 1914, the materiality of which the learned trial judge appears to have been unable to appreciate, would remove all scepticism.

That the representations complained of in fact operated on the mind of the plaintiff as inducements would be a fair inference from their manifest materiality. His explicit testimony that but for them he would not have made the impugned purchases, credible in itself, is certainly not weakened by the trial judge's statement that he

> would not suggest that Mr. Barron is not honestly telling his belief.

I find nothing in the evidence to support the opinion

(1) 36 Can. S.C.R. 476. (2) 2 Ch. App., 21, at p. 29.

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that "he (Barron) would have bought just the same" and that he had "honestly argued himself into that idea (that he would not have purchased had he known the truth) years after the event." Indeed I am at a loss to account for this view of the learned judge, unless it should be ascribed to the influence upon his mind of his attitude towards actions such as this, expressed by himself to be that "of a doubting Thomas." Perhaps one should not be surprised, however. The learned judge also felt himself

inclined to think there was no intentional misrepresentation.

The two learned appellate judges who upheld the judgment dismissing the action appear to have given to the findings of the trial judge what I cannot but think was, under the circumstances, undue weight.

No doubt in making his purchases the plaintiff took into account other matters such as his idea as to the probable location of the railway station. But, having regard to the fact that, if the defendants' representations as to sales had been true, he would have been buying desirable building lots in a town of assured prosperity and immediate growth, whereas if false (as they were), his purchases would be practically on the prairie, their materiality is so palpable and their influence would ordinarily be so preponderating that it is almost impossible to conceive that they had not some effect as inducing causes. It is trite law that it is not necessary that other inducements should be wholly excluded. *Beckman* v. *Wallace*(1).

It is also elementary that a party misled by such misrepresentations as the evidence here establishes has, upon discovery of their falsehood, the choice of repudiating his contract—and (if *restitutio in integrum* be

(1) 29 Ont. L.R. 96; 13 D.L.R. 540.

practicable) he may thereupon claim the equitable relief of rescission with reimbursement—or of affirming it and pursuing the common law remedy of damages in an action of deceit. The present plaintiff seeks rescission. He claims damages only alternatively, *i.e.*, if not entitled to rescission. His right to this alternative relief, although he should have lost his right to rescission, is, in my opinion, incontestible.

The defendants assert that, with knowledge of the falsity of the misrepresentations on which he relies, the plaintiff definitely elected to affirm the contracts in question and to claim damages and is, therefore, disentitled to rescission. This feature of the case has occasioned me some trouble. The evidence of the alleged election to affirm consists in a letter written by the plaintiff's solicitor at Dawson to the defendants Clements & Heyward, on the 6th of March, 1914, accompanied by a payment of $196 on account of moneys due under the contracts, and other acts about the same time—a further payment of $840 on account, a proposal to exchange the lots purchased for others on 9th Avenue, and the publication of an advertisement asking offers for the lots. These other acts are less distinctly unequivocal than the letter, and if, owing to the circumstances under which it was written, it should be held not to afford conclusive evidence of a binding election not to seek rescission, they probably might be disregarded. In the letter it is stated that the plaintiff

> in completing his purchase rather than lose the money already paid on the purchase price before he learned of the false and fraudulent representations made to induce him to purchase, * * * does not waive his right to insist on reparation for the deceit practised upon him, and proposes to bring an action on account thereof.

If the plaintiff, when this letter was written, had full knowledge of all the material facts entitling him to

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rescission, I regard it as conclusive evidence of an election on his part to forego rescission and to rely upon his remedy in damages for deceit. Whatever might be said had it been written by the plaintiff himself without professional advice, such a letter written with full knowledge by a solicitor imports affirmance of the contracts involving a deliberate choice between the two remedies which he must be taken to have known were open.

But the extent of the plaintiff's knowledge of the material facts is challenged. His story is that when his solicitor's letter was written, while he more than gravely suspected, he had no direct evidence that most of the lots on 9th Avenue had been unsold when he was induced to purchase. See 20 Halsbury's L. of E., page 749, note (*b*); Bower on Misrepresentation, page 269; and *Carrique* v. *Catts*(1). The letter, however, is written not on a basis of suspicion but of actual knowledge and I incline to think the plaintiff's rights may not unfairly be determined on the footing that when he instructed the writing of it, he had such knowledge that the representation in regard to the sale of the 9th Avenue lots was false at the time it was made. *Whitehouse's Case*(2). He swears, however, and his evidence is uncontradicted, that while he then believed it probable that the 9th Avenue lots had not been sold when he made his purchases, he was at the date of the solicitor's letter still under the impression that they had been subsequently sold. If that had been the fact of course the lots held by him would have been more desirable and of greater value, and his willingness to keep them and seek damages only may have resulted from his belief that it was so. According to his story, which seems not improbable

(1) 32 Ont. L.R. 548, at p. 559. (2) L.R. 3 Eq. 790.

and stands uncontradicted, he learned positively that many of the 9th Avenue lots still remained unsold only in the middle, or towards the end, of April, on receipt of Mr. C. H. Sawle's letter of the 30th of March, 1914, written in answer to inquiry. This, however, was rather a fact which would influence him in making his election, than a fact which would give rise to his right to make it. Ignorance of it would not suffice to render revocable an election otherwise binding. See Ewart on Waiver Distributed, pages 72-76. The last payment made by the plaintiff was of $840, on the 31st of March, 1914. He says he made it because his solicitor had told him he would have a better chance to sue if he made prompt payments. He apparently had no suspicion throughout 1914 that blocks 119-121 had been unsold when he made his contracts of purchase. His letters of complaint and inquiry contain no reference to them. His testimony is that he first learned that these blocks had not been sold in August, 1915, when *en route* from Skagway to Vancouver returning from Dawson. This action was begun on the 7th of October, following.

While the reading of the evidence left an impression on my mind that the plaintiff was much more affected in making his purchases by the alleged sales of the 9th Avenue lots to Old Hazelton people than by the misrepresentation as to the sale of blocks 119-121, yet I have found neither explicit testimony, nor anything to warrant the inference that his sworn testimony is untrue when he swears that, had he known that those blocks were not actually sold to, but were merely temporarily occupied by Foley, Welch & Stewart, he "would have stopped there" and would not have bought in New Hazelton. In other words, there is nothing to justify a conclusion that his belief that

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blocks 119-121 were actually sold did not in itself influence his conduct in making the purchases as *an* inducing cause. Fraudulent misrepresentation in a matter *primâ facie* material and likely to operate as an inducement having been shewn by the plaintiff, the onus of satisfying the court that it did not in fact so operate is certainly cast upon the defendants. They have not discharged that burden. Had they done so in regard to the representation as to blocks Nos. 119-121, the present case would have been clearly distinguishable from *Boulter* v. *Stocks*(1).

On the other hand, the appellant's case is put by his counsel, at the beginning of their factum, in this form:—

> The specific misrepresentation alleged is that the defendants represented that certain lots in the business section of the townsite of New Hazelton were sold, when in point of fact such lots were not sold, thereby inducing the plaintiff to purchase eight lots in the said townsite.

Viewed thus it was substantially a single misrepresentation of development in the business section that induced the appellant to purchase. If so, the reason which led him to believe that the representation as to the sale of the 9th Avenue lots had been untrue, and satisfied him that he had been the victim of false and fraudulent misrepresentations, as his solicitor's letter asserts, should have made him realize that the whole scheme was one of deception. His own letter of the 30th December, 1913, and his solicitor's letter of the 6th of March, 1914, are susceptible of an interpretation indicating that he did so. If he did, the present case is brought within *Campbell* v. *Fleming*(2), distinguished by this court in *Boulter* v. *Stocks*(1), and the misrepresentation in regard to blocks 119-121 should be regarded not as a distinct fraud, but merely as "a new incident in the fraud." That, said Patteson J.,

(1) 47 Can. S.C.R. 440; 10 D.L.R. 316. (2) 1 A. & E. 40.

can only be considered as strengthening the evidence of the original fraud and it cannot revive the right of repudiation which has been waived.

"There is no ground" says Lord Denman, "for saying that a party must know of all the incidents of a fraud before he deprives himself of the right of rescission."

See too *Whitehouse's Case*(1).

I have found some difficulty, however, in distinguishing this case from *Boulter* v. *Stocks*(2). The fact, had it been true, that three entire blocks had been purchased by such large railway contractors as Foley, Welch & Stewart might well indicate to a man like Barron that large railway "shops" would probably be located permanently on them and would contribute materially to the rapid growth and prosperity of the new town. If so it would almost seem that the misrepresentation as to that purchase might be deemed of a distinctive character, quite as much so as was that as to the acreage in *Boulter* v. *Stocks*(2). While I bow to the authority of that decision, I am not satisfied that, if a member of the court, I should have concurred in it. It appears to rest upon the view expressed by Mr. Justice Davies that (before the lease there relied upon as evidencing an election to affirm the contract had been executed)

the facts brought to the plaintiff's knowledge from time to time as he began cultivating the land in the spring, as to the dirty condition of the soil and the presence of large quantities of noxious weeds, would (not) of themselves be sufficient to satisfy the plaintiff that the sale of the farm to him was a fraud and a deception. The evidence was of a character, no doubt, to raise grave and serious doubts in his mind as to whether he had not been deceived in the transaction, but nothing more;

and, as put by Mr. Justice Duff,

He (the plaintiff) may have had his suspicions as to Boulter's entire honesty, but it is quite clear that the possibility in shortages in acreage had not then occurred to him and he had no suspicion that the

(1) L.R. 3 Eq. 790. (2) 47 Can. S.C.R. 440; 10 D.L.R. 316.

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whole transaction had been on Boulter's part the swindle that it ultimately proved to be. It would probably seem to him to be most unlikely that the misrepresentations as to the number of apple trees—so easy to expose—had been made deliberately and as to the prevalence of noxious weeds that is a matter respecting which he may well have thought some exaggeration was to be expected. I think the evidence is quite consistent with the view that his discoveries in regard to these matters did not bring home to his mind a conviction that a fraud had been practised upon him such as would entitle him to impeach the sale.

Here, on the contrary, the plaintiff in his own letter of the 30th December, 1913, after stating the representations made to him, says:—

> Had the truth been told me I would not have bought a dollar's worth.

In Firth's confidential letter of March 3rd to the defendants, Clements & Heyward, so much relied upon by the plaintiff for other purposes, it is stated

> As intimated, Mr. Barron is positively preparing a case against you for misrepresentation on account of marking off all the 9th Avenue lots as being sold when in reality they were not.

The nature of the charge made is indicated in these words:

> Personally I do not believe that Mr. Barron has any case at all, for I cannot bring myself to imagine that a firm of your standing would deliberately mark off any portion of a townsite map as being sold when such was not so.

In the plaintiff's solicitor's letter of March 6th, he speaks of "the false and fraudulent representations made to induce him to purchase" and of "the deceit practised upon him." That Barron then believed he had been the victim of a fraud is scarcely open to question. The case at bar therefore may probably be distinguished on this ground from *Boulter* v. *Stocks*(1).

Having regard to all the circumstances I have, not without some hesitation, reached the conclusion that the defendants have sufficiently shewn an election by

(1) 47 Can. S.C.R. 440; 10 D.L.R. 316.

the plaintiff which is a bar to his exercising the right of rescission.

I have not taken the evidence of the witness Quinn into consideration at all. That, in my opinion, was the only proper course to follow since the learned trial judge saw fit to close the case before the cross-examination of that witness had been completed and thereupon delivered judgment dismissing the action.

The appeal should be allowed with costs throughout and judgment should be entered for the plaintiff (by revivor) for recovery of damages, to be assessed in the Supreme Court of British Columbia upon a reference to the proper officer according to the usual practice of that court, for the deceit practised upon the original plaintiff in inducing him to purchase the properties described in the several agreements mentioned in the statement of claim.

BRODEUR J.—This is an action for the rescission of a certain agreement for sale of lots of land in New Hazleton or, in the alternative, in damages for deceit.

New Hazelton is a new townsite which was subdivided during the construction of the Grand Trunk Pacific. It was expected that a railway station would be erected at that place and Robert Kelly, the respondent, bought a large tract of land which he subdivided into lots and offered for sale. Clement & Heyward, a firm of real estate agents in Vancouver, were instructed by Kelly to make the sale of those lots and they, in their turn, appointed different sub-agents in different towns of the West.

The sub-agent they appointed in Dawson City was a man named Firth and they sent him a map shewing the townsite and several lots were marked on this map with a stroke. It is claimed by the plaintiff,

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Barron, who asks for rescission, that it was represented falsely to him that these lots so marked were sold and that he bought the nearest ones on the strength of those misrepresentations.

On the other hand, the defendants (respondents) claim that it was not represented that those lots were sold but simply reserved for sale or selected by some intending purchaser.

The trial judge found that there was no intentional misrepresentation and his judgment has been affirmed by a majority in the Court of Appeal. This is an appeal from that decision. The main point in the case is whether or not there has been misrepresentation.

The appellant has proved, not only by himself but by some other witnesses, that the agent, Firth, has represented to him that the lots on 9th Avenue nearest to the station had been taken. That representation is confirmed by the written evidence which was presented in the case. Firth had received a map of the townsite from his principals, Clement & Heyward, and it was stated on that map that the lots in question had been sold. Then, it is no wonder that the agent, in selling those lots to the plaintiff, would have represented that those lots had been actually disposed of.

It is in evidence, on the other hand, that, as a question of fact, they had not been sold. Proposals of sale might have been made but no actual agreement for sale had taken place. We all realize that such a representation might have induced the plaintiff to purchase some other lots in the neighbourhood when he saw that within a very short time so large a number of lots had been taken up by purchasers living in the neighbourhood, and consequently better posted as to the prospects of the place. The plaintiff was then living very far from there, could not very easily com-

municate with the place and had no other information than what was conveyed to him by the respondent's representative.

It cannot be claimed that those representations were not of a fraudulent nature because why should the respondent state that those lots had been sold when, as a question of fact, they were still under their control? Why not represent the facts as they were, if they had simply reserved those lots for being sold by their agent at New Hazelton?

The only conclusion which I can reach is that there were misrepresentations and that those misrepresentations were fraudulent and induced the plaintiff to purchase the lots in question. There would be then no question as to the rescission, if the plaintiff, after being apprised of those misrepresentations, did not find it advisable to make some payments and to waive the right which he had for rescission.

By a letter which his counsel wrote to the respondent on the 6th March, 1914, he declared himself ready to complete his purchase; but did not waive his right to insist on reparation for the deceit practised upon him and proposed to bring an action on account thereof. If it were not for such a letter I would not hesitate to grant his action for rescission, but he should be all the same entitled to damages for deceit.

The judgment appealed from should be set aside; the appeal should be allowed and there should be judgment for the appellant for damages for deceit and an inquiry should be had to assess those damages.

Appeal allowed with costs.

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

Solicitors for the respondents: *Russell, Macdonald & Hancox.*

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*Apr. 17.
*May 7.

DAME MARY MAHER AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

JOSEPH ARCHAMBAULT (DEFENDANT)..... } RESPONDENT.

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

Partition—Licitation—Parties—Irregularity—Second action in partition—Arts. 1038, 1185 C.P.Q.

The father of the appellants, co-heir owner of a lot of land, was not made a party to a suit for partition, as prescribed by art. 1038 C.P.Q., apparently on account of his insanity and his absence from Canada. The respondent became the *detenteur* of the lot through sales following such licitation. The appellants, alleging the above nullity, took another action in partition against the respondent.

Held, Idington J. dissenting, that the judgment entered in the first partition proceedings should have been first set aside on the ground of nullity before a second action in partition could be taken; and such relief cannot be granted in the present action as all the parties to the first proceedings are not before the court.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of the Superior Court, District of Montreal, and dismissing the plaintiffs' action with costs.

The circumstances of the case are fully stated in the above head-note and in the judgments now reported.

F. J. Laverty K.C. for the appellants.

J. O. Lacroix K.C. for the respondent.

THE CHIEF JUSTICE:—I am of opinion that the appeal should be dismissed with costs.

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

(1) Q R. 25 K.B. 436.

DAVIES J.—I will not dissent from the judgment proposed to be given by a majority of my colleagues confirming the judgment of the Court of King's Bench, Quebec, though I entertain grave and strong doubts as to its correctness.

IDINGTON J. (dissenting)—The appellants claim that their late father Edouard Trudel who was admittedly owner of a share of certain lands in the Province of Quebec died without parting with such ownership and that respondent is the owner of the remaining shares therein and seek to have a partition or sale of said lands.

The respondent claims as heir or devisee of one Desparois whose title (if any) in or to the share of the appellants' father in said lands rests entirely upon certain alleged proceedings taken for partition resulting in an alleged licitation.

Edouard Trudel had lived and married in New York State and become insane long before said proceedings and so continued during same and for many years until his death.

Art. 1038 C.P.Q. provides that:

1038. All the co-heirs or co-proprietors must be parties in the suit for a partition.

This seems imperative. Edouard Trudel was not made a party. A consent judgment sanctioned only by those owning other shares was entered. Later on upon it being discovered, as it must have been known to those acting, if care taken, that he was entitled to the share now claimed, an irregular entry was made on the *cahier de charges* that for his share of proceeds he would be entitled to claim. There is nothing to connect deceased with this particularly unauthorized proceeding. Nor is there even the

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shadow of pretence for it in law, but later on, through steps taken by one or more of the parties concerned, the wife of deceased was improperly induced to accept a sum of money pretended to be proceeds of the sale and hence it is pretended the appellant and her children are bound thereby.

No curator was ever appointed for him in Quebec. By a New York Court his wife was afterwards appointed his committee.

It is proven by expert testimony that by the law of New York this gave her no authority in respect of the sale of his real estate. She could collect rents of real estate but that is as far as her authority went even in New York State.

Assuming for the moment that a foreign state where his land was could recognise her power in that respect, there was no such recognition or direction given by any one having power to give it in Quebec. Nor does it seem very clear what could have been done in that way.

I am unable, therefore, to understand how such proceedings can be held otherwise than a nullity so far as the share of the deceased was concerned.

This court, in the case of *Serling* v. *Levine*(1), held that the minor who was sued without a tutor being named and shortly afterwards came of age, and then had acted in many ways in such a manner as to induce some of us to hold that he had waived the right to object to the want of a tutor at the initiation of the proceedings, could not complain of such absence of a tutor. Instead of defying and disregarding the court when he came of age, he had submitted and acted in many ways that some

(1) 47 Can. S.C.R. 103; 7 D.L.R. 266.

of us thought precluded him from insisting upon such an objection.

The court above, however, overruled us, and held the whole proceedings a nullity(1)..

The acts and submissions of the defendant in that case after his majority (which if memory serves me were more than detailed in the judgment of my brother Brodeur) seem to me to have been more important in the way of overcoming the initial difficulty than anything relied upon herein as done by the committee of the insane person in the way of ratification.

In principle I cannot distinguish that case from this in regard to the question of nullity.

There are many reasons why an insane man should be more jealously protected than an infant of somewhat mature years at least.

The law seems to make no distinction.

It seems idle to suggest that the proceedings are different, especially in face of the imperative language of the article I have just quoted. And in view of the fact that the first step to inquire as to in a partition suit is whether or not partition can advantageously be accomplished. See Art. 698 C.C. and 1040 C.P.Q., and other articles in each of the respective sections where they appear.

It so happens in most cases all the steps thus indicated as possible are needless, for a mere glance at the circumstances so demonstrates the situation and sensible people act accordingly and proceed to licitation.

They proceeded in this instance by a consent judgment, but who consented?

The folly of disregarding the article requiring all co-heirs or co-proprietors to be made parties became

(1) 19 D.L.R. 108; [1914] A.C. 659, at p. 662.

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apparent in this instance for the consent should never have been given because one of the parties who should have been joined therein was in an insane asylum without a curator or committee. If that had been disclosed no doubt the judgment never would have been entered.

The conduct of someone was at fault and no need for harsh words, but yet it seems quite incomprehensible without suspecting someone of at least crass negligence.

To maintain such a proceeding it seems to me would be putting a premium on worse conduct in the like cases.

Having considered all the articles of the Civil Code and Code of Procedure cited to us, and many others, I do not see the necessity for elaborating the matter.

The case of *Bank of Montreal* v. *Simson*(1); illustrates how the law in Quebec has always looked at the interest of minors and the limited powers of tutors in regard to certain classes of property held by the minor.

Curators stand in the same position relative to any powers they may have unless when expressed otherwise.

And when we contemplate the shadow of one as it were acting by reason of an analogous appointment in a foreign state and not renominated under the law of the country where an immoveable is in question, I fail to be able to attach any importance to her acts or omissions as having any bearing upon what is really involved.

And the importance sought to be drawn herein from what was done as if judicially done, suggests I should refer the inquiring mind to the case of *Davis* v. *Kerr*(2),

(1) 14 Moo. P.C. 417.

(2) 17 Can. S.C.R. 235.

at page 244, where Taschereau J. is reported as making some pertinent remarks which might well be applied to some things done or permitted in the proceedings in question herein.

Holding the entire proceedings a nullity so far as the share of the deceased was concerned, I need not trouble myself as to the possibility or propriety of taking another course than that taken by those instituting the proceedings.

Nor do I see any difficulty in regard to the proof of the marriage of deceased and legitimacy of the appellants. Much less has been acted upon judicially.

Indeed I respectfully submit if the ground taken by the court below and in respondent's argument that the original record was quite regular and the adjudication therein valid and the appellants' action denying positions so groundless as these suggested I do not see why that feature of the case and the utterly void conduct of the committee in what she did as representing the court in New York should be laboured with or given prominence as it is at every turn in both judgment and argument.

The English system relative to the insane and their property of which New York law is, as it were, the heir, does not furnish quite as much safeguarding or restriction as the French system in force in Quebec relative to the appointment of a guardian called in the one a "committee" and in the other a "curator." The results are surprisingly alike, though possibly differing in origin and mode of appointment.

But in the last analysis the entire power of a committee of a lunatic is statutory and there is not a vestige of authority in the state of New York to maintain that which the wife of deceased was induced to assume. And it does not require much penetration to discern by whom and why she was so induced.

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Inasmuch as the principle upon which a licitation sale is rendered by Art. 1054 C.P.Q., in its results analogous to the effect of a sheriff's sale, our decision in the case of *Leroux* v. *McIntosh*(1), may be worth considering.

The appeal should be allowed with costs here and below and the judgment of the learned trial judge restored.

Since writing the foregoing the case has been re-argued but I see no reason for changing my opinion as the result thereof.

ANGLIN J.—We have heard this appeal argued twice. While careful consideration of it on each occasion has not entirely dissipated all doubt in my mind whether the conclusion of the learned trial judge—at all events in so far as it established the title of the plaintiffs other than Mary Maher—should not be restored for the reasons stated by him and by Mr. Justice Cross, I am not convinced that the several judgments entered in the partition proceedings, through which the defendant claims title, must not first be set aside. That relief, if sought, could not properly be granted in this action in which the parties to those proceedings are not before the court.

Although it is expressly provided by art. 1038 C.P.Q.

> that all the co-heirs or co-proprietors must be parties in the suit for a partition,

it is conceded that there was no representation whatever of the interest of Edouard Trudel, one of the co-heirs, in the partition proceedings until after the property had been sold and the record shews that

(1) 52 Can. S.C.R. 1; 26 D.L.R. 677.

neither he nor his foreign curatrix was made a party to them at any stage.

I am by no means satisfied that under the law of the Province of Quebec a foreign curatrix or committee of a lunatic, who, according to the law of the forum of her appointment, was not authorized to dispose of his real property, could, by her approval and ratification of proceedings already had for the sale of the lunatic's interest, vest it in the purchaser. If she could, I question whether the terms of the power of attorney given by her to Mr. Prefontaine would enable him to give such approval or ratification on her behalf, or to represent her in the proceedings subsequent to its date. He does not appear to have had any other authority. As a matter of fact, although Edouard Trudel's interest as a co-heir was brought to the attention of the court, as appears from the *cahier des charges*, as already stated, neither he, nor his committee or curatrix, was ever joined as a party to the proceedings.

It is only

after the observance of all the formalities above required,

including the joinder of all co-heirs or co-proprietors as parties, as prescribed by art. 1038, that the adjudication, under art. 1054 C.P.Q., transfers the property. Whatever there may be in the nature of an estoppel against the plaintiff, Mary Maher, the curatrix, by reason of her receipt and retention of the moneys representing her husband's share of the proceeds of the sale does not affect her co-plaintiffs. Nor, so far as I am aware, have their rights been extinguished by the expiry of any period of prescription.

Yet, while it may be a little difficult to understand on what ground a judgment pronounced in a proceeding to which neither he, nor any person representing or in

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privity of estate with him was a party, should be held so far binding on the owner of an interest in property that he is obliged to have it set aside before asserting his title in the courts against a person whom he finds in possession and claiming ownership, the procedure provided for by art. 1185 C.P.Q. *et seq.* would seem to indicate that this is necessary. On this ground alone, therefore, though not without hesitation, I concur in the dismissal of this appeal.

BRODEUR J.:—La présente action en partage est mal dirigée contre le défendeur Archambault. Ce dernier, d'après le demandeur, serait le détenteur d'un lot de terre qui appartenait jadis à la succession Trudel et qui aurait été vendu en 1893 par l'autorité judiciaire sur action en partage. La demanderesse prétend que cette vente judiciaire est nulle parce que son mari, l'un des héritiers, n'aurait pas été régulièrement mis en cause.

Il appert par les procédures qui ont amené cette vente qu'Edouard Trudel, le mari de la demanderesse, n'avait pas été assigné comme l'une des parties. Plusieurs années auparavant quelques-uns de ses frères avaient disposé de ses intérêts dans la propriété, vu qu'il était incapable de vaquer à ses affaires et qu'il était alors dans un asile d'aliénés. Le tout paraît avoir été fait par ses frères avec la meilleure foi du monde et dans son meilleur intérêt.

La part qu'il avait était de peu de valeur. Cela avait été fait évidemment pour éviter des frais. A tout événement lorsque le cahier des charges sur l'action en partage de 1893 fut préparé, on a dû découvrir que la vente des droits d'Edouard Trudel était nulle et alors on a inséré une clause dans les conditions de vente par laquelle les droits d'Edouard

Trudel à un onzième indivis de la propriété étaient reconnus. Des procédures furent prises par la demanderesse pour se faire nommer curatrice à son mari et pour retirer sa part dans le prix de vente.

La propriété fut vendue par la cour. La demanderesse toucha la somme qui représentait les droits de son mari. La propriété passa entre les mains de divers acquéreurs; et, suivant la demanderesse, le défendeur Archambault en serait maintenant le propriétaire. Elle le poursuit en partage en alléguant que le premier partage est nul.

Il est de principe élémentaire que les parties ne peuvent intenter une nouvelle action pour sortir de l'indivision tant que la nullité de la première vente n'est pas prononcée. Baudry-Lacantinerie, vol. 8, No. 3513; Demolombe, vol. 15, No. 518.

Maintenant contre qui cette action en nullité doit-elle être dirigée? Est-ce contre le détenteur de la propriété ou contre ceux qui ont été partie au partage?

Cette première vente constitue un contrat judiciaire qui, comme les autres contrats, est susceptible dans certains cas d'être annulé ou d'être nul. L'action en nullité attaque un contrat qui est présumé avoir réuni le concours de tous les héritiers. Je considère que cette action doit être dirigée contre tous les co-partageants. Duranton, vol. 7, No. 584; Demolombe, vol. 17, No. 457; Aubry & Rau, vol. 6, p. 577; Laurent, vol. x, No. 497.

Avant d'instituer la présente action, il était donc du devoir de la demanderesse de se présenter devant les tribunaux et de réclamer, en présence de ses co-héritiers, la nullité du contrat auquel ils ont été partie en 1895, lors de la première action en partage.

Il peut se soulever entre ces co-héritiers des débats

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de comptes et partages qui pourraient anéantir ses droits dans l'immeuble en question en cette cause-ci.

Il me semble que la demanderesse, avant d'attaquer Archambault, devra s'adresser à ses co-héritiers.

La Cour d'Appel a donc bien jugé en renvoyant son action.

L'appel est renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *Blais, Laverty & Hale.*
Solicitor for the respondent: *J. O. Lacroix.*

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*Apr. 19.
*May 7.

WILLIAM POWER AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

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

AND

THE QUEBEC HARBOUR COMMISSIONERS (DEFENDANTS) .... } RESPONDENTS;

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation—Crown grant—Clause of resumption—Extinction of right —Prescription.

The appeal from the judgment of the Exchequer Court of Canada (16 Ex. C.R. 104), was allowed, Davies and Idington JJ. dissenting.

In a grant from the Crown of a water-lot to the appellants' predecessor in title, it was provided for the resumption of it by the Crown at any time for purposes of public improvement upon giving twelve months' notice in writing of its intention to exercise that right.

Per Anglin, Brodeur and Lavergne JJ.—The Crown, by instituting expropriation proceedings in respect of this water-lot, elected not to exercise its right of resumption.

Such right, having been vested in the Quebec Harbour Commissioners under 22 Vict. c. 32, does not form part of the Crown domain, notwithstanding their public character and the nature of their trust.

Per Brodeur and Lavergne JJ.—This right, not having been exercised for a period of over thirty years, was extinguished by prescription under art. 2242 C.C. Anglin J. contra.

Per Davies and Idington JJ. dissenting.—The appeal should be dismissed as the appellants have no reason to complain of the amount of compensation allowed.

APPEAL from the judgment of the Exchequer Court of Canada(1), rendered in expropriation proceedings taken by respondent.

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*PRESENT:—Davies, Idington, Anglin and Brodeur JJ. and Lavergne J. *ad hoc*.

(1) 16 Ex. C.R. 104; 34 D.L.R. 257.

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The material circumstances of the case and the questions of law in issue on the present appeal are stated in the head-note and in the judgment now reported.

Lafleur K.C. and *St. Laurent K.C.* for the appellants.

Gibsone K.C. for the respondent His Majesty The King.

Dobell for the respondent the Quebec Harbour Commissioners.

DAVIES J. (dissenting).—I would dismiss this appeal and confirm the judgment of the Exchequer Court with costs with a small variation arising out of an admitted error of $2,000 made by the learned judge in allowing twice over for the 6,335 square feet, being the block conveyed to the R. C. Bishop.

The judgment should be reformed by deducting this $2,000.

IDINGTON J. (dissenting).—I do not see that the appellant has any reason to complain of the amount of compensation allowed and therefore would dismiss his appeal with costs.

ANGLIN J.—No appeal has been taken against the valuation of $20,049 placed by the learned judge of the Exchequer Court upon the expropriated wharves. The parties interested have also agreed that compensation for a strip of land comprising 720 square feet held by the appellants under an emphyteutic lease from the authorities of the Church of England should be determined as if the latter had no interest in it and that they and the appellants will subsequently arrange amongst themselves what should be the share of the Church in whatever amount may be awarded.

For a strip of land covered by water lying between the two parts of the water lot No. 2411 owned by the appellants, comprising 6,503 square feet, the Harbour Commissioners, whose title to it is no longer in dispute, have also accepted the compensation awarded, 25 cents per square foot, or $1,625.75. They are satisfied with the same valuation upon 2,220 square feet owned by them at the south end of lot 2415, amounting to $555. The Crown contests neither of these items.

Only two matters, therefore, form the subject of this appeal—the respective rights of the Harbour Commissioners and the appellants in the parallelogram, comprising 6,335 square feet, forming the south-east part of lot 2411, and the value of the interest of the appellants in the properties taken other than those above mentioned and of the appellants and of the Harbour Commissioners (if any) in the parallelogram of 6,335 square feet.

The question of title to this parallelogram depends upon the effect that should be given to a condition in the grant of it by the Crown to the appellants' predecessor in title, the R. C. Bishop of Quebec, providing for the resumption of it by the Crown at any time for purposes of public improvement on giving twleve months' notice in writing of its intention to exercise that right and on payment of the value of any improvements made on the property, and to a statute vesting certain lands, revenues, etc., in the Quebec Harbour Commissioners. The learned judge treated the right of resumption as subsisting at the date of the expropriation and held that it had passed to the Harbour Commissioners.

There are no improvements on this water lot. Instead of itself giving notice of intention to resume possession under the condition in its grant, or having

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the Harbour Commissioners do so, the Crown saw fit to include this parcel in proceedings for expropriation. It relies upon the condition, however, as minimizing the value of the appellants' interest. The appellants on the other hand assert that by instituting expropriation proceedings in respect of this parcel the Crown elected not to exercise its right of resumption; that it should therefore be deemed to have been waived; and that it had been extinguished by prescription.

As the property affected forms part of a public harbour and any public improvement for which the right of resumption might be exercised would be in the nature of harbour works, if that right were still vested in the Crown at the date of Confederation, it would, in my opinion, thereafter belong to the Crown in right of the Dominion. *Samson* v. *The Queen*(1).

I cannot assent to the suggestion of counsel for the Crown that the commencement of expropriation proceedings may be regarded as tantamount to the giving of notice of intention to exercise the right of resumption. I accept the view of the appellants that the pendency of these proceedings was inconsistent with the exercise of that right.

But up to the moment they were begun it was competent for the Crown (or the Quebec Harbour Commissioners) unless the right of resumption had been prescribed, to have given the requisite notice and to have acquired possession on the expiry of twelve months without payment of any compensation whatever. The appellants' interest would in that view have been merely a right to retain possession for twelve months. Why the Crown did not proceed in regard to this parcel by giving this notice itself or having the Harbour Commissioners give it is not now material. It is

(1) 2 Ex. C.R. 30.

incontestable that it is the value of the owner's interest immediately before the expropriation for which he is entitled to compensation. Upon all the evidence I should incline to the view that that interest, if subject to this condition of resumption, had no substantial value.

But was the right of resumption vested in the Crown or in the Quebec Harbour Commissioners? And, in either case, was it prescribed?

The learned trial judge has found that it passed to the Commissioners under 22 Vict., ch. 32, and against this finding the Crown has not appealed. The Harbour Commissioners, through their counsel, stated that they were willing to accept an equal division between themselves and the appellants of the $2,000 allowed as compensation for this parcel as suggested by the learned trial judge; and the Crown has not appealed against the amount awarded. The appellants could not hope to increase that amount if the right of resumption still existed at the date of the expropriation. Therefore, unless the condition for resumption has been extinguished by prescription, neither the amount of the compensation nor its apportionment need be further considered.

If the right of resumption had remained vested in the Crown, I should have been inclined to regard it as a real right declared imprescriptible by art. 2213 C.C. and therefore not within art. 2215 C.C. invoked by counsel for the appellants. But a right vested in the Quebec Harbour Commissioners, notwithstanding their public character and the nature of their trust, does not form part of the Crown domain.

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(1) Q.R. 1 S.C. 365.

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other hand, I find it difficult to understand how the appellants holding under a deed subject to the condition under consideration can claim its extinguishment by prescription. Having shewn their title under the Crown grant there is no room for the application of the law of prescription to establish an independent possessory title in them. *Labrador Co.* v. *The Queen* (1). Moreover a title so shewn helps to establish the defects of the possession which hinder prescription. Art. 2244 C.C. Had the condition entailed an obligation on the part of the grantee, that obligation would, perhaps, have been susceptible of negative prescription under art. 2210 C.C. by nonfulfilment of it during a period of thirty years, or during a shorter period under some other prescription provision. But I incline to think that the Crown's right of resumption did not impose any obligation upon the holder of the land. If there was anything that could properly be called an obligation contracted by the grantee and binding his successors in title, it was to surrender or deliver up possession of the property. That obligation would arise, however, only when twelve months had elapsed after notice had been duly given of intention to exercise the right of resumption and the other terms of the condition, if applicable, had been complied with. Since no one may prescribe against his title (art. 2208 C.C.) unless in the sense of freeing it from an obligation (art. 2209 C.C.), the possession of the appellants under their title derived from the Crown grant implied a constant and continued acknowledgement of the terms of that grant, including the right of resumption to which it was subject. For these reasons I should, with respect for my learned brothers who are of the contrary opinion, be disposed to accept the conclusion of the learned

(1) [1893] A.C. 104, at p. 122.

trial judge that the provision for resumption was not extinguished by prescription. I am also of the opinion that, as a right held by a public authority for the purposes of a "port," the right of resumption for public improvements, although it had ceased to form part of the Crown domain, should nevertheless be deemed imprescriptible under art. 2213 C.C.

The precarious title of the appellants to this considerable area at the south-east of lot 2411, and their lack of title to the strip already referred to as vested in the Harbour Commissioners lying between the two portions of the water lot in front of lot 2411 held by them and also to the 2,220 square feet at the south end of lot 2415 likewise owned by the Harbour Commissioners, materially affect the value of the remainder of their property as a wharf site. As shewn by exhibit 15 there is at low tide at the end of the existing wharf on the latter lot from 6 ft. 7 ins. to 7 ft. 7 ins. of water and at the end of the wharf on lot 2411 from 7 ft. 3 in. to 8 ft. 5 ins. of water. According to the evidence of the witness Leclerc a deep water wharf should have fourteen feet of water at low tide. The depth of water at the Harbour Commissioners' line in front of these lots appears to range from fourteen to eighteen and twenty feet. They seem to have been the most western properties on the north shore of the harbour on which it was thought worth while to build substantial wharves. Opposite the adjoining land to the west owned by the Lampsons, where the shore is indented by a cove, the depth of water at the Harbour Commissioners' line is materially less, especially along its western half. That property is therefore not at all so suitable as a site for wharves as that owned by the appellants. There also would seem to have been some question as to the title of the Lampsons to the water lot on the eastern part of their

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property, which probably affected the price of it. In placing a value on the appellants' property, however, the learned Judge of the Exchequer Court appears to have been influenced by the fact that the entire Lampson property had been acquired by the Crown at a price equal to about twenty cents a square foot. On the other hand, the Hearn property, which adjoins that of the appellants to the east, was valued in the Exchequer Court at $1.64 a square foot and in this court at 65 cents a square foot(1). We are told by Mr. Fraser, its purchasing agent, that the Crown paid for part of the Molson property, somewhat farther east, 65 cents and for the remainder 50 cents; for the Bélanger property 70 cents and for the Allan property 95 cents. These properties are of course nearer to the centre of shipping activities in Quebec. In some respects, however, they resemble the appellants' property more than that acquired from the Lampsons does.

It is no doubt extremely difficult to arrive with even approximate accuracy at the value of a property such as that with which we are dealing. Taking into account all its features—its advantages as well as its disadvantages—disclosed by the evidence, its value seems to me to have been somewhat underestimated. For the area of 49,394 square feet taken from the appellants (which includes the 720 square feet leased from the rector and churchwardens, but not the parallelogram containing 6,225 square feet for which the sum of $2,000 was allowed separately) I think an average of 45 cents a square foot, or $22,027.30, approximately represents its value at the date of expropriation. In arriving at this figure I have, of course, considered all the evidence and I have not

(1) 55 Can. S.C.R. 562, at p. 585.

lost sight either of the materially higher prices offered by the Crown in its information of 1911, afterwards withdrawn, or of the much lower prices paid by the appellants when purchasing the property in 1901. I would vary the judgment in appeal accordingly and would fix the compensation of the appellants as follows:—

For 49,394 sq. ft. of land	$22,227.30
For 6,335 sq. ft. (½)	1,000.00
For wharves	20,049.00
Total	$42,276.30

The Harbour Commissioners are entitled;

For strip comprising 6,503 sq. ft. at 25 cents, to	$1,625.75
For 6,335 sq. ft. at S.E. end of lot 2411 (½), to	1,000.00
For 2,220 sq. ft. at S. of Lot 2415	555.00
Total	$3,180.75

Both sums bear interest from the 8th Nov., 1913.

BRODEUR J.:—La principale question qui se présente dans cette cause est de déterminer la valeur du terrain exproprié. Il y a aussi une question de titre pour une partie de ce terrain; mais, au point de vue pratique, cette dernière question n'a pas l'importance de la première.

Le terrain exproprié fait partie des lots 2411 and 2415 du cadastre de Québec, et il est exproprié pour la construction du Transcontinental National. Il se trouve sur les bords du St. Laurent, dans le Hâvre de Québec, et il consiste surtout en quais et en lots à eau profonde. Il se faisait autrefois à cet endroit un commerce de bois considérable; mais depuis plusieurs

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années ces quais ont été peu utilisés. Nous avons eu dans une cause de *Hearn* v. *The King*(1), à examiner la valeur de terrains situés à proximité de celui dont il est question en la présente cause. Même l'un des dix lopins de terre expropriés dans cette cause de Hearn était voisin à l'est du No. 2411.

Par la preuve qui a été faite dans la cause de Hearn et que je retrouve dans cette cause-ci, il apparait que des propriétés semblables mais un peu plus rapprochées du centre de la ville et appartenant aux successions Molson & Bélanger et à la Compagnie Allan ont été vendues au Gouvernement. Celle de la succession Molson, qui se trouvait la plus rapprochée des propriétés Hearn, a été vendue en partie pour 65 cents du pied. Me basant sur cette dernière vente, j'ai été d'opinion qu'on devait accorder 65 cents dans cette expropriation Hearn.

Dans la présente cause, notre attention a été particulièrement attirée sur la valeur de propriétés situées plus à l'ouest, savoir celles du Séminaire de Québec, de William Power, de A. O. Falardeau, de Frank Ross, de la succession Dobell, de la Marquise de Bassano et de la succession Lampson, qui ont été payées de cinq cents du pied à vingt cents du pied. Mais ces dernières propriétés n'étaient pas aussi bien situées pour les fins de la navigation que la propriété en question dans la présente cause et, de plus, celle qui se trouve la plus rapprochée de cette dernière a été vendue au prix de 20 cents, mais il ne s'agissait que d'une vente sans garantie. Les vendeurs ne paraissaient pas avoir un titre parfait.

La Cour d'Echiquier a accordé une somme de 30 cents du pied aux appelants en la présente cause. Je crois qu'en prenant en considération les ventes

(1) 55 Can. S.C.R. 562.

ci-dessus mentionnées, ainsi que le jugement rendu dans la cause de Hearn, je serais d'opinion que les appelants seraient perfaitement indemnisés en leur accordant 45 cents du pied, ce qui ferait pour les 55,729 pieds de terrain $25,078.05. Il faudrait ajouter à cela la somme de $20,049 pour les quais qui leur a été accordée par la cour inférieure, que je trouve raisonnable. Cette dernière somme est basée sur le prix que nous avons accordé pour les quais dans la cause de Hearn. Ces deux sommes réunies de

$25,078.05
et de 20,049.00
forment
un total
de

$45,127.05

Cette somme correspond à peu près à celle qui avait été offerte et acceptée par les parties en 1911. A cette dernière date, en effet, la Couronne avait offert aux appelants, devant la Cour d'Echiquier, une somme de $42,597.00 pour 45,000 pieds de terrain. Cette somme avait été acceptée par les expropriés.

Mais en 1912 l'expropriation fut discontinuée et les propriétés remises à leurs anciens propriétaires conformément aux dispositions de la loi. Plus tard, la Couronne a décidé de les exproprier de nouveau.

La preuve au dossier n'est pas bien précise quant à la différence de la valeur de ces terrains en 1911, date de la première expropriation, et en 1913, date de la seconde; mais il parait y en avoir une légère.

Reste maintenant la question du droit de propriété quant à la partie sud-est du No. 2411. Les lettres patentes émises par le Couronne en 1854 stipulaient que Sa Majesté avait le pouvoir, en donnant un avis

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de douze mois, de reprendre cette propriété pour des fins publiques en payant au propriétaire la valeur des améliorations qu'il y aurait faites.

L'Intimé dit maintenant qu'aucune indemnité ne devrait être accordée pour ce morceau de terre, vu qu'il n'y a eu aucune amélioration de faite et que la Couronne désire le reprendre. Si on avait procédé sous les dispositions de ces lettres patentes à exercer ce droit de rachat ou de reprise, la prétention de la Couronne pourrait avoir beaucoup de force; mais on n'a pas jugé à propos de réclamer en vertu de ce droit de reprise. On a procédé suivant les dispositions de la loi des expropriations et ce sont alors les principes de cette loi qui doivent s'appliquer.

Cette question s'est présentée devant la Cour d'Echiquier il y a plusieurs années dans une cause de *Samson* v. *The Queen*(1), et M. le Juge Burbidge a alors décidé que, les procédures ayant été prises en vertu de la loi des expropriations, l'indemnité devrait être basée sur les principes de cette loi.

D'ailleurs, ce droit de reprise ou de rachat existe-t-il encore? Si ce droit était encore entre les mains de la Couronne, je serais probablement venu à la conclusion qu'il est encore en vigueur et qu'il peut être exercé, ou, du moins, qu'il devrait être pris en considération en déterminant l'indemnité (art. 2213 C.C.).

Mais ce droit, ainsi qu'il a été décidé par la Cour d'Echiquier, a été cédé et transporté aux Commissaires du Hâvre de Québec par l'Acte de 1859, 22 Vict. ch. 32, et ces terrains, ainsi que les droits qui y étaient attachés, ont cessé de faire partie du domaine public de Sa Majesté. Il a été décidé par la Cour d'Echiquier que ce droit de reprise a été cédé aux Commis-

(1) 2 Ex. C.R. 30.

saires du Hâvre par la loi de 1859 et la Couronne n'a pas appelé de cette partie du jugement.

Ce droit de reprise est-il prescrit? La Commission du Hâvre peut-elle réclamer une partie de l'indemnité pour la valeur de ce droit?

En vertu de l'article 2242 du Code Civil, tous les droits et actions dont la prescription n'est pas autrement règlée par la loi se prescrivent par trente ans. Ce droit pour les Commissaires du Hâvre de reprendre ce terrain a commencé à exister pour eux en 1859; et, ne l'ayant pas exercé pendant les trente années qui ont suivi, il est donc éteint par le laps de temps et se trouve prescrit.

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L'indemnité qui a été accordée par la Cour d'Echiquier aux Commissaires du Hâvre pour la valeur de ce droit ne leur appartient pas et les appelants ont le droit de réclamer la valeur entière de ce lot.

L'appel doit être maintenu avec dépens. Les appelants devraient avoir leur indemnité portée à la somme de $45,127.05.

LAVERGNE J. *ad hoc.*—I am of opinion to maintain the appeal with costs and I concur in the notes of judgment of Mr. Justice Brodeur.

Appeal allowed with costs.

Solicitors for the appellants: *Pentland, Stuart, Gravel & Thompson.*

Solicitors for the respondent His Majesty The King: *Gibsone & Dobell.*

Solicitor for the respondents the Quebec Harbour Commissioners: *A. C. Dobell.*

(1) Q.R. 1 S.C. 365.

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*May .
*June 10.

THE MERCHANTS BANK OF CANADA (PLAINTIFF) ..... } APPELLANT;

AND

O. H. BUSH (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Guarantee—Bank and banking—Illegal interest charged to principal debtor—Variation of contract—Liability of guarantor.

A director of an incorporated company gave a written guarantee that he would pay any undebtedness of the company to a bank up to the sum of $3,000. The bank, in the course of its dealings with the company, charged in its books interest at 8% contrary to the provisions of the "Bank Act," but, so far as appears, without the knowledge of the company. The amount of the principal and interest legally due by the company to the bank exceeded the amount of the respondent's guarantee.

Held, that the charging of the illegal interest did not constitute a variation in the terms of the contract of guarantee; and the respondent was not thereby discharged from liability to the bank for the amount legally due.

APPEAL from a decision of the Court of Appeal for British Columbia(1), affirming, by an equal division of the court, the judgment of Hunter J. at the trial and dismissing the action of the plaintiff with costs.

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

F. E. Meredith K.C. and *D. L. McCarthy K.C.* for the appellant.

Eug. Lafleur, K.C., and *Robert Cassidy, K.C.*, for the respondent.

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

(1) [1918] I.W.W.R. 383; 38 D.L.R. 499.

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THE CHIEF JUSTICE:—There are two points raised by the defence which fall to be decided on the present appeal; and first it is contended that on the pleadings the plaintiff—appellant—has not alleged that the principal debtor has made default. I am, however, of opinion that the allegations in the statement of claim which contain an averment that the principal debtor is indebted to the plaintiff and that payment has been duly demanded of the surety sufficiently state the claim.

It is said in the second place that the surety is not to be held liable because the bank charged the principal debtor upon advances made to him interest at the rate of 8% whereas the "Bank Act" provides that banks may take interest not exceeding 7% but no higher rate of interest shall be recoverable by the bank.

The point is not without difficulty, and if I have come to the conclusion that it cannot be allowed it is only upon the special circumstances of the case. For if the transaction were simply a loan of $3,000 and the bank had charged an exorbitant rate of interest there would be great force in the argument that the surety could say that he did not intend to guarantee a money-lending transaction, but was entitled to rely on the bank only charging interest at a rate which they were legally empowered to do, that is to say

not exceeding 7% and the excess beyond which at any rate they could not recover.

But that is not such a transaction as the one with which we are dealing in the present case. The surety here guarantees to the bank that the principal debtor will pay to the bank all moneys which may at any time be due to the bank from him.

Now, of course, it is open to the surety to shew that the moneys alleged to be due from the principal debtor

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are not recoverable by the bank, but that is not the point of the defence which is, not that there are not moneys legally due and recoverable from the principal debtor, but that because in the course of the dealings between him and the bank the latter has made a charge which it was not entitled to make though this be outside and beyond the sum sought to be recovered from the surety.

I do not think the transaction between the bank and the principal debtor can be called in question in this way by the surety. If he chooses to give a general undertaking to become liable for whatever may at any time be due to the bank from the debtor he must accept the consequences of their dealings which he can neither claim to control nor dispute as discharging his liability.

And the mere fact that advances and charges were made, which by statute are made not recoverable, cannot in the absence of any proof of prejudice to the surety be any ground for discharging his liability for the ultimate debt properly due.

The "Interest Act" provides that on any money secured by mortgage made payable on the sinking fund plan no interest whatever shall be recoverable unless the mortgage contains a statement shewing the amount of the principal money advanced and the rate of interest chargeable thereon. The fact that the bank had made an advance on such a mortgage on which no interest whatever was recoverable though the rate of interest was not excessive could not be ground for discharging the surety.

I think that the respondent must be held liable for $3,000 the amount to which his guarantee is limited with interest at 6% as also provided and I would therefore allow the appeal with costs.

DAVIES J.—This action was one brought by the bank against respondent Bush to recover the sum of $3,000 due upon a continuing guarantee given by him to the bank for the payment to it

of all moneys which may at any time be due to the bank from the Seafield Lumber and Shingle Co.

with provision that the sureties' liability should not exceed $3,000 with interest at 6% from the time of payment being required.

The only defences set up by the defendant were that the bank had not specifically proved the debt due to it and secondly that in its dealings with the company the bank had charged interest at the rate of 8%, which was contrary to the provisions of the "Bank Act."

As to the proof of the debt being due and not paid to the bank, I have only to say that I agree with the Court of Appeal in its holding that the pleadings admitted both facts, the debt being due and the company's default in not paying it. Mr. Lafleur's contention was that the moment the customer paid the illegal rate of interest to the bank that fact constituted a new contract between him and the bank and discharged the guarantor. But there was not a scintilla of evidence that any payment of the illegal interest charged had been made by the company with knowledge of the illegal rate. The only evidence on the point was the admission at the trial by the bank that it had charged in its books interest at 8%, but whether to the knowledge or not of the company does not anywhere appear. In my judgment, therefore, there was no change or variation in the contract as guaranteed which could discharge the guarantor.

The excess of interest charged could not possibly in any view affect the amount of $3,000 guaranteed

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because the amount of the items, principal and interest, admitted as properly charged and due by the company to the bank greatly exceeded the limited amount of the respondent's guarantee.

The charging of an excessive rate of interest would only in an accounting between the bank and the guarantor have the same result as charging improperly an item of principal. In either case they would be struck out. As I have pointed out already, apart altogether from any excess of interest the balance of account due by the company to the bank exceeded largely the limit of the guarantee and the guarantor was not and could not be prejudiced by the excess of interest charged.

I would therefore allow the appeal with costs and direct judgment to be entered for the amount guaranteed, $3,000, with interest as provided in the guarantee and with costs in all the courts.

IDINGTON J.—The respondent was a shareholder in, and director of, a corporate company known as the Seafield Lumber and Shingle Company, Limited, carrying on business in British Columbia, who, with others, gave appellant at Nanaimo, on the 17th November, 1914, their joint and several guarantee that said company would up to a named sum pay appellant all moneys which might at any time be due to it from said company.

The guarantee was of the usual kind taken by banks when requiring a customer to furnish some guarantor for the payment of the ultimate balance of the customer's indebtedness. In this case, the liability was limited to three thousand dollars and six per cent. per annum thereon from the time of payment being required.

The company went into liquidation in February, 1916, and then owed over $4,900 to the appellant.

This action was brought by appellant to recover from respondent the sum of $3,000 on account of said indebtedness.

The appellant had been charging the company eight per cent. per annum on its loans.

The learned trial judge held that in law the respondent was thereby discharged from his guarantee.

This view was also entertained by Mr. Justice Eberts in the Court of Appeal but no one else there ventured to support it.

Mr. Justice Martin held the appeal should be dismissed because sufficient proof had not been adduced of the indebtedness in question and declined to express any opinion upon the other point as in that view he had taken it was immaterial. The Chief Justice and Mr. Justice McPhillips held that appellant was entitled to succeed. In the opinion of the latter, he suggests that the charging by banks of a higher rate of interest than the maximum statutory rate may be said to be matter of common knowledge. I think he is right in so assuming and especially so in regard to dealings in the western provinces. I should be much surprised to find any business man, of the standing which the admitted facts indicate respondent to have been, ignorant of such a common practice. The respondent in his examination for discovery denies that he knew what rate was being charged by appellant to the said company.

I accept his denial implicitly for he seems to have retired from business; but he was not asked as to his knowledge of the usual rate, as he doubtless would have been, had he been able to deny all knowledge of such rates as eight per cent. being originally required. There

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is not the slightest indication in the guarantee itself or, in the meagre evidence we have relative to the surrounding facts and circumstances, that can entitle us to read into the documents any implication of a condition relative to the limitation of the rate of interest to be charged.

No business man signing such an instrument, in recent years, can ever have conceived that the bank could not, if it chose, exact as a condition of its making advances a higher rate than seven per cent.

The well-known case of *The Union Bank of Canada* v. *McHugh*(1), referred to at the trial herein, and on argument here, had been decided in this court over three years before the guarantee in question was given. And if my memory serves me, I think cases preceding that by many years which bore the mark of dealings in what the learned trial judge referred to as killing rates had been presented for our consideration. There never was any serious doubt as to the permissive character of the provisions in the "Banking Act" and bankers in the zones where it was necessary to charge more than seven per cent. deducted from the advances made accordingly, or got out of business.

The question of what could be collected on overdue amounts gave rise to a difference of opinion here and was set at rest by their Lordships in the Privy Council in the *McHugh Case*(2), before this guarantee was given.

I therefore am unable to understand why any one, signing such documents thereafter, could pretend they were entitled to read into that writing they had so signed, a something not found there.

Nor can I find any legal principle upon which a surety could claim a discharge by virtue of any such

(1) 44 Can. S.C.R. 473. (2) [1913] A.C. 299; 10 D.L.R. 562.

supposed implication. If we refer to the cases cited there is, on examination, nothing found to maintain such a proposition of law. If we turn to DeColyar on Guarantees to find something amongst the many means, tabulated by the author, whereby a surety may be discharged, we can find nothing to give us any hint of a suggestion upon which such a proposition can rest.

In short, there was neither fraud nor variation of the contract or the contractual relation for which the respondent stood as guarantor.

The improvidence of the principal is not a legal basis for such discharge unless it has been stipulated against and is in truth the reason for the banker shifting the burden thereof, in part at least, on to him willing to become a guarantor.

To maintain the proposition that in face of an elaborate document, framed to meet every hitherto known contingency whereby a surety might escape answering for the ultimate balance due by a principal, or the part of it he had undertaken, we must find therein an implied condition, agreed to by appellant, and broken so soon as signed and accepted.

The statement relied upon for proof of the rate of interest being eight per cent. expresses the fact that such rate

had been charged the company right along.

Is the suggestion of an implied condition under such circumstances not too absurd for acceptance?

The examination of respondent for discovery as well as the frame of the pleadings, relieves me from any discussion of the point made as the proof of indebtedness.

This appeal should be allowed with costs throughout and judgment be entered for the amount claimed

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with interest at six per cent. per annum as stated in guarantee.

ANGLIN J.—I agree with the view taken by the majority of the learned judges of the Court of Appeal as to the sufficiency of the allegation in the plaintiff's claim of the indebtedness and default of its principal debtor and as to the effect of the absence of any specific denial thereof in the plea of the defendant.

The only defence set up is an alleged variation of the contract between the bank and its debtor in regard to the rate of interest payable by the latter, which the defendant asserts has discharged him as a surety. He contends, I incline to think with reason, that his guarantee must be presumed to have been based on a contract between the principal debtor and the bank not *ultra vires* of the latter under the "Bank Act," and, therefore, importing an agreement for interest at a rate not exceeding 7%. The variation alleged is based on an admission of counsel made at the trial that the rate charged against the principal debtor in the books of the bank has been 8%.

There is no evidence of any assent by the debtor to this charge or that he was cognizant of it. No agreement to pay it would have bound him except in so far as he had actually paid it or had assented to a stated account containing items of interest charged at that rate. *McHugh* v. *Union Bank*(1). There is no proof of any such payment or account stated. Therefore no binding agreement between the principal debtor and the bank to vary the terms of the contract guaranteed has been shewn, and in order that it hould effect the discharge of the surety an agreement for a variation in the terms of the contract of the

(1) [1913] A.C. 299; 10 D.L.R. 562; 44 Can. S.C.R., 473.

principals must be legally binding. Both the debtor and the guarantor would have been entitled to have the account of the bank taken on a footing of interest at 7%—or, it may be, at 5%.

Had actual payment of interest to the bank by the primary debtor at a rate exceeding 7% been shewn to have been made subsequently to the giving of the defendant's guarantee, it may be that he would have been discharged, unless, indeed, it should be clearly established that the guarantor's risk—the likelihood of his being called upon under the guarantee—was not thereby appreciably affected.

Solely on the ground that the defendant has failed to shew any variation in the terms of the guaranteed contract legally binding upon either the primary debtor or himself I would allow this appeal with costs here and in the Court of Appeal and would direct the entry of judgment in the plaintiff's favour for the amount claimed by it with costs of this action.

BRODEUR J.—The action by the appellant is on a guarantee given by the respondent to the effect that if a certain company did not pay to the bank its indebtedness the respondent as guarantor would pay to the extent of $3,000.

The contract of guarantee provided that the liability would cover not only the capital sums advanced by the bank to that company but also all interests, costs, charges for commissions and other expenses which the bank, in the course of its business, could charge in respect of any advances or discounts made to the principal debtor.

It appears that the bank, in the course of its dealings with the customer, charged an interest of 8%, contrary to the provisions of the "Bank Act" which authorized an interest of 7%.

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The amount representing that excess of rate could not be large for the advances covered a short period of time, and it seems very clear that the amount due by the customer was much larger than $3,000 when the action on the guarantee was instituted, even after having deducted that excess of rate of interest.

The respondent claims that he is discharged from any liability because the bank charged 8% instead of 7% on the advances made to the principal debtor.

There is no doubt that the bank had no right to charge more than 7% and the contract between the bank and its customer as to interest is void and the bank could recover only statutory interest, as it was decided in the case of *McHugh* v. *Union Bank of Canada* (1). The guarantor may, when he is called upon to pay the debt of the principal debtor, refuse to pay more than the statutory rate of interest. He could only be compelled to make good what the company owed up to the sum of $3,000.

There is no evidence that when the contract of guarantee was signed there was a contract between the bank and the company. But later on, advances were made to the latter; and if, in making those advances, some illegal thing has been done, it does not render the contract of guarantee null and void; but the advances made as a result of such an illegal thing could not be claimed from the guarantor.

It is said, however, that it was an implied part of the contract of guarantee that no larger rate of interest than 7% should be charged, and that the bank had varied that contract.

I fail to see in this contract any implied covenant as the one suggested. The parties, on the contrary, have formally stipulated as to the interest; and it is

(1) [1913] A.C. 299; 10 D.L.R. 562.

a well-settled principle of law that the courts will not by inference insert in a contract implied provisions with respect to a subject which the contract has expressly provided for. Beal, Legal Interpretation, p. 129.

Besides assuming that such an implied covenant would exist in this contract, the alteration would require to be substantial in order to discharge the surety. *Holme* v. *Brunskill*(1).

For these reasons, the bank should succeed and its appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Abbott, Macrae & Company.*
Solicitors for the respondent: *McKay & O'Brian.*

(1) 3 Q.B.D. 495.

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*May 7, 8.
*May 14.

THE CITY OF VICTORIA.....APPELLANT;

AND

FRANCES J. MACKAY.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Statute—Interpretation—Directory or mandatory provision—By-law—Publication.

By s.s. 142, s. 50, of the "Municipal Clauses Act" of British Columbia, it is stipulated that "every by-law passed under the provisions of this sub-section shall, before coming into effect, be published in the *British Columbia Gazette* and in some newspaper published in the municipality."

Held, Fitzpatrick C.J. and Brodeur J. dissenting, that this provision is mandatory and not merely directory and the publication of the by-law is a necessary condition to its validity.

Per Fitzpatrick C.J. and Brodeur J.:—The by-law is valid whether published or not, but it shall be published before coming into effect.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) rendered upon a special case stated by arbitrators in expropriation proceedings between the appellant and the respondent.

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

C. A. McDiarmid for the appellant.
H. H. MacLean K.C. for the respondent.

THE CHIEF JUSTICE (dissenting):—The city, for the purpose of a street improvement, passed a by-law on the 29th May, 1910, for the expropriation of certain land belonging to the respondent. All necessary proceedings were taken, except that the by-law was not

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

(1) 39 D.L.R. 450.

published, nor registered, in the Land Registry Office in the district in which the land is situate, as provided for in sec. 50, sub-sec. 142 of ch. 32 of the statutes of B.C., 1906.

Three arbitrators were duly appointed to determine the compensation payable to the respondent, and having heard the evidence and counsel for both parties they made an award, subject to the opinion of the court, whether the city was liable to pay the compensation.

The city from motives of economy desires to abandon the intended scheme of improvement and has set up as a ground of non-liability to pay the compensation the fact that the by-law was never published as aforesaid.

The concluding sentence in sub-sec. 142 of sec. 50 is all that is material, and it reads:—

> Every by-law passed under the provisions of this sub-section shall, before coming into effect, be published in the *British Columbia Gazette* and in some newspaper published in the municipality.

The contention on behalf of the appellant is that this means that the by-law shall not become effective until such publication has been had, in other words, that the statute must be read as if it had said:

> No by-law passed under this sub-section shall come into effect until it has been published, etc.

I do not think this is a legitimate or even possible interpretation of the meaning of the words used. I think they necessarily contemplate the coming into effect of the by-law whether published or not and they only direct that before it does come into effect it shall be published. This seems to me the natural interpretation to put upon the words used, and not only reconciles the sub-section with section 86, but is just what we should expect in view of the provisions of that section, which provides that

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The Chief Justice.

every by-law passed by the council of any municipality * * * shall be registered in the County Court * * * and such by-law shall take effect and come into force and be binding on all persons as from the date of such registration.

It would require clear words to override this absolute and general provision and we have not got them because it is perfectly possible to read sub-section 142 as if after the words

before coming into effect

there were added

as by section 86 hereinbefore provided.

There is no validity in the claim advanced by the appellant that the upholding of the award would be a hardship to the local property improvement owners, which the quashing of it certainly would be to the respondent. The expropriation was made by the representatives of the former and must be considered as if it were their own act. Moreover, it is a salutary rule in the courts that private individuals ought to be protected from oppression at the hands of corporations with whom they have to contend on such unequal terms. A corporation is vested with the extreme power of expropriating private property only in the necessary interests of the public, and it certainly would be oppressive if it could take all necessary proceedings so far as the owner dispossessed is concerned and then avoid payment of the compensation by pleading its own neglect to observe procedure directed by the statute the due observance of which can hardly be a matter that individual owners are under obligation to ascertain or even to have knowledge of. *Nowell* v. *Worcester*(1); Maxwell on Statutes, 5th ed., p. 598, says: When nullification would involve general inconvenience or injustice to innocent persons, or advantage

(1) 23 L.J. Ex., 139.

to those guilty of the neglect, without promoting the real aim or object of the enactment, such an intention is not to be attributed to the legislature.

DAVIES J.—This was a special case stated by arbitrators for the decision of the court and the question was whether, under the special facts as stated by them, they had power to make an award of compensation for lands of the respondent alleged to have been expropriated by the city under a by-law passed by the council for a proposed widening of a public street.

The decision of the trial judge, Mr. Justice Murphy, was that the arbitrators had such power—that the city was liable to pay the compensation awarded.

On appeal the court was equally divided and the judgment of the trial judge accordingly stood.

I think this appeal must be allowed and that the question submitted should be answered that the arbitrators had no power to make an award of compensation because the by-law authorizing the widening of the street and the necessary expropriations therefor had never been published.

The determination of the question submitted depends upon the construction of sub-sec. 142 of sec. 50 of "The Municipal Clauses Act, 1906," empowering municipal councils from time to time to make, alter and repeal by-laws on a number of specified subjects. The question is whether sub-sec. 142 of sec. 50 was merely directory in its provisions, as to publication of a by-law, or was mandatory. I have no hesitation in reaching the latter conclusion and in holding that publication is essential to make a by-law under that sub-section valid. The latter part of the section provides:—

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Every by-law passed under the provisions of this sub-section shall, before coming into effect, be published in the *British Columbia Gazette* and in some newspaper published in the municipality, or if no newspaper is published in the municipality, then in a newspaper circulating in the municipality, and a certified copy thereof shall be filed in the Land Registry Office of the district in which the land affected by the by-laws is situate.

I cannot think of language which would more clearly carry out the evident intention of the legislature than that used. It provides that

before coming into effect

every by-law passed under the provisions of the sub-section should be published in the way and manner provided. Publication was made a condition precedent to the by-law coming into effect.

The 5th section provided (*inter alia*) for the establishing, opening and widening of roads, streets, squares, etc., and for expropriating, taking, or using any real property in any way necessary or convenient for any of the specified purposes without the consent of the owners.

It was not the owners alone who were interested in the exercise of the powers granted to the corporations in this section. The great body of the municipal ratepayers who had to pay the moneys necessary to carry out the improvements mentioned were interested, and it was no doubt to bring to their notice before it became valid any by-law passed by the municipal council under the sub-section that the language was used providing that "before coming into effect" the by-law should be published as provided.

For us in this court to say that any by-law passed under this sub-section was valid before and without publication, where the legislature has said that "before coming into effect" it must be published, seems to me to amount to legislation on our part and

not simply construction of legislation enacted by the proper authority.

I would allow the appeal with costs.

IDINGTON J.—The question raised by this appeal turns upon the meaning or want of meaning to be found in sub-sec. 142 of sec. 50 of the "Municipal Clauses Act" of British Columbia, passed in 1906.

Said section 50, which evidently was intended to define with great particularity the subjects respecting which a municipal council might make by-laws and the limitations of power it might so exercise, reads as follows:—

50. In every municipality the council may, from time to time, make, alter and repeal by-laws for any of the following purposes or in relation to matters coming within the classes of subjects next hereinafter mentioned, that is to say:—

There follow this introductory enactment one hundred and ninety sub-sections, of which sub-section 142 is as follows:—

(142) For establishing, opening, making, preserving, improving, repairing, widening, altering, diverting or stopping up roads, streets, squares, alleys, lanes, bridges, or other public communications within the boundaries of the municipality or the jurisdiction of the council, and for entering upon, expropriating, breaking up, taking or using any real property in any way necessary or convenient for the said purposes without the consent of the owners of the real property, subject to the restrictions contained in sections 251 and 252 of this Act. Every by-law passed under the provisions of this sub-section shall, before coming into effect, be published in the *British Columbia Gazette* and in some newspaper published in the municipality, or if no newspaper is published in the municipality, then in a newspaper circulating in the municipality, and a certified copy thereof shall be filed in the Land Registry Office of the district in which the land affected by the by-law is situate.

It has been held below that the last sentence of this sub-section was merely directory and hence null. Those so holding do not use this language, but I respectfully submit that is the effect of the decision,

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if allowed to stand. In short the imperative words therein

shall before coming into effect

are given no effect to.

The sentence in which these words occur was an amendment to the "Municipal Act" in 1903. If intended to be entirely directory it should never have contained these words. As a purely directory enactment, having nothing in the way of sanction to secure its observance, once these words are deleted, it would stand as a unique piece of legislation.

In argument I pressed counsel for respondent to suggest any possible purpose the legislature could have had in view in such an enactment if the argument that these words were not to be given any operative force should stand good. I am yet without any explanation or suggestion of anything the legislature could have had in view if the words in question were not to be given any effect.

I think the plain ordinary meaning of the language used requires us to say that the by-law, so called, now in question, which has been acted upon, never was effective as a by-law and never should have been acted upon or given any appearance of vitality.

It seems idle to disregard the scope and purpose of section 50 expressly designed to define the exact limitations and conditions to be observed in exercising effectively the by-law making power, and rely upon section 86 of the Act appearing among others under the caption "Passage and Authentication of by-laws" which deals with filing of by-laws in the County Court and incidentally uses the words:—

shall take effect and come into force and be binding on all persons as from the date of such registration, etc.

and treat these words because now in same statute as predominant over any others therein. Surely it was quite competent for the legislature to impose any terms it chose to declare as preliminary to any by-law becoming effective. And if section 86 at first blush is misleading and puzzling when we find the restriction in sub-sec. 142 of sec. 50 was enacted as an amendment thereto, long after section 86 had stood as law with the words just quoted, we must doubtless conclude the amendment was designed to restrict all else, including, if necessary, this older section 86 in its operation so far as related to by-laws of the class named in sub-section 142.

To test that reasoning further and see if this language used in section 86 can be applied in the way suggested, instead of presupposing any by-law it refers to as an already effective and valid by-law, let us follow the subject under the caption of "Quashing by-laws," as found in section 89 *et seq.*, and see where it would land us.

We find that so-called by-laws registered in the County Court may possibly have been null and void and liable therefore to be quashed.

The reading of section 86 in the imperative and wide sense urged upon us by counsel for respondent as absolutely effective, would render it impossible to quash any by-law no matter how absurdly beyond the competence of the council, once it got registered in the County Court.

The mere statement of such a proposition shews how untenable it is.

The language used in section 86, relied upon herein for respondent, evidently does not and never was intended to mean that whatever form of by-law is filed in the County Court it is effective.

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Publicity, and the furnishing of an accessible record, fixing the starting point of time when, but not before, any by-law might become effective, would seem to have been the purpose of enacting section 86, requiring registration in the County Court of all by-laws which had passed through certain named formalities.

Whatever the object to be accomplished thereby, or however clumsy and inapt the language used, matters little for our present consideration.

It seems very clear that the amendment of section 142 by adding the provision now therein for publication and registration of any of the by-laws of the class named therein in the Land Registry Office, was intended to fit the law to the reasonable needs of those concerned in their dealings with real estate, affected by such by-laws, and render it quite safe for them to rely upon the real estate record alone.

The absurdity of requiring such persons to watch the County Court Office instead of the usual record in the Land Registry Office was put an end to by the amendment and doubtless was so intended.

With great respect I submit it was not merely directory but imperative in its terms, and constituted a much needed condition precedent to the operation of any by-law of the class in question.

And if regard had been paid by respondent to its terms she need not have appointed an arbitrator and brought all the trouble that has followed the doing so upon herself.

The appellant has done no wrong to any one by refraining from proceeding to the publication and registration and thereby abandoning its project when found improvident.

The clerk of the municipality may have erred in

sending the notice he did, but five years' lapse of time should have suggested it was a mere error.

The legislature also may have erred in letting such a curiosity as section 86 presents stand in its present shape.

I submit, however, none of these things present any reasonable ground for our punishing other owners of real estate by depriving them of the protection of a beneficent amendment to the law.

That amendment never having been observed the question submitted by the arbitrators should be answered in the negative.

I therefore think the appeal should be allowed with costs throughout.

ANGLIN J.—At the threshold of this appeal we are confronted with the contention that this proceeding should not be entertained because the validity of the submission and of the appointment of the arbitrators and their authority, which they have seen fit to make the subject of "a special case for the opinion of the court," declaring their award to be conditional upon their right to make it being upheld, is not a

question of law arising in the course of the reference

within the meaning of sec. 22 of the "Arbitration Act," R.S.B.C., 1911, ch. 11. I rather incline to the view that it is not. From the fact, however, that there is no allusion whatever to this objection in the judgment delivered in the provincial courts, or in the factums filed here, I infer that it was not raised below. Counsel for the respondent took it in this court only after he had fully presented his argument on the merits, and had some reason to think the court was not in his favour. Since the result of deciding that the objection to the status of the special case should prevail might be that

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the condition which the arbitrators have attached to their award would alone be held bad and the award itself in favour of the respondent, shorn of that condition, absolute, it will probably be better, under the circumstances, to deal with the question submitted on the assumption that it is properly before the court. That question is whether the publication and the filing in the Land Registry Office of by-laws of the special class within it, which sub-sec. 142 of sec. 50 of the "Municipal Clauses Act," 1906, ch. 32, prescribes shall take place

before (their) coming into effect,

are thereby made conditions of their efficacy, or whether this is merely a directory provision, non-compliance with which does not render such by-laws invalid or prevent their being in force.

The by-law was passed in May, 1911. Notice of expropriation was given in June. The respondent promptly presented her claim for compensation, which was rejected; and the council named an arbitrator. No further action was taken until 1916 when the respondent also named an arbitrator, and a third arbitrator was named either by the two, as stated by the appellant, or by a Judge of the Supreme Court, as averred by the respondent. The city's representatives appear to have taken part in these proceedings without protest. When the arbitrators first met, however, the city took exception to their jurisdiction on the ground of the invalidity of the expropriation by-law. The arbitrators nevertheless proceeded and published a conditional award in March, 1917.

If sub-sec. 142 stood alone I agree with the learned Chief Justice of the Court of Appeal that

its construction would be simple enough. It might very well be read as making publication a condition precedent to the coming into force of the by-law.

Indeed I think it would admit of no other construction. Is there anything in the history of the legislation which tends either to confirm this as the proper construction of the clause added in 1904 to sub-sec. 142 (formerly sub-sec. 127) of sec. 50 or to render it improbable that such a construction was intended? Is there anything in the context of the statute which clearly requires that a different construction be placed upon that clause?

The question is one of intention. The history of the legislation—the provision of the Revised Statute of 1897 (ch. 144, sec. 83) prescribing that every by-law passed by any council

> shall come into effect and be binding on all persons after publication of the same in the *British Columbia Gazette* and in some one or more of the newspapers selected by the council and circulating in the municipality;

the substitution in 1902 (2 Ed. VII., ch. 52, sec. 22) for such publication of registration in the office of the County Court with like consequences; and the revival in 1904 (3 & 4 Ed. VII., ch. 42, sec. 9) in the terms in which it is couched of the requirements as to publication, apparently because greater publicity than registration in the office of the County Court would afford was found to be necessary or desirable in the case of the by-laws specially dealt with in sub-sec. 127 of sec. 50 of the "Municipal Clauses Act" (R.S.B.C., 1897, ch. 144)—in my opinion, makes it reasonably obvious that the legislature meant to impose such publication and filing in the Land Registry Office as conditions of the validity and efficacy of such by-laws.

No doubt the provision of section 86 of the "Municipal Clauses Act," 1906, applicable to all by-laws,—that they shall be registered in the office of the County Court, and,

> shall take effect and come into force and be binding on all persons from the date of such registration—

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presents a difficulty of construction. I think that difficulty is to be met, however, and the intention of the legislature carried out rather by treating sub-sec. 142 of sec. 50 as creating a condition (as its language imports) which the legislature assumed would have been already complied with, in the case of by-laws to which it relates, before section 86, which occupies a later position in the statute, would be acted upon, than by straining the language of sub-section 142 in order to make of it not the imposition of a condition, but a mere direction as to the time at which publication and filing in the Land Registry Office should take place, *i.e.*, before registration in the office of the County Court, treating that as the time of

> the coming into effect,

of by-laws within sub-section 142. No other provision of the statute is referred to as presenting any difficulty. I find nothing therefore in the context which requires or justifies a refusal to give to sub-section 142 the effect that its terms indicate was intended.

This case appears to be distinguishable from *Nowell* v. *Mayor of Worcester*(1), and *Montreal Street Railway Company* v. *Normandin*(2), much relied upon by the respondent. In the *Nowell Case*(1) a statute was held directory chiefly because, as put by Pollock C.B.

> no means are given them (the contractors with the municipality) of ascertaining the fact

whether the prescribed duty had or had not been fulfilled.

> "How are the plaintiffs who contracted to do work for the corporation," asks Baron Parke, "to get information as to whether a report has been made by their surveyor?"

Here the failure to publish and to file in the Land Registry Office could easily have been ascertained by

(1) 23 L.J. Ex. 139. (2) [1917] A.C. 170; 33 D.L.R. 195.

any person. In the *Normandin Case*(1) general inconvenience would have resulted from holding the neglect of the prescribed duty fatal and the main object of the legislature would not have been thereby promoted. Here, so far as appears, the respondent alone will be adversely affected by holding the by-law to be invalid and the main object of the legislature, which was to secure further publicity, might be frustrated were the provision in question to be treated as merely directory. The section does not designate an official to discharge the duty imposed and no sanction is provided to ensure its fulfilment.

Moreover, the statute with which we are dealing empowers taxation as well as an exercise of eminent domain. On both grounds a strict compliance with the terms in which it authorizes the exercise of the rights conferred may properly be exacted.

I am further of the opinion that no conduct of the municipal council or of its officials can have the effect of rendering binding steps taken under a by-law subject to an unfulfilled condition such as that imposed by the amendment of 1904, or can estop or preclude the municipal corporation from setting up the consequent invalidity of the by-law in any proceeding in which it is sought to enforce it or to compel its being carried out. It would be quite too dangerous to permit conditions imposed by statute to be thus evaded. To-day it is the municipal corporation which urges that non-compliance with the terms of its statutory authority renders its by-law ineffective: to-morrow a taxpayer or a landowner may have occasion to press a like objection. In either case the construction of sub-section 142 and the effect of the omission to carry out its requirements must be the same.

(1) [1917] A.C. 170; 33 D.L.R. 195.

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I say nothing as to any possible right of action that any person injuriously affected by an attempt made by the municipal corporation or any of its officers to carry out or act upon such an invalid by-law may have.

Counsel for the respondent further contended that, assuming the invalidity of the by-law, the arbitration proceedings and the award of compensation to his client might nevertheless be supported under section 251 of the "Municipal Clauses Act" of 1906, ch. 32. But that section deals with the making and ascertainment of compensation for lands taken or injuriously affected by the corporation *in the exercise of any of its powers.* The power to take or injuriously affect land for, *inter alia,* the widening of a highway is conferred by sub-sec. 142 of sec. 50 of the same Act, and the means thereby prescribed for the exercise of that power is the enactment of a by-law according to the terms, and subject to the conditions which it and other sections of the statute impose. That is the power which the council ineffectually sought to exercise. If it possessed any other it did not attempt to use it. A valid and effectual exercise of a power to take or injuriously affect land is the foundation upon which proceedings under sec. 251 must rest. Without that foundation such proceedings are unauthorised and ineffectual.

I am, for these reasons, with respect, of the opinion that this appeal should be allowed.

BRODEUR J. (dissenting)—I concur with His Lordship the Chief Justice.

Appeal allowed with costs.

Solicitor for the appellant: *F. A. McDiamid.*

Solicitors for the respondent: *Elliot, MacLean & Shandley.*

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THE KOMNICK SYSTEM SAND-STONE BRICK MACHINERY COMPANY (PLAINTIFF) ..... APPELLANT;

*May 8.
*May 14.

AND

THE B.C. PRESSED BRICK COMPANY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Statute—Construction—Legislation declared ultra vires—Amendment granting right to "maintain anew" action—Jurisdiction—"Supreme Court Act," section 2, par. (e).

An action brought by the appellant was dismissed by the trial court upon the merits and by the Court of Appeal for British Columbia on the ground that the appellant, being an unlicensed extra-provincial company, had been prohibited by the "Companies Act" of 1897 from making the contract sued upon. Later on this legislation was held by the Judicial Committee of the Privy Council to be *ultra vires* of the provincial legislature. The "Companies Act" was subsequently amended by enacting the following provision:—

"Where an action, suit, or other proceeding has been dismissed or otherwise decided against an extra-provincial company on the ground that any act or transaction of such company was invalid or prohibited, by reason of such company not having been licensed or registered pursuant to this or some former Act, the company may, if it is licensed or registered as required by this Act and upon such terms as to costs as the court may order, maintain anew such action, suit, or other proceeding as if no judgment had therein been rendered or entered."

Held, that the appellant was not obliged to bring an action *de novo*, but had the right to ask for a re-instatement or revivor of the dismissed action at the stage at which it was when the judgment based upon the statute subsequently held *ultra vires* was pronounced.

The judgment appealed from holding that the action must be begun *de novo* is a final judgment within the meaning of par. (e) of section 2 of the "Supreme Court Act."

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

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KOMNICK SYSTEM SANDSTONE BRICK MACHINERY CO. v. B.C. PRESSED BRICK CO.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), maintaining the judgment of Clement J. at the trial, by which the plaintiff's action was dismissed with costs.

The material facts of the case and the issues raised in the present appeal are fully stated in the above head-note and in the judgments now reported.

H. J. Scott, K.C. for the appellant.
Chrysler K.C. for the respondent.

THE CHIEF JUSTICE.—The appellants brought suit which after trial was, on the 22nd of March, 1911, dismissed upon the merits. An appeal from the judgment was dismissed not on the merits but on the ground that the transaction in respect of which the action was based was invalid by reason of the plaintiff not having been licensed pursuant to the "Companies Act" then in force.

The "Companies Act Amendment Act" 1917 (7 & 8 Geo. V., ch. 10) repeals sections 168 and 169 of the "Companies Act" (R.S.B.C. 1911, ch. 39) and substitutes a provision therefor as sec. 168. Subsection 3 of the said substituted section is as follows:—

> Where an action, suit or other proceeding has been dismissed or otherwise decided against an extra-provincial company on the ground that any act or transaction of such company was invalid or prohibited by reason of such company not having been licensed or registered pursuant to this or some former Act, the company may, if it is licensed or registered as required by this Act, and upon such terms as to costs as the Court may order, maintain anew such action, suit or other proceeding as if no judgment had therein been rendered or entered.

The marginal note is "remedial provision."

The form of the legislation would seem rather unfortunate. The sub-section does not appear to be properly placed in the "Companies Act" for it cannot

(1) 17 B.C.R. 454; 8 D.L.R. 859.

be read without reference to the Act by which it was passed. No doubt the intention is that any suit decided prior to the Act of 1917 can be maintained anew and presumably only suits so previously decided.

It is unnecessary to refer to the circumstances which led to the passing of this remedial provision, it is sufficient to say that they are such as to render it incumbent on the court to afford every possible relief that the terms made use of will admit in favour of those litigants for whose benefit it was passed and this in accordance with the intention of the legislature which cannot be doubted.

Now this was a motion to the Court of Appeal

> for an order that the appeal herein, for which notice was given on the 17th day of June, 1911, be entered for rehearing as if no judgment had been rendered or entered herein.

The Court of Appeal dismissed the motion on the ground that it had no jurisdiction to make the order sought. That

> to maintain anew in these circumstances means to bring and maintain, that is to say, an action *de novo*.

The question therefore, is, whether the Court of Appeal is right in holding that the statute cannot be construed so as to enable the appellants to take up and continue their action at the point when the court decided that their action could not be maintained by reason of their not having been licensed as if such judgment had not been rendered.

I think the position is the same as if the appeal had not yet come on for hearing, and that I think is certainly in accordance with the intention of the Act.

It is not to be expected in such a special case that we can find any guidance in the rules or in authority. We have nothing but the obvious intention of the statute to assist in construing the terms made use of.

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The Chief Justice.

It would have been difficult to provide for every possible case, impossible perhaps to foresee a suit left in such a position as this. Now the Court of Appeal has said

> that to maintain anew in these circumstances means to start the action all over again

and it is precisely in the words

> in these circumstances

that the error in the decision is to be found. Even if it be conceded that under some circumstances the words

> to maintain anew

might bear the meaning put upon them by the Court of Appeal, I do not think they can or ought to be so interpreted in the actual circumstances.

I think the provision for maintaining

> anew such action, suit or other proceeding as if no judgment had therein been rendered or entered

may very properly be held to mean that the Court of Appeal should hear the appeal as if its previous decision had never been rendered and I certainly think that this will be only giving effect to the intention of the legislature in enacting the measure of relief to those who suffered hardship through the mistaken view of the law then held.

DAVIES J.—My impression at the close of the argument in this case and of the motion to quash for want of jurisdiction was that the motion should be dismissed, the appeal allowed and the case remitted back to be heard on the merits, with costs on the motion and in the appeal. Further consideration has satisfied me that my impression was right.

On the question of our jurisdiction to hear the

appeal, I am of the opinion that there was alike finality in the judgment appealed from and also that a substantial right on plaintiff's part to continue the present action was adversely determined upon.

On the merits, I am of the opinion that subsec. 3 of sec. 2 of the "Companies Act" should not be construed as giving the unlicensed company whose action had been dismissed on that ground simply a right to begin another action after it had become licensed but a right to maintain or continue the dismissed action at and from the stage at which it was when dismissed. I construe the words maintain anew, as used in that sub-section, as meaning continue anew.

The result would be the same as if this court had on appeal reversed the judgment dismissing the action.

I would therefore refer the case back to the Supreme Court for hearing on the merits.

IDINGTON J.—There are two appeals; both and motions to quash each of them herein were argued together.

The respondent has moved to quash these appeals and relies upon the decision in *Saint John Lumber Co.* v. *Roy*(1), wherein it was held that an order allowing the service of a writ out of the jurisdiction of the court could not become the subject of an appeal to this court.

Inasmuch as the only question there was of the forum before which the parties were held bound to appear and submit to its jurisdiction, and these appeals in the last analysis involve only the question of forum, the point seems well taken if that decision is to be held binding.

However, those who decided that case are agreed

(1) 53 Can. S.C.R. 310; 29 D.L.R. 12.

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it does not govern and I am content; especially because in each case there was, in my opinion, a substantial right in controversy in the action involved in the appeal. I do not think there should be any costs of the motions.

The British Columbia Legislature has passed a rather drastic licensing Act relative to foreign corporations doing business in that province and thereby attempted to deprive those failing to comply therewith of all rights to contract or sue upon contract made there in the British Columbia courts. This legislation was held by the Judicial Committee of the Privy Council to be *ultra vires* the legislature. Meantime an action had been tried and on the merits dismissed by the learned trial judge who declined to rely upon the said statute. Upon appeal to the Court of Appeal that court relied upon the said statute and dismissed the appeal. To rectify the possible wrongs done a suitor in cases wherein effect had been given to the said *ultra vires* statute the legislature in 1917, by the "Companies Act," ch. 10, sec. 2, repealed the said statute and re-enacted by section 168 thereof new licensing provisions applicable to companies, and amongst other things in the said section subsection 3 enacts as follows:—

> Where an action, suit or other proceeding has been dismissed or otherwise decided against an extra-provincial company, on the ground that any act or transaction of such company was invalid or prohibited, by reason of such company not having been licensed or registered pursuant to this or some former Act, the company may, if it is licensed or registered, as required by this Act, and upon such terms as to costs as the court may order, maintain anew such action, suit or other proceeding as if no judgment had therein been rendered or entered.

The neat point involved in each of these appeals is whether or not any suitor desiring to take advantage of the relief thus provided must do so by bringing a new action. The Court of Appeal has so held. It

might be possible, following the refining and technical means of interpretation of the section which has been so adopted, to maintain that view. I prefer, instead of such critical way of approaching the interpretation and construction of such a statute, to have due regard to the rules laid down for construing an enactment by the Barons of the Exchequer in *Heydon's Case*(1) which rules can be found either in Maxwell on Statutes or Hardcastle on Statutory Law, as follows:—

> For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered. (1) What was the common law before the making of the Act. (2) What was the mischief or defect for which the common law did not provide. (3) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. (4) The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtile inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*.

I venture once more to quote these rules as the most cogent and concise argument in answer to the reasons in support of the appeal. I am clearly of the opinion that the appeal ought to be allowed with costs and the appellant permitted to renew or revive its motion for appeal before the Court of Appeal and have its case heard upon the merits.

ANGLIN J.—In *John Deere Plow Co.*, v. *Wharton*(2), the Judicial Committee of the Privy Council held that:

> Part VI. (sections 139-173) of the "Companies Act" of British Columbia (R.S.B.C. 1911, ch. 39), which in effect provides that companies incorporated by the Dominion Parliament shall be licensed or registered under that Act as a condition of carrying on business in the province or maintaining proceedings in its courts, is * * * ultra vires the provincial legislature under the "British North America Act," 1867.

(1) 3 Coke 7b. (2) [1915] A.C. 330; 18 D.L.R. 353.

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In 1917 (ch. 10) the legislature repealed secs. 168 and 169 of the "Companies Act" (R.S.B.C. 1911, ch. 39; sec. 123 of the "Companies Act," 1897, ch. 44) and substituted therefor the following:

168 (1) No unlicensed or unregistered company shall be capable:—

(*a*) of maintaining any action, suit or other proceedings in any court of the province in respect of any contract made in whole, or in part, within the province, in the course of, or in connection with, its business; or,

(*b*) of acquiring or holding land, or any interest therein, in the province, or registering any title thereto under the "Land Registry Act."

(2) Where an extra-provincial company has heretofore become licensed or registered under this, or any former Companies Act, or becomes licensed or registered under this Act, or a licence or certificate of registration of any such company is suspended, revoked or cancelled, and is subsequently restored or reinstated, the provisions of the foregoing subsection and any prohibition having a like effect formerly in force, shall be read and construed as if no disability thereunder had ever attached to the company, notwithstanding that any such contract was made or proceeding in respect thereof instituted, or any land or interest therein acquired or held, before the first day of July, 1910.

(3) Where an action, suit or other proceeding has been dismissed or otherwise decided against an extra-provincial company on the ground that any act or transaction of such company was invalid or prohibited by reason of such company not having been licensed or registered pursuant to this or some former Act, the company may, if it is licensed or registered as required by this Act and upon such terms as to costs as the Court may order, maintain anew such action, suit or other proceeding as if no judgment had therein been rendered or entered.

While the chief purpose of these amendments unquestionably was to meet the objections which had prevailed against the former legislation, there can be little room for doubt that subsection 3 was designed to undo as far as possbile whatever injustice had been sustained by extra-provincial corporations whose actions had been dismissed for non-compliance with the legislation which the Privy Council held to be invalid.

When these amendments were enacted the plaintiff company found itself in this position: This action brought by it in 1909, while still unlicensed, to recover

the price of machinery furnished by it to the defendants had been dismissed at the trial in 1911 on the merits, the trial judge holding that the machinery did not fulfil the requirements of the contract under which it had been sold. On the 8th Nov., 1912, the Court of Appeal, by a majority of the judges, upheld the judgment dismissing the action, but on the ground that the plaintiff, as an unlicensed extra-provincial company, had been prohibited by the "Companies Act" of 1897 from making the contract sued upon and that its licence, obtained in September, 1909, after the commencement of this action, did not entitle it under an amendment of 1910 (ch. 7) further to maintain and prosecute it. Two of the four judges who constituted the court expressed views favourable to the appellants on the merits(1).

Conceiving itself entitled to prosecute its action under the legislation of 1917

as if no judgment had therein been rendered or entered

dismissing it on the ground that its contract sued upon was invalid or prohibited by reason of the company not having been licensed or registered under the "Companies Act" of 1897 (ch. 44, sec. 123), in order to meet the requirements of the "War Relief Act" (1916, ch. 74) and the "War Relief Amendment Act" (1917, ch. 74), the plaintiff company applied for and obtained from Mr. Justice Gregory, on the 30th of October, 1917, an order declaratory of its rights to proceed with the action, notwithstanding the provisions of those statutes.

It then applied to the Court of Appeal upon motion for an order that the appeal herein, for which notice was given on the 17th day of June, A.D. 1911, be entered for hearing as if no judgment had been rendered or entered therein upon such terms as to costs as the

(1) 17 B.C.R. 454; 8 D.L.R. 859.

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court may order, and for such further order and directions as to the court may deem fit.

This motion was dismissed on the 20th Nov., 1917, the court (Martin, Galliher and McPhillips JJ.A.) holding that the statute of 1897 did not entitle the plaintiff to prosecute the action which had been dismissed in 1911-12, but enabled it to bring and maintain a new action for the same cause of action.

Maintain anew * * * means bring again.

It is from this order that appeal No. 1 is now brought to this court.

Meantime the defendants had appealed from the order of Mr. Justice Gregory. Adhering to the view that the action in which that order purported to be made had been finally dismissed in 1911-12 and was not resuscitated by the legislation of 1917, the Court of Appeal on the 22nd January, 1918, allowed this appeal and set aside Mr. Justice Gregory's order. This judgment forms the subject of appeal No. 2.

The respondent moves to quash both appeals on the ground that the judgments appealed from are not "final judgments" within the meaning of paragraph (*e*) of section 2 of the "Supreme Court Act," as enacted by 3 & 4 Geo. V. ch. 51, sec. 1. The motions and the appeals were heard together.

Both the judgments of the Court of Appeal determined that the plaintiff's action was at an end and negatived the right to maintain or prosecute it further. In my opinion that right is

a substantive right in controversy in the action

which has been determined adversely to the plaintiff, within the definition of section 2 (*e*) of the "Supreme Court Act." I find it difficult to appreciate the argument that a judgment which holds that an action is at an end, with the result that it stands forever dismissed,

is not a final judgment. Its finality seems to be so obvious that it scarcely brooks the aid of definition. The definition of "final judgment" now found in the "Supreme Court Act" was required to bring within that term judgments, which, though finally dispositive of substantive rights in controversy therein, did not terminate the actions or judicial proceedings in which they were rendered. *St. John Lumber Co.* v. *Roy*(1) It was not needed to meet the case of a judgment dismissing an action or declaring it to be finally disposed of and terminated.

It was also urged that the orders appealed from were discretionary and dealt with mere matters of procedure and were therefore not appealable. I cannot understand how an order denying a claim of statutory right on the ground that, properly construed, the statute does not confer it can be said to be in any sense discretionary. Neither in my opinion is the matter disposed of by the orders one of procedure only. I regard it as one of substantive right—the right to maintain this action. The motions to quash, in my opinion, fail.

With deference, I am unable to agree in the construction placed by the Court of Appeal on subsec. 3 of sec. 168 of the "British Columbia Companies Act" as enacted in 1917. The word "maintain" is obviously equivocal. As Mr. Chrysler frankly admitted in the course of his able argument, it may mean either to bring or institute an action or proceeding or to continue or further prosecute an action or proceeding already commenced. It is, however, coupled in the statute with the word "anew," and, no doubt, not a little may be urged in support of the view that "maintain anew," if standing alone, would imply

commence or begin afresh.

(1) 29 D.L.R. 12; 53 Can. S.C.R. 310, at p. 319.

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But this phrase may not be segregated from its context without doing violence to a fundamental canon of construction. Not only does the word "such," which precedes the words

> action, suit or other proceeding,

clearly referring back as it does to the

> action, suit or proceeding

mentioned at the commencement of the subsection, indicate that it is the very action, suit or other proceeding which has been dismissed or otherwise adversely decided that the extra-provincial corporation is empowered to "maintain anew," but the concluding clause of the sentence,

> as if no judgment had *therein* been rendered or entered

would appear to put the matter beyond doubt. It is the action which has been dismissed (*such* action)—the action *wherein* the judgment, based

> on the ground that (the) act or transaction of (an extra-provincial) company was invalid or prohibited by reason of such company not having been licensed or registered * * * has been rendered or entered

that the company is authorized to maintain anew.

With great respect, I fear that the significance of the words of reference, "such" and "therein," must have escaped the attention of the learned appellate judges. I cannot conceive of a legislature employing the terms of subsection 3 to express the idea that a new action might be brought for the same cause of action as was involved in that which had been dismissed. The language used clearly points to a reinstatement or revivification of the dismissed action or proceeding

> as if no judgment had therein been rendered or entered,

i.e., at the stage at which the dismissed action was when the judgment based upon the statute subse-

quently held *ultra vires* was pronounced. Not only are two well-known rules of construction—one, known as "The Golden Rule," that

> in interpreting all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument,

and the other that

> remedial statutes should be construed liberally and so as to suppress the mischief and advance the remedy,

thus given due effect, but the apparent purpose of the legislation of 1917—to place extra-provincial corporations, as far as possible, in the same plight and position as if, in litigation to which they were parties, judgments based on the statute held to be invalid had never been pronounced—is best attained. The costs of the litigation incurred up to the date of the judgment that should not have been rendered are not thrown away, as they would be if a new action should be brought. Moreover, if obliged to bring new actions, many plaintiffs, who had suffered dismissals based on the statute held to be invalid, would find their causes of action barred by statutes of limitations. It is most probable that the legislature had this in view and therefore authorized the prosecution of the very action so dismissed rather than the institution of new proceedings, in which the remedy which the legislature meant to afford might prove illusory. By empowering the court to deal with the costs—

> upon such terms as to costs as the court may impose—

it has been made reasonably certain that no injustice to any party will ensue.

While the use of the terms

> as if no judgment had therein been rendered or entered

might at first blush lead one to think that it was meant that in every case the action should stand for judgment before the trial court, although it had, as here,

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been there dismissed on the merits and not because of any lack of status of the plaintiff, further consideration of the subsection as a whole I think warrants the view that the only judgment with which it was intended to interfere was a judgment based on the ground that the failure of the company to obtain licence or registration was fatal to the validity of the act or transaction forming the subject matter of the suit. It follows that the appellant company was right in applying to the Court of Appeal to reinstate this action in that court as it stood before it pronounced its judgment on the 5th of Nov., 1912—the first judgment which based the dismissal of the action on the ground of the invalidity of the plaintiffs' contract by reason of its not having been licensed or registered.

Whether the Court of Appeal should hear further argument, whether it should allow any amendments, if sought, or the introduction of any further evidence are questions of practice and procedure which that court may more properly deal with. Pronouncing the order which, in our opinion, the Court of Appeal should have made, we merely direct that the action of the plaintiff company be reinstated in the Court of Appeal of British Columbia and be dealt with by that court as if its judgment of the 5th Nov., 1912, had *not* been rendered or entered—subject to such terms as to costs as it may see fit to direct or impose.

The appellant is entitled to its costs in this court, of the appeals and of the motions to quash and also to the costs of the appeal to the Court of Appeal from the order of Mr. Justice Gregory.

BRODEUR J.—I concur with my brother Anglin.

Appeal allowed with costs.

Solicitors for the appellant: *McPhillips & Smith.*
Solicitor for the respondent: *D. G. Marshall.*

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FURNESS, WITHY AND COMPANY (PLAINTIFFS) ..... } APPELLANTS; *May 22, 23 *June 10

AND

KARL A. AHLIN (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Bailee for hire—Warehouseman—Storage of goods on wharf—Defective piles—Negligence—Reasonable care.

Goods stored under contract in a warehouse on a wharf built on piles in the harbour of Halifax were destroyed or damaged in the collapse of the wharf. In an action by the owners of the wharf and warehouse for wharfage and for work and labour performed in salving the goods there was a counterclaim for damages.

Held, affirming the judgment of the Supreme Court of Nova Scotia (51 N.S. Rep. 291), that as it was proved that the collapse of the wharf was caused by the piles having become wormeaten and unable to support the superstructure, and that the life of a pile in Halifax harbour is about ten years; and as it was not proved that the piles had been properly inspected or renewed during the sixteen years of the existence of the wharf; the warehousemen had not exercised the reasonable care required of a bailee for hire and were responsible for the loss and injury to the warehoused goods.

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

The facts of the case are sufficiently stated in the above head-note.

Jenks K.C. for the appellants.

W. A. Henry K.C. for the respondent.

THE CHIEF JUSTICE:—There can, I assume, be no doubt about the law which governs the relations of

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

(1) 51 N.S. Rep. 291; 35 D.L.R. 150.

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The Chief Justice.

the parties to this case. At the argument, both parties agreed that the wharfinger stands in the position of an ordinary bailee for hire and is therefore not an insurer of the safety of his dock. But he is under an obligation to use reasonable care to keep it in a safe condition.

The whole controversy here turns upon the condition of the dock at the time the appellants (the owners) and warehousemen agreed to discharge, pile and re-load the cargo of the "Camino," a Belgian relief ship which put into Halifax harbour for repairs. The bare fact of the accident may not be sufficient to cause a presumption or permit an inference of negligence; but that fact taken in connection with the physical cause or causes of the accident may shew that the responsible human cause of the particular accident in question was a fault of commission or omission on the part of the defendant.

Ritchie J. gave judgment for the plaintiffs (appellants) for $7,107.64 and dismissed the counterclaim. He said:—

> There is danger about every wharf, because as soon as the supporting piles are driven the worms attack them—the failure of one pile may cause a collapse. The plaintiffs, no doubt, were fully alive to the danger of worms. The question is whether or not, having regard to the danger, they used reasonable care as prudent men in the maintenance of the wharf. The evidence of the witnesses called by the plaintiffs has convinced me that they did use such care.

The late Chief Justice Sir Wallace Graham, with whose opinion Russell and Chisholm JJ. concurred, said:

> The company cannot claim that this was a case of inevitable accident or that the defect in the piles was a latent defect so far as they were concerned. It was either known to the company or would have been known to them, if they had used proper care in examination and in renewing the piles which had been ravaged by the worms.

He quotes at length from the testimony in respect to the cause of the breaking of the piles and the

opportunity of knowing the condition of the defective piles.

The wharf was constructed in 1899 and the evidence is that in Halifax the average life of piles is 10 years. The Chief Justice says:—

> If 10 years is the life of a pile, the company in the course of 15 years would, at least, be expected to have renewed all the piling under this wharf. There is no evidence to that effect. As a fact, a majority had not been replaced.

I entirely agree in the conclusions reached by the court *en banc*. The diver, who was in the best position to give evidence as to the conditions under the water, was not produced as a witness and no explanation is given for his absence. His name is not mentioned and therefore the respondent had no opportunity to discuss his competence. Ample opportunity existed on the other hand to check the accuracy of the statement made by Mr. Jefferson Davis and in the absence of any attempt to contradict him I am disposed to accept the conclusion he reached. If, as appears to be admitted by both sides, the life of a pile in Halifax harbour is 10 years and the wharf was over 16 years old, every original pile put in had outlived its usefulness at the time of the accident and the omission to prove that the piling had been renewed or properly inspected taken with the fact of the accident is sufficient to permit an inference of negligence.

The appeal should be dismissed with costs.

DAVIES J.—This was an appeal from the judgment of the Supreme Court of Nova Scotia holding the defendant, appellants, liable for the damages caused to the respondent's goods warehoused on their wharf by the defendants.

The wharf collapsed after the goods were so warehoused, the underpinning piles of the wharf giving way

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and many of them breaking off about at or below low-water mark. The evidence shews I think clearly that a number of the supporting piles of the wharf had been eaten almost through by worms and that they had in consequence become unable to give the necessary support to sustain the weight placed in the warehouse of the plaintiffs' goods, and had not been replaced by sound and strong piles.

There is no doubt that the plaintiffs took great pains to keep that part of their wharf which was above low water in good order and repair. Reasonably constant inspections of this part of the structure were made from time to time and if anything in this case depended upon the discharge by the appellants of their duty in that regard I should have for one been prepared to say that they appeared to have fully and fairly discharged that duty.

But it does not appear to me that the full discharge by the appellants of their duty in respect of the superstructure of the wharf down to low water affects the question whether they discharged their duty with respect to the piling below low water on the strength and soundness of which the whole superstructure depended. The appellants were, it is true, as warehousemen only bailees for hire of the goods warehoused and as such had a limited liability. They were not insurers but were obliged to take reasonable care of the goods and chattels warehoused by them. In the case of *Searle* v. *Laverick*(1), Blackburn J., in delivering the judgment of the court, says:

> The obligation to take reasonable care of the thing intrusted to a bailee of this class (amongst which he had previously mentioned warehousemen as included) involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state so that the thing deposited may be reasonably safe in it.

(1) L.R. 9 Q.B. 122.

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The question in this case is thus reduced to the single one whether the appellants did take such reasonable care with respect to their warehouse on their wharf. Reasonable care necessarily, of course, required such care of the underpinning of the wharf on which the warehouse rested.

Did the appellants prove reasonable care in that respect? I think not. They, it is true, employed a diver to make the necessary examination of the underpinning below low water on which the safety of the whole structure above depended. But this diver was not shewn to be a competent person for the task assigned him, nor was he called at the trial, nor evidence given shewing that his presence could not be had. As far as I can gather, his name was not even given or his absence from the trial explained, or his qualifications for the important duties assigned him shewn. It is true that it was proved a diver had been employed to make the necessary inspection and Mosher's evidence is to the effect that wherever this diver told him a new supporting pillar should be placed in lieu of the one destroyed by the worms, he, Mosher, placed it.

On this crucial and necessary point of the competency of the diver employed to discharge the duties assigned to him either by his own evidence or by other evidence the appellants failed to shew they had discharged their duty and their obligation to take reasonable care of the goods entrusted to them.

The proper inference to be drawn from the collapse of the wharf and the warehouse and the examination of the supporting and broken piles made after the collapse in the absence of any direct evidence on the point is that the diver was not a competent man for the important duty entrusted to him and failed to discharge it.

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Idington J.

On this ground I hold that the appeal must be dismissed with costs.

Idington J.—I do not think the evidence adduced on behalf of the appellants at the trial satisfies the requirements of the law imposed upon them as the result of the unexplained reason for the collapse of the wharf in question in face of the assurances given the respondent to induce him to unload his vessel.

I think the appeal should be dismissed with costs.

ANGLIN J.—I have not been convinced that the conclusion reached by the majority of the learned judges of the court *en banc* is erroneous. The evidence makes it reasonably certain that the cause of the collapse of the defendants' wharf was the weakening of supporting piles due to the action of limnoria, rendering it incapable of sustaining the weight of the cargo of the "Camino," which, as placed on the dock, averaged 311 lbs. to the square foot, with a possible maximum weight of 413 lbs. to a square foot at some points. It was well known that wooden piling of wharves in Halifax harbour is exposed to this cause of deterioration. Adequate inspection at reasonably frequent intervals, followed by such repairs and replacements as such inspection discloses to be necessary, is admittedly the proper means that should be taken to guard against this danger. Under the circumstances of this case the onus was upon the defendants to establish that they had taken these means. In my opinion they failed to discharge that burden satisfactorily. The evidence and absence of evidence which warrants this conclusion has been fully stated by the late learned Chief Justice of Nova Scotia and no good purpose would be served by again detailing it.

I would dismiss the appeal.

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Brodeur J.

BRODEUR J.—It is common ground that it was the duty of the appellant company to exercise reasonable care that the condition of the wharf was such that the vessels using it would not be exposed to injury. That principle of law placed upon the appellants the burden of proof that reasonable care was taken to avoid accidents.

There is no doubt that the wharf collapsed on account of the piles being defective and wormeaten. The evidence shews that after the accident the piles were examined and found to be in that condition.

The appellants claim, however, that they had during the previous year the wharf examined and repaired. The report of their inspector shews, in fact, that he had examined a certain part of those piles; but he could not say himself whether or not the part which was covered by water at that time had been duly inspected.

The appellants claim that a diver had been sent to examine that part covered by water; but they failed to bring the diver in evidence to shew that he was a competent man and that he had duly performed his work. It was the duty of the appellants under these circumstances to adduce such evidence; and having failed in that respect to shew that they had exercised reasonable care of their property they should be held liable for the accident which has destroyed the cargo of a vessel of which the respondent was the master.

For these reasons, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Fulton.*
Solicitor for the respondent: *W. A. Henry.*

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*May 17, 20
*June 25

ELIZABETH ELLIOTT (PLAINTIFF)..APPELLANT;

AND

THE WINNIPEG ELECTRIC RAILWAY COMPANY (DEFENDANTS).. } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Negligence—Street Railway—By-law—Removal of Snow—Validating Act—Statutory duty.

By the terms of the by-law authorizing the Electric Railway to operate over the streets of Winnipeg the company was obliged to keep the tracks and the roadway for eighteen inches on each side clear of ice and snow and cause the same to be spread over the rest of the street so as to afford a safe passage for vehicles. If the city engineer considered that the work was not properly done he could have it performed at the company's expense and could, at his discretion, order the company to remove the snow and ice entirely. By a provincial statute this by-law was ratified and confirmed "in all respects as if (it) had been enacted by the legislature." At a certain point on its line the company swept the snow four feet back from the track where it formed a bank sloping somewhat steeply down to the track, and E., attempting to board a car, fell on this slippery surface and was severely injured. The city engineer never objected to this method of removing the snow.

Held, reversing the judgment of the Court of Appeal (28 Man. R. 363), Davies J. dissenting, that the company had not performed its statutory duty of keeping the street safe for traffic and was liable in damages to E. for the injury so sustained.

Held, per Anglin J., that the nature and extent of the statutory duty, the manner in which it should be performed and the correlative rights of the defendant company were not properly presented to the jury and there should be a new trial.

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

The material facts are stated in the above headnote.

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

(1) 28 Man. R. 363; 38 D.L.R. 201.

B. L. Deacon for the appellant. As to breach of statutory duty see *Fulton* v. *Norton*(1), and *Butler* v. *Fife Coal Co.*(2).

The clause of the by-law respecting the removal of snow and ice is part of a public statute (R.S.M. [1913] ch. 168, secs. 5 and 9) and should be construed liberally in favour of the public. Craes Statute Law (4th ed.), page 465; *Shea* v. *Reid Newfoundland Co.* (3), at page 544.

The case, from the evidence produced, could not have been withdrawn from the jury and the verdict should not have been disturbed. See *Toronto Power Co.* v. *Paskwan* (4), at page 739.

Laird K.C. for the respondent. The by-law was merely a contract between the city and the company and gave no right of action for a breach to one of the public. *City of Kingston* v. *Kingston &c., Electric Railway Co.*(5); *City of Toronto* v. *Toronto Railway Co.*(6), at page 547.

The contract provides for a summary enforcement of the company's obligation which is the only available remedy. *City of Winnipeg* v. *Winnipeg Electric Railway Co.*(7).

If there is a statutory duty it is one for the benefit of the city only. *Johnston* v. *Consumers Gas Co.*(8); *Sharpness New Docks* v. *Attorney General*(9).

THE CHIEF JUSTICE.—I agree that the appeal should be allowed with costs for the reasons given by Mr. Justice Idington.

(1) [1908] A.C. 451.
(2) [1912] A.C. 149.
(3) [1908] A.C. 520.
(4) [1915] A.C. 734; 22 D.L.R. 340.
(5) 28 O.R. 399; 25 Ont. App. R. 462.
(6) [1916] 2 A.C. 542; 29 D.L.R. 1.
(7) 26 Man. R. 63; 25 D.L.R. 308.
(8) [1898] A.C. 447.
(9) [1915] A.C. 654.

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DAVIES J. (dissenting)—This is an appeal from the unanimous judgment of the Court of Appeal for Manitoba setting aside a judgment for $4,000 in favour of plaintiff entered by the trial judge on a general verdict of a jury who found that amount as damages.

The claim of the plaintiff is one for personal injury caused to her as she was about to enter one of the defendant's cars and is and must be based upon the defendant's negligence.

The plaintiff, it appeared in evidence, was with her daughter at the corner of Portage Avenue and Belmont St. waiting for a west bound car which, when it came along, stopped a little west of its usual stopping place. They walked west to where the car was standing and when they arrived opposite to the entrance door of the car, but before plaintiff had reached up her hand to grasp the rail, she slipped and fell. The evidence shewed that there was a slope or incline in the snow starting about three and a half or four feet north of the north rail of the car track and sloping to the edge of the rail. Deacon, one of plaintiff's witnesses, stated that at the point where the accident happened the snow

> was swept clear from the track between the rails and swept back, sloping back to a ridge about four feet;

and that from that point to the north curb the street was level. The same witness further states that at the time

> there was a lot of automobile and jitney traffic on Portage Avenue, that they ran one wheel between the rails and the other on the incline in order to keep off the deep snow and that the effect of this traffic was to make the incline or slope hard and slippery.

Some evidence was given by defendant's witnesses to the effect that the incline was not as great as Deacon stated but of course the jury had a right to accept his evidence in preference to that of others and assuming

they did so the vital question arises in what respect were the defendants guilty of negligence causing or contributory to the accident?

The defendant company was incorporated by the Legislature of Manitoba by legislation which expressly validated and confirmed a by-law of the City of Winnipeg giving to the defendant company the right to construct and operate a street railway on the streets of the city of Winnipeg for the carrying of passengers and prescribing the terms and conditions of such construction and operation. Full provision is made as to the location and manner of construction of such railway subject to the approval of the city engineer.

Sub-clause *f* of clause 3 of the by-law deals with the main question of the defendants' liability in such a case as this and is as follows:

(*f*) The said applicants shall at all times keep so much of the streets occupied by the said line of railway as may lie between the rails of every track and between the lines of every double track and for the space of eighteen inches on the outside of every track cleared of snow, ice and other obstructions and shall cause the snow, ice and other obstructions to be removed as speedily as possible, the snow and ice to be spread over the balance of the street so as to afford a safe and unobstructed passageway for carriages and other vehicles. Should the said engineer at any time consider that the snow or ice has not been properly or as speedily as possible removed from or about the tracks of the railway lines or not properly or as speedily as possible spread over the street, he may cause the same to be removed and spread as aforesaid and charge the expense to the said applicants who shall pay the same to the city. If, however, the engineer is of opinion that the snow or ice should be removed entirely from the streets so as to afford a safe passage for sleighs and other vehicles the said applicants shall at once do so at their own expense and charge, or in in case of their neglect the engineer may do so and charge the expense to them and they shall pay the same.

Apart from the question of negligence in carrying out the obligations which this sub-clause (*f*) imposes upon it the company is not liable for the condition or non-repair of the city's street. It is the duty of the city to keep the streets in repair and if by reason of

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its failure to do its duty in that respect any one sustains injuries it is the city that would be liable.

The city is not a party to this action and I do not desire to express any opinion whatever as to its liability for the plaintiff's injuries.

The question then in this case is whether or not the defendants have been guilty of negligence in discharging their obligations with respect to the removal of the snow and ice which would from time to time in Winnipeg gather on and alongside of their car tracks.

I do not think the defendants' obligation as to the removal and disposition of the snow can be expressed more clearly than the sub-section above quoted has expressed them. The city engineer is to determine whether the company has or has not properly removed the snow from about the track of the railway lines and if he decides they have not he is empowered to remove it at their expense. There was not a scintilla of evidence to shew that the engineer had at any time determined that the company had not properly removed the snow at all times. The only inference to be drawn from the evidence is that he was quite satisfied.

If the company complies with its obligation in that regard without negligence and causes injury to others no liability for damages rests upon them, on the plain and simple ground that the doing of an act authorized by the legislature cannot, without negligence involve liability to others for injuries they may suffer in consequence.

The rule or principle of law on this point seems clearly beyond doubt. In the case of *Canadian Pacific Railway Co.* v. *Roy*(1), their Lordships of the Privy Council held expressly that a railway company authorized by statute to carry on its railway

(1) [1902] A.C. 220.

undertaking in the place and by the means adopted is not responsible in damages for injury not caused by negligence but by the ordinary and normal use of its railway or, in other words, by the proper execution of the powers conferred by statute. In that case some sparks which escaped from an engine drawing a train of the railway company set fire to and destroyed the plaintiff's barn, but as there was no negligence on the part of the company they were held not to be liable for the loss.

See also *Geddis* v. *Bann Reservoir*(1), at pp. 455-6, and *Hammersmith Railway Co.* v. *Brand*(2).

The claim in this case is that the accident to the plaintiff was caused by a slippery incline from the main surface of the snow on the street to the rail upon which incline the plaintiff slipped and fell. But this incline was necessarily caused by the company in the exercise of its statutory powers and obligations in removing the snow from its tracks and spreading it upon the street. That afterwards it was pressed down by motor and jitney traffic leaving a hard smooth "surface" sloping upwards from the rails is something for which the company is in no way responsible. Such a slope or incline as made by the company was unavoidable if they were to fulfil their obligations. If the defendant company had removed all the snow from the eighteen inch strip outside of the rails leaving a perpendicular wall at the eighteen inch distance from the street the incline or slope would naturally have been greater, and the danger to the public much greater than its removal from the rails on a gradual incline. The fact, as Mr. Justice Perdue remarks, that part of the snow remained upon the strip was not an act of negli-

(1) 3 App. Cas. 430. (2) L.R. 4 H.L. 171 at p. 215.

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gence which either caused or contributed to plaintiff's accident. The 18 inch strip of the incline complained of was entirely covered by the overhanging car and the steps of the car and plaintiff's accident occurred further up on the incline just before reaching out her hand to catch the rail or raising her foot to step on the car.

The actual facts are that in a city like Winnipeg, where there are such heavy falls of snow in the winter time, there must without negligence necessarily be in the removal of the snow from the track by the most modern and improved methods an incline or slope to the top of the snow in the street, that this incline or slope was at the time of the accident to the plaintiff made hard and slippery by the automobile and jitney traffic and that this condition was aggravated by a recent light fall of snow. Neither for the effect of the motor and jitney traffic in hardening and making slippery the incline or slope or for the light fall of snow which aggravated and increased the danger of these conditions the combination of which caused plaintiff's accident can the company be held liable.

There was no evidence whatever that the city's engineer was not satisfied with the manner in which the company had discharged its obligations with regard to the removal of the snow from and adjoining its tracks and on the other hand there was clear and undisputed evidence that they had so removed it by the latest and most approved methods and without negligence of any kind.

I agree with the learned judges of the Court of Appeal that the only evidence from which negligence could possibly be inferred was with regard to the incline and that no such inference could properly be drawn. It is not stated by any one that this incline was steeper

than it should have been or that defendants could have avoided making an incline if they discharged their obligations.

There were only two ways in which the company could discharge its obligations with respect to the snow outside of the outer rail for the distance of 18 inches; one was to remove it entirely for that distance and either leave a perpendicular wall of snow 18 inches outside the rail and from the top of that wall leave or make an incline or slope to the top of the snow on the street level or remove the snow as they did by well-known modern appliances in an incline or slope from the rail to the snow on the street level. They adopted the latter course which had the approval, as I infer, of the engineer inasmuch as he never disapproved in any way. The other course of leaving a perpendicular wall at the 18 inches limit from the rail would obviously have created an intolerable and dangerous condition alike to vehicular traffic and to pedestrians and would doubtless have met with the prompt disapproval of the engineer. The slippery condition of the incline was caused by the motor and jitney traffic and was increased by a light fall of snow the night before the accident. For neither of these was the defendant in any way responsible.

For these reasons I would dismiss the appeal with costs.

IDINGTON J.—The legal foundation upon which, beyond question, appellant's right of action herein can be rested is that what was improperly done or left undone by respondent resulted in unjustifiably putting a public highway so out of repair as to constitute thereby that sort of public nuisance for which an action will lie at the suit of any traveller injured thereby,

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as she claims she was, against the party so creating the nuisance or contributing thereto.

The relevant law is daily applied for example against the negligent teamster who has left improperly his waggon or machine or load on the highway, or the contractor engaged in repair or reconstruction of part thereof, who has improperly done or left undone something whereby he has endangered needlessly those using, as of right, the highway, and thereby caused any injury and damage to any of them.

The Electric Railway Company given by virtue of any legislation a franchise for the use of any highway is protected, so far as acting within the powers so conferred, from liability to any action for accidental results solely and necessarily due thereto. But it must so absolutely live up to the terms and conditions of its franchise that the accident complained of, in any action for damages arising therefrom, cannot be attributed to its having done or left undone that which the terms of its legalized franchise may have imposed or rendered obligatory upon it.

Its licence is limited to that which it can rightfully enjoy, concurrently with an observance of such terms. An habitual disregard thereof may entitle the Attorney-General or other duly constituted public authority in that behalf to move the courts to deprive it of the franchise or enforce its observance.

Under our English system of law the private individual has, however, no such right to complain to the courts, unless and until he has suffered injury resulting from the non-observance of the said terms and conditions. Then he or she suffering have, in case a public nuisance is created, a right to complain.

It is this phase of the law which distinguishes the

case of *Ogston* v. *Aberdeen District Tramways Co.*(1) from some other cases.

The law as laid down in that case relative to the result of non-observance of the terms and conditions of the franchise leading to the creation of a nuisance is applicable here.

The observance of the respective set of terms and conditions used in any such like cases of a purchase may lead to different results as illustrated by the case of *City of Montreal* v. *Montreal Street Railway Co.*(2), where that complained of was held to have been conceded to the railway company by the city's by-law and hence could furnish no ground of complaint. See also the cases of *Morrison* v. *Sheffield*(3), distinguishing *Great Central Railway Co.* v. *Hewlett*(4), which itself illustrates how the company had been adjudged liable and then protected by a later Act enabling it to maintain what had formerly been adjudged a nuisance, and the cases of the *Dublin United Tramways Co.* v. *Fitzgerald*(5); *Geddes* v. *Bann Reservoir*(6); *Mersey Docks Trustees* v. *Gibbs*(7); *Metropolitan Asylum District* v. *Hill*(8), and *Canadian Pacific Railway Co.* v. *Parke*(9), where the obligation not to be negligent is implied in the legislative grant if proven. See also cases cited in earlier reports of these cases.

The law, I take it, rendering liable one so transgressing its rights and disregarding its duties needs no elaboration, but from the argument adduced it seemingly needs in order to have confusion in thought and law eliminated from the discussion to have it pointed out that though the city may also have incurred liability

(1) [1897] A.C. 111.
(2) [1903] A.C. 482.
(3) [1917] 2 K.B. 866.
(4) [1916] 2 A.C. 511.
(5) [1903] A.C. 99.
(6) 3 App. Cas. 430.
(7) L.R. 1 H.L. 93.
(8) 6 App. Cas. 193.
(9) [1899] A.C. 535 at 544 et seq.

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in regard to what has taken place and is in question herein that does not in law excuse or exonerate the respondent.

In like manner and for the like purpose I may observe that it is quite possible that the appellant's action may be rested upon the statute which confirmed the contract between the city and respondent.

I avoid passing any decisive opinion upon that subject for the two-fold reason that it is not necessary herein to do so, and the elaborate examination of the law on that point to bring the question so raised within the range of easy solution and determination would be useless and needlessly confusing.

Once it might be shewn that the statute by its purview or language, to adopt the rule laid down by Lord Cairns in the case of *Atkinson* v. *Newcastle Water Works Co.* (1), would support the action what have we gained?

We need not go further than the elementary principles of law which I have adverted to.

If the statute gives an action it can herein only proceed upon the same identical principles relevant to the application of the facts in either case. The whole question involved and all the questions involved, in any way one can look at the matter, must turn upon the tests of whether or not the respondent lived up to the terms and conditions of its licence to invade the highway and whether or not it was a result of its non-observance thereof which caused the appellant's injuries.

In directing the jury the learned trial judge used the word "negligence" which at first blush I was inclined to think might not most aptly describe all that

(1) 2 Ex. D. 441.

was needed to direct the jury, once they were told the nature of the obligation resting on respondent.

I have tested it in many ways in my own mind and I cannot find any one that would better convey to the jurors' minds what in the last analysis was left for them to decide upon the evidence as applicable to the obligation resting upon the respondent when exercising its powers.

There certainly was evidence that would have to be submitted to the jury and their determination of it ought to have been held final and left undisturbed unless some misdirection shewn.

There was nothing complained of at the trial by counsel for respondent which gives any legal ground for setting the verdict aside.

The disregard of the request to submit questions to the jury is not in Manitoba a misdirection.

Much often is to be said in favour of submitting questions but I cannot think an obligatory rule of that sort would promote the administration of justice. Take for example the case of *Jamieson* v. *Harris*(1), which presented ordinary everyday sorts of facts which any jury ought to have been able to decide upon, by applying their common sense, yet after twenty-six questions submitted and answered it was decided here that the learned trial judge had missed the right mark to direct attention to.

The next ground of complaint made at the trial in regard to the charge was that the action had not been based on any breach of alleged statutory duty.

Inasmuch as (which I have already tried to explain) the real question to be decided, was (so far as facts upon which the jury had to pass were concerned) identically the same whether presented as a breach of

(1) 35 Can. S.C.R. 625.

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statutory duty or as the liability arising from the creating of a nuisance, I fail to see any valid ground of objection in what is thus put forward.

The more elaborate presentation which was made of the objection resolves itself into a mere verbal distinction without containing anything in substance.

So far as pointed at the question raised as to the possibility of resting an action upon the statute it can be of no avail, in my view, that the action can rest upon the liability for nuisance quite independently of the statute.

It is not always that a charge which possibly proceeded in the misconception in the mind of the learned trial judge of the exact expression applicable to the name of the relevant law can be upheld.

But in this case it could by no possibility have misled the jury in the most rigorous discharge of their actual duties. They were identical in either way that the case might have been presented.

And still more is that the case when we come to weigh the term negligence to which, in some way not made clear, objection may have been intended to have been taken.

The learned trial judge upon mere mention of it at once assumed the question of contributory negligence had not been passed upon and corrected as it seems to me the erroneous impression of counsel, who seems to have assented.

There seems to have been some ten or more acts or omissions which appellant had put forward as acts of negligence on the part of the respondent.

In one part of the charge the learned judge seems to say that if respondent was guilty of any of these it must fail. This seems too broadly stated but is not objected to and the general tenor of the charge was

such as to confine the jury's attention to the question of whether respondent had properly observed its obligations in a clause of the contract referred to as "F" and which imposed upon it a manner of dealing with the snow which certainly does not seem to have been observed else the situation created thereby would not have been that which was presented in evidence.

A slope of eighteen inches over the three and a half feet of snow turned into ice on any street lying next outside the rail seems to have been the condition which produced the accident in question.

That certainly was not what one would have expected to find as the product of the due observance of the contract in question, nor was it a fit condition for vehicular travel.

If that resulted from respondent's treatment of the snow problem, then I see no defence to the action, or reason for interfering with the verdict of the jury.

But even falling a long way short of such a product there seems no reason for a new trial which is prohibited by the "Court of Appeal Act" unless there has in truth been a miscarriage of justice within the meaning of same.

It has occurred to me that the specification "F" requiring a clear space between the rails and eighteen inches outside the rail was not very suitable for probable conditions and that a slope may have been treated by way of compromise.

Moreover, that is only surmise and at best could not help the respondent which could be no party to anything but that specified.

The afterthought suggestion that the snow was to be spread over the balance of the street so as to afford a safe and unobstructed passageway for carriages

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and other vehicles but did not provide for pedestrians does not seem to have much weight. If such a passage-way for carriages and other vehicles had been produced, the walking would not have been bad.

What is complained of was neither fit for pedestrians nor passengers by carriages or other vehicles. No doubt the jury understood this and assumed rightly pedestrians had full right to travel there to reach the car.

If the slope had only been a full eighteen inches wide it would have been overcome by the overhanging side of the car and have done appellant no harm.

Had the actual specification in "F" been adhered to pedestrians would have been quite safe in trying to get aboard a car, but I imagine the city and its engineer would have had to face a problem they do not, as was their duty, seem to have efficiently tried to have discharged.

That is no reason for setting aside appellant's judgment.

The respondent asks for a new trial if we should be disposed to disturb the appellate court's judgment.

The only thing put forward in that regard not already considered and dealt with is the interesting question of the non-reception in evidence of photographs of the street as it existed a month or more after the accident. I think the learned trial judge was right in such refusal.

There has been quite enough of confusion of law and of fact introduced into this simple case without giving such another cause therefor. Whether photographs can ever be insisted upon or not I will not pass upon but certainly as a guide to the condition of snow and ice on a street in Winnipeg a month before taken is asking too much.

The appeal should be allowed with costs here and in Court of Appeal and the judgment of the trial judge restored.

ANGLIN J.—I am with respect unable to accept the conclusion reached in the Court of Appeal in this case that there was no evidence on which a jury could reasonably base a verdict for the plaintiff. The very condition of the roadway as described by some of the witnesses—a slope extending from the rails outward rising eighteen inches in four feet—might (of course I must not be understood as saying or meaning that it should) be considered by the jury to have been not "safe" * * * for the passage of carriages and other vehicles," and to have been due, in part at least, to some negligence on the part of the defendant company's servants in exercising its statutory right (or duty) to spread "over the balance of the street" the snow removed from the railway tracks and the adjoining eighteen inch strips.

But I am of the opinion that the case was not properly submitted to the jury on this vital issue and that the defendant is entitled to a new trial. As the action should therefore, in my opinion, go before another jury, it would not be proper for me to discuss the issues involved further than is necessary to make clear the ground on which I would direct a new trial.

Upon the charge of the learned trial judge, although the jury should be of the opinion that in disposing of the snow handled by them the company's servants had done all that was required

> to afford a safe and unobstructed passage for carriages and other vehicles,

they might, if they thought that there was a condition dangerous *to pedestrians* ascribable in some degree

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to the acts of the defendants' servants, find a verdict for the plaintiff. After reading the first sentence of clause (*f*) of the regulations embodied in by-law 543 of the City of Winnipeg, validated by sec. 34 of 55 Vict., ch. 56, whereby the defendant company was declared to be entitled to

all the franchises, powers, rights and privileges thereunder,

the learned judge said to the jury:

But apart altogether from the statute, but at the same time not inconsistent with it, the street railway company may remove such snow from its tracks and such portions of the streets as may be necessary for the operation of its cars. But if it does remove the snow, or alter its natural condition in any way, there is a duty cast upon it to do so in a reasonable manner and without negligence. If it removes snow from its tracks and throws it upon part of the highway adjoining the tracks in a careless and negligent manner or leaves it piled up or heaped up with a dangerous slope upon a highway, and if it was by reason of such negligence that the plaintiff slipped and fell, then (subject to the rule of contributory negligence which I will presently explain) the defendant would be liable.

You may quite properly require a high degree of care to such of the public who may in the ordinary course of events attempt to board a street car or who, in other words, are invited to cross, to the car, that portion of the street cleaned and distributed, but excepting in so far as the defendant may have rendered the street dangerous by its acts, it is not liable for the dangerous condition of a public street on which it receives and discharges passengers. However, in removing snow from one part of the street and depositing it on another part at an angle, you may fairly charge the defendant with knowledge of the traffic and its probable effect upon the snow so distributed.

Except under the authority of the by-law ratified by the legislature the defendant company had no right to interfere with the normal conditions of the highways. Anything in the nature of an obstruction or danger to lawful traffic thereon of any kind caused wholly or in part by its interference resulting in injury would, apart from the statutory sanction, amount to an actionable nuisance. The legislature saw fit, however, to give the company the right to remove snow and ice from their tracks and a defined space on either side of

them in order to permit of the free operation of their tramcars. In doing so it thought proper to approve of the condition annexed by the city by-law to the exercise of the right so conferred, viz., that the company should spread the snow and ice so removed "over the balance of the street." It had no right to take away any of the snow or ice to any other place, unless the city engineer should so direct, when in his opinion that should become necessary

to afford a safe passage for sleighs and other vehicles.

The by-law approved by the legislature specified the manner in which the snow should be spread by the company, *i.e.*,

so as to afford a safe and unobstructed passageway for carriages and other vehicles.

No doubt, as put by the learned judge, in this connection the defendant may fairly be charged with knowledge of the traffic on the highway and its probable effect. But the measure of its duty—the condition of the exercise of its right—is that, having regard to such traffic, it should spread snow and ice removed from its tracks, etc., so as not to obstruct or render unsafe vehicular traffic—always of course so far as the exercise of reasonable care and skill will enable that to be done. If, notwithstanding the exercise of such care and skill, a condition dangerous to pedestrians should ensue—either because of the excessive quantity of snow and ice thus accumulated on "the balance of the street," or because of other conditions not attributable to any neglect of the company's servants in the exercise of its statutory right with its incidental obligation, the company is not legally responsible. It would only have done that which the legislature authorized it to do in the very manner and to the extent specified by the approved by-law. It is solely

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because this aspect of the case was, in my opinion, improperly presented to the jury that there should be a new trial.

Objection to the learned judge's charge on this ground was probably sufficiently taken by counsel for the defendant, when he urged that

> no person can set up a claim in law for damages based on negligence against a party who has complied with a statutory power or a statutory duty,

and again, that the plaintiff would not have a cause of action arising out of the slope in the highway unless that defect falls "within the purview of the statute"—meaning, I take it, that a condition due to the acts of the company's servants, which, although unsafe for pedestrians, was reasonably safe and unobstructed for vehicular traffic, would not entail liability on the company.

I would merely add, with respect, that this appears to be a case in which the learned trial judge might very properly have yielded to the suggestion of counsel for the defendant that questions, covering the several issues, should be submitted to the jury.

BRODEUR J.—This is a case arising out of a street railway accident. By virtue of a by-law passed by the City of Winnipeg, the respondents were bound to keep the part of the street occupied by their lines for a space of 18 inches on both sides of the track clear of snow, ice and other obstruction and to spread over the balance of the street the snow or the ice so as to afford a safe and unobstructed passageway for carriages. This by-law was validated and confirmed by the legislature in all respects

> as if the said by-law had been enacted by the legislature.

It appears by the evidence that on the day of the accident there was a slope which might be of a danger-

ous nature spreading at the rail and extending back about four feet to a height of about 18 inches. When the appellant came to board the street car she fell by reason of that dangerous condition and was very seriously hurt.

It is claimed by the appellant that the duty imposed upon the respondent company was a statutory one in view of the declaration made by the legislature and that the by-law should be considered as being enacted by the legislature itself. That view has been accepted by the trial judge but the Court of Appeal would not adopt it and reversed on that ground the judgment of the Court of King's Bench of Manitoba.

If the legislature had simply confirmed the by-law, the latter should be considered as a contract between the city and the street railway company. But in declaring that this by-law becomes a legislative enactment that duty imposed upon the railway company becomes a statutory duty and if in the exercise of those powers, or in the carrying out of those duties, the company acts negligently then there is liability on its part towards any person who might be injured as a result of that neglect.

Some evidence has been adduced to shew that this incline on the street was caused by the company and by the way the snow had been removed from the centre of the street and there was certainly sufficient evidence to justify the jury in coming to the conclusion that the duty imposed upon the company had been negligently carried out. On that ground, I should be of opinion that the findings of the jury should be sustained. Besides, the company in exercising a statutory power is under a common law duty not to injure the public. *Geddes* v. *Bann Reservoir*(1).

(1) 3 App. Cas. 430.

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It is suggested, however, that a new trial should be ordered because the judge did not properly instruct the jury as to the nature of the duty and obligation of the company.

If I refer, however, to that charge I fail to see that he has not given those proper instructions. I notice that he uses, in one part of his charge, the following words, and I think they cover the objection which has been raised:

> But apart altogether from the statute but at the same time not inconsistent with it, the street railway company may remove such snow from its tracks and such portions of the streets as may be necessary for the operation of its cars, but if it does remove the snow, or alter its natural condition in any way, there is a duty cast upon it to do so in a reasonable manner, and without negligence. If it removes snow from its tracks, and throws it upon part of the highway adjoining the tracks, in a careless and negligent manner, or leaves it piled up or heaped up with a dangerous slope upon the highway, and if it was by reason of such negligence that the plaintiff slipped and fell, then the defendant would be liable. You may quite properly require a high degree of care to such of the public who may in the ordinary course of events attempt to board a street car, or who, in other words, are invited to cross to the car that portion of the street so cleaned and distributed. But excepting in so far as the defendant may have rendered the street dangerous by its acts, it is not liable for the dangerous condition of a public street on which it receives and discharges passengers. However, in removing snow from one part of the street and depositing it on another part, at an angle, you may fairly charge the defendant with a knowledge of the traffic and its probable effect upon the snow so distributed.

In those circumstances, I think that the judgment appealed from should be reversed and the judgment of King's Bench should be restored with costs of this court and of the courts below.

Appeal allowed with costs.

Solicitor for the appellant: *Benjamin L. Deacon.*
Solicitors for the respondents: *Moran, Anderson & Guy.*

DONALD C. HOSSACK AND LUCINDA E. HOSSACK (DEFENDANTS) ..... } APPELLANTS;

AND

JOHN E. SHAW AND FRANK E. SHAW (PLAINTIFFS) ..... } RESPONDENTS.

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*June 17.
*June 25.

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

Contract—Loan of money—Interest at specified rate "until paid"—Maturity of loan—Payment of interest after maturity.

Where a contract is made for the loan of money "with interest at 2½ per cent. per month till paid" the borrower is not obliged to pay interest at said rate after maturity of the loan.

Payment of interest at such rate after maturity is voluntary and the excess over the statutory rate cannot be recovered back.

Judgment of the Appellate Division (40 Ont. L.R. 475), reversing that on the trial (39 Ont. L.R. 440), reversed in part.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial (2), in favour of the defendants.

The appellants gave promissory notes for money borrowed from respondents agreeing to pay interest at the rate of 2½ per cent. a month. In an action on the notes two defences were offered, that the respondents were money-lenders and the transaction was harsh and unconscionable and therefore void under the Dominion or Ontario "Money-Lenders Act." The Supreme Court held that they were not money-lenders and these Acts did not apply.

The second ground of defence was that in any case

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(1) 40 Ont. L.R. 475. (2) 39 Ont. L.R. 440.

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the rate of 2½ per cent. a month would only govern until maturity of the notes.

The trial Judge held (1), that respondents were money-lenders and the transaction harsh and unconscionable. The Appellate Division (2), reversed his decision and gave judgment against appellants for the full amount claimed.

J. M. Ferguson and *Coffey* for the appellants.

A. A. MacDonald and *W. J. McCallum* for the respondents.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be allowed in part and the judgment modified as stated by Mr. Justice Anglin.

IDINGTON J.—At the close of the argument of counsel for appellant the substantial part of the appeal was held untenable.

He failed to establish either that respondents were money-lenders within the meaning of the Ontario "Money-Lenders Act," R.S.O., [1914] ch. 175, or that the rate of two per cent. per month for such loans as in question could be held harsh and oppressive within the meaning of section 4 of said Act, even if it is applicable to transactions, between a borrower and another not such a money-lender, that fall within the meaning of the Act.

The appellants' counsel took, however, the further point that the contracts in question did not provide for such an excessive rate of interest as two per cent. per month after maturity.

As to so much of said interest at said excessive rate as was paid (if any) in respect of interest falling due

(1) 39 Ont. L.R. 440. (2) 40 Ont. L.R. 475.

after maturity, the payments must be held to have been voluntary, and hence not recoverable or to be interfered with in the accounting.

Beyond the date of maturity, or time after maturity up to which interest may have been paid, and up to the signing of judgment for the principal, the rate should only be computed at the rate of five per cent. per annum unless a higher rate clearly is stipulated for in the respective contracts in question.

The $2,500 note bore no rate of interest as expressed on its face and such contract as existed relative thereto does not seem to extend to renewals of which that sued on seems to have been one of many.

The same would seem to hold good of the two smaller notes sued upon.

The note for $950 reads at end thereof: "Int. 2% per mo. till paid." It is dated 22nd November, 1915. There appears in the case a letter of 22nd July, 1915, which refers no doubt to the original note for same loan which expressly provides for interest at the rate of two per cent. per month until paid, but I cannot see how that can be extended to renewals, for it is not so expressed.

The note sued on therefore must in such case stand on what it expresses. It has been held that such like expressions mean, *primâ facie,* when due but this note is on demand. And the evidence shews such demand was made within a few days after given.

A moderate rate of interest even exceeding the rate of five per cent. per annum might well be held as extended beyond the due date when coupled with later payments at such moderate rates but that reasoning from conduct does not extend to such an excessive rate as two per cent. per month. See Leake on Contracts,

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(4th ed.), p. 784, and cases there cited, also cases of *St. John* v. *Rykert* (1), and *The Peoples Loan and Deposit Co.* v. *Grant* (2), cited by appellants' counsel in argument.

I conclude, therefore, that if the sum of $452.22 allowed by the Appellate Division is based, as claimed and not denied, upon the computation of interest at two per cent. per month on any of these several contracts there is an error in the judgment which should be rectified by a computing of the rate of interest at five per cent. per annum from the respective dates thus in question up to which the appellant had paid interest, down to the date when judgment was entered for the principal sum.

If the parties cannot agree as to the result of such computation the matter should be referred to the registrar to determine the amount.

The appeal to that extent should be allowed and the judgment appealed from reformed accordingly.

The appeal having failed in its main object, I cannot say there should be costs thereof allowed, but think under all the circumstances there should be no costs to either party here or in the Court of Appeal.

ANGLIN J.—The defendants in my opinion have failed to establish that

> having regard to all the circumstances the cost of the loan(s) is excessive (or) that the transaction(s) (are) harsh and unconscionable

within the meaning of s. 4 of the Ontario "Money-Lenders Act" (R.S.O., ch. 175).

The male defendant is a solicitor and real estate dealer of considerable experience and is a most unlikely person to be the victim of a "harsh and unconscionable" bargain. He was in a position to know whether the

(1) 10 Can. S.C.R. 278. (2) 18 Can. S.C.R. 262.

rate of interest was or was not excessive, having regard to the conditions of the money market during the currency of the loans. Presumably he would also know the nature and value of such securities as he had to offer, and would appreciate the risk which the lender was taking. A perusal of the evidence does not enable me to say that the Appellate Division erred in finding that a case within section 4 of the "Money-Lenders' Act" has not been made out.

The contention that the respondents were "money-lenders" within the meaning of either the Ontario "Money-Lenders' Act" or of the "Dominion Interest Act" (R.S.C. ch. 122) is still more hopeless. There is no evidence whatever to support the suggestion that they carried on money lending as a business.

But on another branch of the appeal I think the plaintiffs are entitled to some relief. A stipulation for interest at a certain rate on a loan "until paid" is established by a long series of cases, of which it is needful to refer only to *St. John* v. *Rykert*(1), and *People's Loan and Deposit Co.* v. *Grant* (2), in this court, to import a contract to pay interest at the specified rate only until the maturity of the loan. To carry the contract for the stipulated rate beyond the maturity of the loan explicit provision to that effect must be made. It follows that after the maturity of the several obligations taken by the plaintiffs (including any renewals which specified the rate of interest) the defendants were under no contractual liability to pay interest at the high rate agreed upon. They were liable only for the statutory rate of 5%.

But payments at the higher rate actually made cannot be recovered back. They were voluntary. If

(1) 10 Can. S.C.R. 278. (2) 18 Can. S.C.R. 262.

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made under any mistake, it was a mistake of law. *Union Bank* v. *McHugh* (1), may be cited as a comparatively recent illustration of the application of this well-known doctrine of English law.

In respect of the periods whch have elapsed since the several dates at which the respective obligations (including such renewals as specified the rate of interest) matured, any interest unpaid can be recovered only at the statutory rate of 5%. The judgment in appeal should be modified accordingly.

In view of the divided success there should be no costs of this appeal or in the Appellate Division.

Our attention was called during the argument to what was said to be an accidental error in the judgment of the Appellate Division under which the female defendant might be required to pay $2,196 in addition to the amount recovered against her co-defendant. This was admittedly not intended and any correction necessary to limit the whole recovery to the amount for which Donald C. Hossack is found liable should be made. His co-defendant is jointly liable with him for a portion of that amount.

BRODEUR J. concurred with Anglin J.

CASSELS J. (*ad hoc*).—I have carefully considered the questions argued on appeal in this case. The question has resolved itself into the one question of what rate of interest should be allowed after maturity of the loans and from the date of the payments after maturity.

I have had the benefit of a perusal of the reasons for judgment of Mr. Justice Anglin, and can add nothing further to what he has stated. I concur with

(1) [1913] A.C. 299; 44 Can. S.C.R. 473; 10 D.L.R. 562.

his conclusions and with the disposition of the appeal as stated in his reasons for judgment.

Appeal allowed in part.

Solicitors for the appellant, Donald C. Hossack: *Day, Ferguson & McDonald.*

Solicitor for the appellant, Lucinda E. Hossack: *D. J. Coffey.*

Solicitors for the respondents: *Lamport, Ferguson & McCallum.*

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*June 17.
*June 25.

LONDON AND LANCASHIRE FIRE INSURANCE COMPANY (DEFENDANTS)..... APPELLANTS;

AND

F. VELTRE (PLAINTIFF)..... RESPONDENT.

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

Insurance—Condition of policy—Notice of cancellation—Return of unearned premium—Notice and tender by mail—Receipt by insured.

In the statutory conditions indorsed on a policy of insurance against fire condition 11 provides that "the insurance may be terminated by the company by giving seven days' notice to that effect and * * * by tendering therewith a ratable proportion of the premium paid for the unexpired term calculated from the termination of the notice." By condition 15 "any written notice to the assured may be by registered letter addressed to him, etc."

Held, that the notice of cancellation of the policy may be given by registered letter addressed to the assured as required by condition 15 and the terms of condition 11 as to rebate are complied with if the money for the unearned premium is enclosed with the notice in an envelope so properly addressed and registered.

Held, however, that the cancellation of the policy will not be effected unless the notice and money are actually received by the assured before a loss under the policy occurs.

Held, *per* Brodeur J., that the unearned premium must be personally tendered to the assured. Judgment of the Appellate Division, 40 Ont. L.R. 619; 39 D.L.R. 221, affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment on the trial in favour of the defendants.

The appellant by its policy dated 15th June, 1916, insured the respondent for one year from 17th June, 1916, to the amount of $1,500.00 against loss or damage by fire in respect of the stock of merchandise and store

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

(1) 40 Ont. L.R. 619; 39 D.L.R. 221.

furniture and fixtures in the respondent's premises on Claremont street in the town of Thorold. A cash payment of $22.50 was made.

The policy was by its express terms subject to the statutory conditions set forth in section 194 of the Ontario Insurance Act, R.S.O. 1914, ch. 183. Among these conditions are the following:—

"11. The insurance may be terminated by the company by giving seven days' notice to that effect, and, if on the cash plan, by tendering therewith a ratable proportion of the premium paid, for the unexpired term, calculated from the termination of the notice, and the policy shall cease after such notice or notice and tender as the case may be, and the expiration of the seven days.

"15. Any written notice to the assured may be by letter delivered to the assured or by registered letter addressed to him at his last post office address notified to the company or where no address is notified and the address is not known, addressed to him at the post office of the agency, if any, from which the application was received."

On the 15th day of December, 1916, the appellant sent by registered letter addressed to the respondent at her proper street address at Thorold a notice in the following terms:

Dear Sir,—I beg to hand you enclosed herewith in legal tender the sum of $11.34 being the unearned premium for balance of the current term of Policy No. 10514765 of this company issued to you dated June 17th, 1916, expiring June 17th, 1917, covering $1,200 on groceries, meats, cigars and tobacco and $300 on store furniture and fixtures, including refrigerator, cheese-cutter, shelving, electric fans, clock, table and stove, all while contained in the 3 storey brick building, occupied as laundry, grocery store, hall and dwelling situate as above, which is hereby cancelled and this company will not be held liable should any loss occur after the 22nd December, 1916.

Yours truly,

ALFRED WRIGHT,
Manager.

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Enclosed with the notice was $11.34 in legal tender to cover the ratable proportion of the cash premium paid for the unexpired portion of the term.

On the 25th day of December, 1916, during the absence for some days of the respondent, a fire occurred by which the insured property was destroyed.

The respondent had not in fact received the notice of cancellation although it arrived at Thorold in due course of post. The respondent is an Italian married to one Sam Savino. According, it is said, to the custom of her people, she retained after marriage her maiden name of Veltre but among the English-speaking people of Thorold, including the postmaster and his clerks, she was known only as Mrs. Savino. Letters are not delivered at Thorold but must be called for at the post office. The respondent's husband had taken a box at the post office in his own name, although he himself was not in business, but, as the name of Veltre was not identified with him or his wife in the minds of the people at the post office, no notice was placed in his box of the arrival of the registered letter. Under these circumstances, knowledge of the letter did not reach the respondent or her husband until after the fire, when they were told by the insurance agent that such a letter had been sent.

The appellant claimed that the mailing of the notice with the money to be returned, operated as a cancellation of the policy according to its terms, relying upon the conditions hereinbefore set forth. Action was brought upon the policy and the trial judge gave effect to the appellant's contention and dismissed the action. The Appellate Division (Meredith C.J.O. dissenting), has reversed the judgment holding that the mailing of the notice and the enclosing of the money therewith did not effectually cancel the policy.

R. S. Robertson for the appellants. The notice and tender complied with the requirements of condition 11 and were effective from the date of mailing. *Mercantile Investment Co.* v. *International Co. of Mexico* (1); *Union Fire Insurance Co.* v. *Fitzsimmons* (2); *In re Simmons and Dalton* (3); *Bruner* v. *Moore* (4). See also *Maldover* v. *Norwich Union Fire Ins. Co.* (5).

A. C. Kingstone for the respondent referred to *Bank of Commerce* v. *British America Assur. Co.* (6); May on Insurance (4th ed.) par. 67k.

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

IDINGTON J.—This appeal ought to turn upon the construction of two conditions indorsed upon the policy of insurance in question and the application of the relevant facts.

The respondent, an Italian woman, whose maiden name was Franzesco Veltre, entirely ignorant of English, married one Savino, carried on with his assistance a shop in Thorold and obtained from appellant an insurance against fire upon the contents thereof for a year from the 17th June, 1916, which were consumed by fire on the 25th December following.

The policy was issued to F. Veltre, Esq., and had indorsed amongst other conditions the following:—

> 11. The insurance may be terminated by the company by giving seven days' notice to that effect, and, if on the cash plan, by tendering therewith a ratable proportion of the premium paid for the unexpired term, calculated from the termination of the notice, and the policy shall cease after such notice or notice and tender as the case may be, and the expiration of the seven days.

(1) [1893] 1 Ch. 484n.
(2) 32 U.C.C.P. 602.
(3) 12 O.R. 505.
(4) [1904] 1 Ch. 305.
(5) 40 Ont. L.R. 532.
(6) 18 O.R. 234.

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15. Any written notice to the assured may be by letter delivered to the assured or by registered letter addressed to him at his last post office address notified to the company or where no address is notified and the address is not known, addressed to him at the post office of the agency, if any, from which the application was received.

The appellant decided to avail itself of the said No. 11 condition and sent a registered letter enclosing the money mentioned and addressed as set forth therein, which letter reads as follows:—

London & Lancashire Fire Insurance Co. Limited of Liverpool, England.
Canada Branch, Toronto, Ont.
Toronto, 15th December, 1916.

F. Veltre, Esq.
82-84-86 Claremont St.,
Thorold, Ont.

Dear Sir.—I beg to hand you enclosed herewith in legal tender the sum of $11.34 being the unearned premium for balance of the current term of Policy No. 10514765 of this company issued to you dated June 17th, 1916, expiring June 17th, 1917, covering $1,200 on groceries, meats, cigars and tobacco and $300 on store furniture and fixtures, including refrigerator, cheese-cutter, shelving, electric fans, clock, table and stove, all while contained in the three storey brick building, occupied as laundry, grocery store, hall and dwelling situate as above, which is hereby cancelled and this company will not be held liable should any loss occur after the 22nd December, 1916.

Yours truly,
ALFRED WRIGHT,
Manager.

The letter never was received by respondent till some time after the fire.

The appellant contends it was by such a letter so addressed, being so sent, relieved from any possible claim under the policy.

There never was any address notified to the company within the language of condition No. 15 and I cannot think that it was entitled to assume that such an address as used could be effective for such a purpose.

If the sender had tried to have a letter miscarry he could hardly have done better.

Either the correct address was known or unknown.

If known it should have been sent correctly addressed and not sent to a woman with the addition of "Esq." If unknown it should, in order to comply with the condition, if available to it, have been sent to Merritton.

That might not have been any more successful in reaching the respondent.

I do not feel called on to express any opinion upon the question of what the result might have been if the letter had been properly addressed within the meaning of any alternative in condition No. 15.

I should be the more reluctant to do so seeing there are no less than four other conditions indorsed on the policy each involving the question of how written notice from the company may in certain cases respectively affect the legal relations of insurer and insured.

It may well be that condition No. 15 is intended to become operative only in regard to any one of three of these other conditions and yet ineffective in the case of tendering money.

In confining myself to the narrow issue I have dealt with I am only adhering to an observance of the issue joined by the pleadings.

And I am by no means troubled over the suggestion of appellant's counsel that respondent is incorrectly described in the policy. She is the person insured, no matter how blunderingly described by appellant.

The appeal should be dismissed with costs.

ANGLIN J.—This action is brought to recover on a fire insurance policy. The issue on the appeal is as to the sufficiency of a notice of cancellation given under the 11th and 15th statutory conditions, prescribed by the Ontario Insurance Act, R.S.O., ch. 194, s. 183. It is stated in the principal judgment of the Appellate Division, delivered by Hodgins J.A., as follows:—

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The respondent company pleads that it validly cancelled the policy under statutory conditions Nos. 11 and 15. This was effected, as the company contends by mailing to the appellant in a registered letter addressed to her under the name, "F. Veltre, Esq., 82-84-86 Claremont St., Thorold, Ont.," a notice cancelling the policy, and by enclosing in this letter the respondent company's cheque for $11.34 or legal tender to that amount "being the unearned premium for balance of the current term of Policy No. 10514765."

The letter containing the notice and money was never delivered to, or recieved by, the appellant until after the fire.

The sole question raised is whether the method thus adopted was an effective compliance with the conditions which require a tender of the unearned premium to be made as well as the giving of notice.

It was held by the learned trial judge that if the notice putting an end to the policy, the distinct end aimed at, can be given in writing by registered letter, the tender of the unearned portion of the premium may be made in the same way.

The learned judge held the tender insufficient and that the notice would be effective only from the time of its receipt by the insured. Magee J.A. concurred as to the insufficiency of the notice and Maclaren and Ferguson JJ.A. agreed in the result. Meredith C.J.O. dissented, holding that a tender by letter was authorised and that the notice was effective from the time of posting, or, at all events, from the time when in the ordinary course the letter would reach the person to whom it was sent.

Mailed at Toronto on the 15th of December, 1915, the notice reached Thorold in the ordinary course of mail on the 16th, but was never actually received by the insured and only came to her knowledge after the loss, which occurred on the 25th. The $11.34 enclosed ($11.25 in legal tender and 9 cents in postage stamps) was admittedly more than sufficient to cover the unearned proportion of the premium.

The insured was the wife of one Sam Savino. It is customary with the peoples of countries where the civil law prevails, that a married woman should be designated by her maiden name in business transactions,

legal documents, etc. The plaintiff was accordingly insured as "F. Veltre, Esq."—the Esq. being added through some unexplained mistake. That is her designation in the policy, which she accepted and retained and on which she now sues.

There is no local mail delivery in Thorold. Probably owing to the notice of cancellation having been addressed to "F. Veltre, Esq.," instead of to Mrs., Mde., or Signora Savino, it was not placed in Sam Savino's box at the local post office, or otherwise delivered, although it seems probable that some inquiry was made for the Savino mail at the general delivery wicket. The Savinos left Thorold on the 24th December, apparently for the purpose of spending Christmas in Toronto. The fire occurred during their absence. The 11th and 15th statutory conditions indorsed on the policy read as follows:—

11. The insurance may be terminated by the company by giving seven days' notice to that effect, and, if on the cash plan, by tendering therewith a ratable proportion of the premium paid, for the unexpired term, calculated from the termination of the notice, and the policy shall cease after such notice, or notice and tender as the case may be, and the expiration of the seven days.

15. Any written notice to the assured may be by letter delivered to the assured or by registered letter addressed to him at his last post office address notified to the company or where no address is notified and the address is not known, addressed to him at the post office of the agency, if any, from which the application was received.

For the assured it was contended that

(1) Condition 15 does not apply to a notice of cancellation:

(2) The notice of cancellation was not addressed as condition 15 prescribes;

(3) Tender of the proportion of the premium for the unexpired term cannot be made by post; it must be made personally;

(4) A notice given under condition 15 is effectual only from the date of its actual receipt;

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(5) If effectual from the time at which it would in the ordinary course of post have reached the insured, the notice given for cancellation on the 22nd would be insufficient: a date having been named it could not operate to effect cancellation at a later date on the expiry of seven days from the time at which it should have reached the insured in the ordinary course of post.

The company on the other hand asserts its right to give written notice of cancellation by registered post if the letter contains a sum of money at least equal to the proportion of the premium unearned, and that such a notice, if addressed as prescribed, should be deemed to have been given when deposited in the post office.

(1) I have no doubt that a written notice of cancellation under the 11th statutory condition is within the 15th condition and may be given by registered post. The literal terms of the 15th condition, taken in their ordinary acceptation, cover it. The collocation and history of the condition and a comparison with its counterpart, condition No. 7, seem to me to put the matter beyond doubt. The provision for sending written notice of cancellation by registered post, formerly itself part of the 19th statutory condition providing for cancellation by notice (R.S.C. 1897, ch. 203, sec. 168), was made the subject of a separate condition (No. 15) and extended to all written notices to be given by the company when the Ontario Insurance Act was re-enacted, preparatory to the revision of 1914, by 2 Geo. V., ch. 33. The obvious purpose was to have a general provision applicable to all notices in writing to be given by the company to the insured, precisely as condition No. 7—formerly condition No. 23, R.S.O. 1897, ch. 203, sec. 168—provides that all

notices in writing to the company may be sent by registered post.

(2) In the policy the insured is designated as "F. Veltre, Esq." It is proved that the Savinos resided over their grocery shop (which contained the property insured) described in the policy as "Nos. 82-84 on the north side of Claremont St., in the town of Thorold." This was either the post office address notified to the company within the meaning of condition 15, or it was the known address of the insured. In either case the notice was rightly addressed to "82-84-86 Claremont St., Thorold, Ont." The addition of the figures 86 to the 82-84 mentioned in the policy is immaterial. Suing as she does in the name of F. Veltre on the policy issued to F. Veltre, Esq., and accepted by her on that name, the plaintiff cannot, in my opinion, successfully maintain that the address of the notice was insufficient.

(3) For the reasons assigned by the learned Chief Justice of Ontario, I am satisfied that the tender provided for by the 11th condition is properly made if the amount of money to be tendered be enclosed with the notice of cancellation in a duly registered envelope, properly addressed to the insured. I cannot place any other reasonable construction on the word "therewith" in the 11th condition, if that condition contemplates, as I think it clearly does, that the notice of cancellation may be in writing, and the 15th condition applies to it. It certainly was not the purpose of the 11th condition, in my opinion, to impose compliance with the formalities of a strict legal tender on the company. "Tendering" is used in the sense of "offering presently to refund."

(4) In considering from what time the seven days which are to elapse between the notice of cancellation and the determination of the policy are to be com-

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puted, the nature of the condition and the purpose for which the seven days are allowed must be taken into account. Rights both of the insured and of the insurer are expressed in the eleventh condition. The latter is entitled to terminate its risk. The former is entitled to a reasonable period, fixed by the legislature at seven days, within which to protect himself, if he so desire, by procuring other insurance. The condition must, if at all possible, be so construed that these reciprocal rights shall be given fair and full effect. The insurer, solely for its own benefit, is allowed the option of giving the notice by making use of the post office as its agent to convey it in lieu of making a personal communication of it to the insurer. If it selects the latter, which may be regarded as the normal method, the policy is determined only on the expiry of seven full days from the moment of communication to the assured of the intention to cancel. Can it have been intended that the company by choosing to make use of the alternative method of giving notice through the mail should be entitled in practically every case to lessen the comparatively short period which the legislature meant the insured should have in which to reinsure, and, in some cases, to deprive him of it entirely? That would be the necessary effect of holding that the seven days should be computed from the moment of depositing the notice in the post office. I am satisfied that was not intended. Strong J., in *Caldwell* v. *Stadacona Fire and Life Ins. Co.* (1), at p. 238, speaks of a condition as

> grossly unfair in not providing that notice should be given a reasonable time before the cancellation should take effect, so that the assured might have the opportunity of covering himself by another insurance.

The cases cited by Mr. Robertson are all readily and clearly distinguishable. They were cases in which

(1) 11 Can. S.C.R. 212.

numerous persons, who might be scattered in many places, were to be notified of calls or meetings, etc. It would be impossible in such a case to fix any one definite date at which the term of the notice should expire unless that term should commence from the moment of deposit in the post office. No such difficulty arises in the case of a notice to a single insured.

On the other hand, it is said that if the notice was meant to be effective only from the moment of its actual receipt by the insured, it is difficult to appreciate the object of the legislature in imposing the registration of it on the company, and it is therefore argued that the notice must have been intended to be operative at least from the time at which it would have reached the insured in the ordinary course of post. It seems to me to be a more reasonable explanation that the legislature directed that notice, if given by mail, should be by registered post in order to facilitate proof of the fact whether a notice so sent had or had not reached the insured. It would be a strong thing to hold that the insurer could extinguish the contractual rights of the insured under his policy without any prior actual notice being given to him. In the absence of an explicit statement that notice of cancellation should be deemed effectual from the time at which it would in the ordinary course of post have reached the insured, nothing short of an irresistible inference from the terms in which the condition providing for notice by post is couched that that was the purpose and intention of the legislature would suffice to justify a court in holding that the contractual rights could be thus extinguished. Dealing with a substantially identical provision made by what was then the 23rd statutory condition (R.S.O. 1897, ch. 203, sec. 168)—now the 7th—the Ontario

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Court of Appeal in *Skillings* v. *Royal Ins. Co.* (1), affirming a judgment of Lount J (2), unanimously held that a letter from the insured to the insurance company notifying it of his intention to cancel his insurance would take effect only from the time of its actual receipt. Maclennan J.A. says, at p. 403:—

> An actual delivery of notice is evidently what the statutory condition intends.

Garrow J.A., citing with approval the unanimous decision of the New York Court of Appeal in *Crown Point Iron Co.* v. *The Ætna Ins. Co* (3), says, at p. 405:—

> The notice sent before, but not received until after, the fire was wholly ineffectual.

It was argued that the *Skillings Case* (1), is distinguishable because the notice there sent was wrongly addressed. But the decision turns on the fact that it was not received—not that it did not fulfil the requirement of the condition as to address.

Notwithstanding section 20 of the Ontario Interpretation Act (R.S.C., ch. 1) it may fairly be assumed that in making the 15th condition a counterpart of the 7th in the Act of 1912, ch. 33, the legislature was not unmindful of the construction which the Court of Appeal had, as recently as 1903, put upon the 7th clause.

There is no provision in the Ontario practice for the service of legal process or notice by registered post such as is found in the English O. XLVII., R. 2. It is noteworthy that in that rule, in order to make a notice so sent operative not from its actual receipt but from the time at which it would be delivered in the ordinary course of post, an explicit provision to that effect was apparently deemed necessary. A not unreasonable

(1) 6 Ont. L.R. 401. (2) 4 Ont. L.R. 123.
(3) 127 N.Y. 608.

inference is that without it the service would be effectual only from the time of the actual receipt of the mailed document. A provision in the English Interpretation Act of 1889, ch. 63, sec. 26, creates the like presumption in regard to any document which a statute authorises or requires to be served, given or sent by post—"unless the contrary is proved." Here the contrary has been proved.

It would, no doubt, have been much more satisfactory had the statute explicitly declared from what time the seven days should be computed in the case of notices by registered post but, in the absence of some such provision as is found in the English rule cited, the terms of condition 15, in my opinion, do not warrant a holding that by resorting to it an insurance company can deprive an insured of the benefit of the whole or any part of the seven days' notice upon giving which condition 11 enables the company to terminate its risk. Notice, unless the contrary be clearly provided, must mean actual notice.

(5) Although in view of the conclusion that the 4th objection to the notice of cancellation must prevail it may be unnecessary to deal with the 5th, it is perhaps better that I should express the opinion I have formed upon it. Since a power of cancellation must, no doubt, be strictly exercised, I was at first much impressed with the view that because the company's letter expressed its intention to terminate the risk on the 22nd of December its notice could not be good for any subsequent date. But on further consideration I incline to think otherwise. *Emmott* v. *Slater Mutual Fire Ins. Co.* (1), was a very similar case. A notice of intention to cancel on the 20th of February, mailed on the 13th was received by the insured on the 14th. The

(1) 7 R.I. 562.

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property covered was destroyed on the 22nd. Ames C.J., delivering the judgment of the Superior Court of Rhode Island, upholding the cancellation as effectual, said, at p. 565:—

> The notice received by the plaintiff on the 14th day of February, informed him, in substance, that from and after the 20th of that month, "no member of his class would be held insured," as the policy would be cancelled at noon on that day, under the power reserved by the by-law, and in pursuance of the vote of the company. The purpose of the by-law, in requiring seven days' notice of the intent to cancel his policy, to be given to a member before the cancellation would become effectual, was, to give him seasonable warning, if he would be protected by insurance, to get it elsewhere. This purpose seems to us to have been as fully answered by the notice given to the plaintiff, as if the 21st day of February, instead of the 20th, had been inserted in the notice as the day from and after which his policy would stand cancelled. By warning him to procure other insurance earlier than the by-law, considering the time he received the notice, permitted, it could not mislead him to his injury; and when the seven days had expired after his receipt of the notice, he had all the notice which the by-law either in its letter or spirit, required; that is, seven days' notice of the intent of the company to cancel his policy on a day subsequent to the giving of the notice.
>
> As the loss happened after the plaintiff had received the seven days' notice of the intent to cancel his policy, we hold that his policy was then cancelled, and order judgment to be entered up for the defendants, with costs.

I find in *Philadelphia Linen Co.* v. *Manhattan Fire Fire Ins. Co.* (1), cited in 19 Cyc. at p. 646, an authority to the same effect. I have unfortunately been unable to see the report itself. The notice of intention to cancel need not specify any date as that on which the risk is to come to an end. When it is given the statutory condition applies and effects the cancellation on the expiry of seven days. The statement of the date on which the notice is to become effective is therefore superfluous. The insured knows, or must be presumed to know, that he is entitled to seven days from the time at which he receives the notice. I therefore incline to the opinion that if the

(1) 8 Pa. Dist. 261.

plaintiff had actually received the notice of cancellation seven days before the fire occurred she could not have recovered on the policy, which would have ceased to be in force, not upon the 22nd of December, but at the expiry of seven days after actual receipt of the notice.

In the result the appeal fails and should be dismissed.

BRODEUR J.—The question is whether the insurance was terminated when the fire took place on the 25th of December, 1916.

The insurance was for a year from June, 1916, to June, 1917. Section eleven of the statutory conditions gave power to the company to terminate it sooner

> by giving seven days' notice to that effect and if on the cash plan by tendering therewith a ratable proportion of the premium paid for the unexpired term.

The statutory condition No. 15 provided that any written notice could be given by a registered letter addressed to the assured

> at his last post office address notified to the company or where no address is notified and the address is not known addressed to him at the post office of the agency, if any, from which the application was received.

In this case the notice cancelling the policy was sent on the 15th of December, 1916, by registered letter to F. Veltre, Esq., 82-84-86 Claremont St., Thorold, Ont., and there was enclosed therein the sum of $11.34, representing the unearned premium for the balance of the current term of the policy.

The letter was not delivered to the insured and remained in the post office at Thorold until after the fire which took place on the 25th of December.

The insured never had any intimation before the fire that the policy was cancelled or to be cancelled. Everything points to the good faith of the insured.

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The insurance had been taken through the agency of the company at Merritton, a suburb of the town of Thorold. The insured was an Italian lady married to a man named Savino The application for the insurance was taken by the agent of the company on a stock of groceries and on fixtures situated in a store bearing Nos. 82-84-86 Claremont St., in Thorold. By the mistake of the company or of the agents, the policy was issued in the maiden name of Mrs. Savino, "F. Veltre." It is customary amongst Italians that the married women preserve and are called by their maiden names.

The company added, however, on the policy to the name of F. Veltre, "Esq."

Mr. Savino had a box in the post office at Thorold and he was well known there. But the name of *F. Veltre Esq.* was entirely unknown to the postmaster or the employees of the post office; and it does not appear by the evidence that the address of F. Veltre was known to be in Thorold. "F. Veltre, Esq." was certainly u known in Thorold. The address of the respondent was never notified to the company. So the company, not knowing the address of the respondent and not having ' een notified of her address, its duty was, according to the statutory condition 15, to send the notice to its agency in Merritton.

Besides, I am of opinion that the tender of money should have been made personally to the insured or at least at her domicile or place of residence and that on that ground the alleged tender made in this case is not valid.

The statutory condition never contemplated that an insurance company could be at liberty to deposit legal tender money in the post office and that from that moment the notice of cancellation would have its

effect. Sir Edward Coke (Co. Litt., p. 210,) says that tender must formally be made only to the creditor himself.

It is contended by the appellant that the use of the word "therewith" in statutory condition eleven entitled the company to enclose the money with the notice and that a personal tender is not required.

I am unable to agree with that contention. The right which the company possesses to cancel a valid contract is contrary to the ordinary rules affecting contractual relations. If the legislature intended to avoid the necessity of a tender being made personally they would then have so provided in the clearest of language. I am unable to find such an intention in construing the conditions referred to. The company had no right to depart from the ordinary rule that the tender should be made to the creditor personally. (Harris, Law of Tender, p. 97.)

For those reasons the judgment *a quo* which maintained plaintiff's action should be maintained and the appeal dismissed with costs.

CASSELS J.—As the majority of the court are in favour of dismissing this appeal, I concur.

Appeal dismissed with costs.

Solicitors for the appellants: *Fasken, Robertson, Chadwick & Sedgewick.*

Solicitors for the respondent: *Ingersoll, Kingstone, & Hetherington.*

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COMPANY—*Subscription of stock—Misrepresentations — Acquiescence — Delay — Estoppel—Stock "to be issued"—Proof.*] *Held,* Fitzpatrick C.J. dissenting, that in case of alleged misrepresentations made by the promoter of an incorporated company, a subscriber for stock must clearly prove that he has in fact been induced by such representations to buy shares, especially if he has kept silent after receiving numerous demands of payment and has failed to repudiate his contract for a considerable period of time after he had knowledge of the falsity of the representations.—*Per* Idington J. and *semble per* Anglin J. A mere statement, at the head of an underwriting agreement, as to the capital to be issued, does not imply that the subscriber will be under no liability to pay for his shares unless and until the amount so stated had been issued.—*Per* Anglin J. Delay in repudiation after