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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. ARTHUR MEIGHEN K.C.

ERRATA ET ADDENDA.

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

Page 421, line 4 of head-note for "H" read "L."

Page 511, line 18, for "than" read "that."

Page 512, line 9 from foot, for "influence" read "inference."

APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NOTED SINCE THE ISSUE OF VOL. 53 OF THE SUPREME COURT REPORTS.

Booth v. *Lowery* (54 Can. S.C.R. 421). Leave to appeal granted, July 1917.

Canadian Northern Railway Co. v. *City of Winnipeg* (54 Can. S.C.R. 589). Leave to appeal refused, July, 1917.

Cornwall, Township of, v. *Ottawa and New York Railway Co.* (52 Can. S.C.R. 466). Appeal dismissed with costs, June, 1917.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

WILLIAM PEARCE..................APPELLANT;

1915
*15 July.

AND

THE CITY OF CALGARY..........RESPONDENT.

ON APPEAL FROM THE DISTRICT COURT, DISTRICT OF CALGARY, IN ALBERTA.

The Registrar in Chambers — Appeal — Jurisdiction—Assessment and taxation—Adjudication authorised by provincial authority—"Supreme Court Act," R.S.C., 1906, s. 41—Finality of provincial decision—"Court of last resort."

A provincial statute, providing that judgments of courts in the province on appeal from decisions of courts of revision in respect of assessments for taxation purposes shall be final and conclusive on the matters adjudicated upon thereby, does not circumscribe the appellate jurisdiction given to the Supreme Court of Canada in such matters by section 41 of the "Supreme Court Act," R.S.C., 1906, ch. 139. *Crown Grain Co.* v. *Day* ((1908) A.C. 504) applied.

A district court judge, in the Province of Alberta, adjudicating in matters concerning the assessment of property for municipal purposes under the provisions of the North-West Territories Ordinance No. 33, of 1893, as amended by the statutes of Alberta, ch. 9 of 1909, and ch. 27 of 1913, sec. 7, is a "court of last resort created under provincial legislation" within the meaning of section 41 of the "Supreme Court Act," R.S.C., 1906; ch. 139,

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and, consequently, an appeal from the decision lies to the Supreme Court of Canada when it involves the assessment of property at a value of not less than ten thousand dollars. *City of Toronto* v. *Toronto Railway Co.* (27 Can. S.C.R. 640) referred to as effete, *Canadian Niagara Power Co.* v. *Township of Stamford* (50 Can. S.C.R. 168) and *Re Heintze, Fleitman* v. *The King* (52 Can. S.C.R. 15) referred to.

MOTION before the Registrar in Chambers, to affirm the jurisdiction of the Supreme Court of Canada to entertain an appeal from the judgment of His Honour A. A. Carpenter, judge of the District Court for the District of Calgary, in Alberta, reducing the assessment of the property of the appellant by varying the decision in respect thereof by the Court of Revision of the City of Calgary.

The city assessor of the City of Calgary assessed real estate in the city belonging to the appellant, at a total value of $236,595, which, on his appeal, pursuant to the provisions of the city charter, to the city council sitting as a court of revision, was reduced to $201,107. On a further appeal to the district judge the assessment was further reduced to the sum of $168,595 by the judgment from which an appeal is now sought to the Supreme Court of Canada direct from the decision of the district judge.

Crysler K.C. in support of the motion contended that the district court judge from whose decision, by provincial legislation, no appeal lay, was a "court of last resort" within the language of section 41 of the "Supreme Court Act," and that an appeal would lie from his decision to the Supreme Court of Canada.

Fisher, contra, urged (1) that the judge of the district court was "*persona designata*" and his decision was not the subject of an appeal, and (2) that the Alberta statutes gave an appeal from the district judge to the Supreme Court of the province and that

the present appeal should not have been taken until after such an appeal had been taken and disposed of.

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The
Registrar.

THE REGISTRAR.—This is an application to affirm the jurisdiction of the Supreme Court of Canada to entertain an appeal direct from the decision of the district judge of the District of Calgary, in Alberta. The facts are as follows:—

One William Pearce, the owner of property in Calgary, Alta., having appealed respecting the assessment of his property there from the decision of the court of revision to the judge of the district court, and being dissatisfied with the decision rendered on that appeal, now desires to appeal direct therefrom to the Supreme Court of Canada under the provisions of section 41 of the "Supreme Court Act." I have to determine whether or not there is jurisdiction in this court to hear such an appeal, there being involved the assessment of property of a value much in excess of $10,000.

A charter was granted to the City of Calgary by an ordinance of the North-West Territories, chap. 33, of the Ordinances of 1893. By section 40 of that ordinance provision is made for assessment appeals by which the roll shall be revised by the city council as a court of revision. The decision of that court was declared to be final, subject to an appeal to the judge of the Supreme Court of the North-West Territories having jurisdiction in the City of Calgary; section 41 of the ordinance gave an appeal from this judge to the Supreme Court *en banc*.

In 1909, by chapter 9 of the statutes of Alberta, a general Act was passed applicable to all cities having a municipal charter by which an appeal from the court of revision was made to lie to the judge of the district

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—
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—

court of the district in which the city or town affected was situated, but this statute made no reference to appeals to the Supreme Court *en banc* nor to section 41, sub-sec. 6, which gave such an appeal from the Supreme Court judge. In 1913, by chapter 27, sec. 7, of the statutes of Alberta, this sixth sub-section was struck out and section 41 was amended in the following manner. The section formerly provided that:—

if any person is dissatisfied with a decision of the Court of Revision he may appeal therefrom to the judge of the Supreme Court having jurisdiction in the City of Calgary.

By the amendment the following words were added, after the word "Calgary":—

and his decision shall be final and conclusive in all matters adjudicated upon

and, by the same Act, sub-section 6 of section 41, which provided for an appeal to the Supreme Court *en banc* was repealed. I take it that the effect of this legislation was to provide that, after 1913, assessment appeals from the court of revision had to be taken to the judge of the district court and that his decision was final so far as provincial legislation was concerned. This, however, could not oust the jurisdiction of the Dominion Parliament. In *The Crown Grain Co.* v. *Day*(1) it was held that provincial legislation could not provide that, in mechanics' lien cases, there should be no further appeal beyond the provincial Court of Queen's Bench, in Manitoba.

The "Supreme Court Act," by section 41, gives an appeal in the following language:—

An appeal shall lie to the Supreme Court from the judgment of any court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes in cases where the person or persons presiding over such court

(1) (1908) A.C. 504.

is or are by provincial or municipal authority authorised to adjudicate and the judgment appealed from involves the assessment of property at a value of not less than ten thousand dollars.

Previous to the Revised Statutes of Canada, 1906, chapter 139, the clause of the former "Supreme Court Act" dealing with assessment appeals, instead of the words in the present section "by provincial or municipal authority authorized to adjudicate," had the words "appointed by provincial or municipal authority" and it was held by this court in the case of *The City of Toronto* v. *The Toronto Railway Co.*(1) that where, in the Province of Ontario, an appeal lay from the court of revision to a board of county court judges, and it was desired to take an appeal from such board to the Supreme Court of Canada, that no appeal lay under the section in question, as it then stood, as the county court judges were not appointed by provincial or municipal authority but by Dominion authority. Since the Revised Statutes of Canada, 1906, came into force this decision has no further application and jurisdiction has been exercised in a number of cases: *Canadian Niagara Power Co.* v. *Township of Stamford*(2) *Re Heintze, Fleitman* v. *The King.*(3)

I am of opinion that the district judge who heard the appeal from the court of revision in the present case was a "court of last resort created under provincial legislation" within the meaning of section 41 of the "Supreme Court Act."

Under these circumstances the motion should be granted and the jurisdiction of the Supreme Court of Canada to entertain the appeal should be affirmed.

Motion granted with costs.

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(1) 27 Can. S.C.R. 640.
(2) 50 Can. S.C.R. 168.
(3) 52 Can. S.C.R. 15.

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On the 2nd of November, 1915, the appeal to the Supreme Court of Canada was heard on the merits, the judges present being Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ., and judgment was reserved.

Chrysler K.C. appeared for the appellant.
C. J. Ford for the respondent.

On the 15th of November, 1915, judgment was delivered allowing the appeal with costs, the Chief Justice and Davies J. dissenting. By this judgment, on a view by the majority of the judges of the evidence as to the value of the property in question, the amount of the assessment thereon was further reduced. (*See* 9 West W.R., pages 195 and 668).

MOISE VERONNEAU..............APPELLANT;

AND

HIS MAJESTY THE KING........RESPONDENT.

1916
*May 29.
*Oct. 10.

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

Criminal law—Constitution of grand jury—Bias—Presentment of true bill—Presence of accuser on grand jury—Prejudice—Criminal Code, s. 899—Evidence.

The appellant was indicted for perjury. The complainant had been summoned to act as a grand juror for the assizes at which the trial took place. The complainant was present with the grand jury when it was charged and when the presentment of a true bill was made. While the bill was under consideration by the grand jury one of the jurymen to whom the complainant had stated that it was a deplorable case, but it had come to the pass that either he or the accused would have to leave the town, repeated this statement to other grand jurors. In the reserved case it was stated by the trial judge that the complainant had in no manner taken any part in the deliberations of the grand jury on the indictment.

Held, affirming the judgment appealed from (Q.R. 25 K.B. 275), Anglin and Brodeur JJ. dissenting, that, in the circumstances stated in the reserved case, neither the fact of the presence of the complainant as a member of the grand jury nor the statement made by him constituted a well-founded objection to the constitution of the grand jury which had passed upon the indictment which therefore could not be quashed under the provisions of section 899 of the Criminal Code.

Per Davies, Anglin and Brodeur JJ.:—An indictment preferred after consideration in which a grand juror disqualified by interest had participated should be quashed. *Rex* v. *Hayes* (9 Can. Crim. Cas. 101) disapproved.

Per Anglin and Brodeur JJ.:—The reasonable inference from the facts stated in the special case is that the complainant was present with the grand jury during their deliberation upon the bill against the accused. The statement made by the complainant

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

to the juryman B., and by him repeated to his fellow-jurymen, was calculated to influence them. It is impossible to know whether the complainant's presence and his statement, so repeated, did or did not affect the grand jury adversely to the accused. He is entitled to have it assumed that they did. He was thereby deprived of his right to have his case passed upon by a duly qualified grand jury which was not improperly biased, and he thereby suffered prejudice within section 899 of the Criminal Code which warrants the quashing of the indictment. *Reg.* v. *Justices of Hertfordshire* (6 Q.B. 753); *The Queen* v. *Inhabitants of Upton St. Leonards* (10 Q.B. 827); *The Queen* v. *Gorbet et al.* (1 P.E.I. Rep. 262), and *Reg.* v. *McGuire* (4 Can. Crim. Cas. 12) referred to.

Per Anglin J.—On a motion to quash an indictment found by a grand jury it is improper to admit evidence of what took place in the grand jury-room during the inquiry in regard to the indictment. *Reg.* v. *Justices of Hertfordshire* (6 Q.B. 753); *Rex* v. *Lancashire Justices* (75 L.J.K.B. 198); *Reg.* v. *Meyer* (1 Q.B. 173) and *Reg.* v. *London County Council* ((1892) 1 Q.B. 190) referred to.

APPEAL from the judgment of the Court of King's Bench, Appeal Side(1), dismissing a motion to quash an indictment on the charge of perjury against the appellant, whereon he had been convicted at the trial before Mr. Justice Globensky and a jury, at Sherbrooke, in the district of Saint Francis, Quebec.

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. 25 K.B. at pp. 279 *et seq.*).

The appellant (Moise Veronneau) was found guilty in the Crown side of this court, in the District of St. Francis, in October, 1915, by verdict of a jury on a charge of having committed perjury.

"He appeals against the verdict, first, on the ground that the indictment should have been quashed because of bias on the part of one of the grand jurors

(1) Q.R. 25 K.B. 275

who found the indictment, and, secondly, on the ground that the trial judge allowed an amendment to be made to the indictment of such a nature as was not permissible in law and allowed it to be made at too late a stage of the trial.

"The learned judge who presided at the trial has stated a case for our opinion on these points, and it appears from the statement that the charge against the appellant was laid by one Denis S. Bachand and that it was set forth in it that the alleged perjury had been committed at a preliminary inquiry held by the district magistrate into a charge made by the appellant against Bachand of having attempted to murder him (Veronneau).

"It also appears that Bachand was one of the grand jurors to whom the bills of indictment were submitted at the October term.

"A true bill for perjury having been returned, and Bachand being one of the jurors present at the return, the appellant, before pleading, moved to quash the indictment on the ground that Bachand was one of the grand jurors who had found the indictment and had said to Brault, another juror (who had repeated them at the sitting of the jurors) the words: 'C'est de valeur ce procès-la, mais au point où on est rendu la, il va falloir que moi ou Veronneau parte de Coaticook.'

"It further appears from the stated case that Bachand did not take part in the deliberations of the grand jury on the case against the appellant; that the words above quoted were uttered to Brault and by him repeated to the other jurors, but that it was not shewn that these words influenced the jurors or affected their decision. The motion to quash was dismissed.

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It further appears that, upon the trial being proceeded with, there was a variance between the charge as laid and the evidence, in that the perjury was charged to have been committed on October 30, 1914, whereas the appellant's deposition taken before the magistrate, and tendered in evidence at the jury trial, purported to have been taken on October 13, 1914. The appellant objected to production of the deposition as not being relevant to the charge, but the objection was overruled and the deposition was read.

"After all the evidence had been taken, counsel for the appellant submitted that the evidence related to testimony given on October 13, and that there was no evidence to support a charge of perjury committed on October 30.

"Thereupon the prosecutor moved to amend by substituting the word 'thirteenth' for the word 'thirtieth' wherever the latter appeared in the indictment.

"The amendment was allowed, and, upon being asked if he desired a postponement, counsel for the appellant declined to say anything. Counsel for the appellant and for the prosecutor then addressed the jury, and, after a summing-up by the judge, a verdict of guilty was found

"The questions to be decided are as follows:—

"1. Did the fact of Denis S. Bachand being a grand juror affect the legal constitution of the grand jury, and could the grand jury lawfully find the indictment, Bachand not having taken part in the consideration of this bill? Was the judgment dismissing the motion to quash right?

"2. Was there error in the judgment permitting the amendment?"

The judges of the court now appealed from unan-

imously answered the second question in the negative but, as to the first question, two of the judges, Carroll and Pelletier JJ., dissented from the opinion of the majority who decided that, in the circumstances, the constitution of the grand jury was not so affected as to prevent the finding by them of a true bill on the indictment.

Verrett, K.C., and *Cabana* for the appellant.
Nicol K.C. and *Shurtliff K.C.* for the respondent.

THE CHIEF JUSTICE.—This is an appeal on a stated case.

In answer to the first question I would say the grand jury was regularly constituted notwithstanding that Bachand, who was the party complainant before the magistrate in this particular case, was sworn as a member of it. A grand juror is not sworn like a petit juror to try and a true deliverance make on the evidence submitted. His duty is to diligently inquire and a true presentment make of all such matters and things as shall be given him in charge *or shall otherwise come to his knowledge.* Until quite recently grand jurors might make presentments of their own knowledge and information without the intervention of any prosecutor or the examination of any witnesses. *Vide* Report of Royal Commissioners on English Draft Code, pages 32 and 33.

As to the proceedings before the grand jury, it is part of the stated case that Bachand, whose name was on the back of the indictment, was examined, but took no other part in the proceedings. In these circumstances, Bachand was not a stranger in the jury room. His presence is explained and accounted for by the fact that he was a witness before the grand jury

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in this particular case. And, if Bachand took no part in the proceedings, I do not think his mere physical presence somewhere about could affect the result of the grand jurors' deliberations or constitute an interference with the privacy of their proceedings. There is no impropriety in some one or more proper persons being present with the grand jury during their inquiries on bills of indictment: *Reg.* v. *Hughes*(1). I have not overlooked *Goby* v. *Wetherill* (2). The stated case might have been more explicit on this point, but when the judge states the fact to be that Bachand

> n'a aucunement pris part aux délibérations qui eurent lieu au sujet du dit acte d'accusation.

I think he must be assumed to mean that he took no part in the finding of the bill. It would have been wiser, however, for Bachand to have left the room after giving his evidence and, as a matter of ethics or propriety, he should not have been present in the box when the bill was returned.

We must assume for the purposes of this appeal that Bachand took no part, except as a witness, in the discussions or deliberations on this indictment or in the finding of the true bill, and I express no opinion as to whether if he had done so the indictment should have been quashed.

I attach little importance to the observations made to Brault who was also a grand juror.

DAVIES J.—This appeal is one from a judgment of the Court of King's Bench (Appeal Side), Province of Quebec, refusing, by a majority, to quash an indictment found against the appellant on the alleged ground that one of the grand jury which found the indictment was interested and biased, having been the prosecutor.

(1) 1 C. & K. 519. (2) 31 Times L.R. 402.

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I should say that if the facts proved had shewn Bachand to have taken any part in the proceedings or in the consideration of the bill found by the grand jury of which he was a member, as to which he was interested or biased, that would have justified the appeal and the quashing of the indictment.

The question is one of fact capable of being proved by evidence. The finding of the learned trial judge before whom the motion to quash was first made, that the proof established that Bachand did not participate in the proceedings of the grand jury upon this particular bill or in the consideration of the jury's finding of a true bill upon it, approved of by the court of appeal, if sustained by the evidence, is sufficient to dismiss the motion.

I am of opinion that the evidence to shew this non-participation and non-interference was properly admissible and that it is sufficient to uphold the findings of the courts below.

I cannot accede to the proposition that the fact of one member of a grand jury being disqualified from interest or bias with respect to one of the bills brought before that body for consideration, affects the constitution of the grand jury generally.

Such a disqualified person cannot take any part in the proceedings or findings of the jury with respect to the bill in which he is interested, but such disqualification is a personal and limited one and does not affect the constitution of the jury as a whole or the right of the juror so partially disqualified from taking part in all the proceedings or findings of the jury on other bills in which he has no interest or bias.

This question of the participation or non-participation of Bachand in the proceedings of the grand jury upon this bill, including their finding upon it,

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was the main and substantial question argued on this appeal. There were other subsidiary questions mentioned with respect to them. I do not think there was anything in them to justify this court in interfering with the judgment appealed from.

IDINGTON J.—The appellant was indicted for perjury and the learned trial judge was moved to quash the indictment on the ground that the private prosecutor was a member of the grand jury which returned the bill as true.

The learned trial judge investigated the matter and dismissed the motion but reserved the point raised thereby together with another which developed during the trial.

In his stated case separate questions were asked. The court of appeal disposed, by their unanimous judgment, of the second, leaving only that bearing upon the motion to quash in regard to which in that court there were dissentient opinions which enabled the accused to appeal here.

The first question, which thus comes before us, was stated as follows:—

Première Question.

Le fait que Denis S. Bachand avait été assigné comme grand juré affectait-il la légalité de la constitution du grand jury, et ce dernier pouvait-il légalement rapporter comme bien fondé, l'acte d'accusation porté contre Véronneau, Bachand n'ayant aucunement pris part aux délibérations qui eurent lieu au sujet du dit acte d'accusation, et la décision de cette Cour renvoyant la motion de l'accusé, était-elle celle qui devait être rendue?

The law applicable to the question raised before the learned trial judge is stated in section 899 of the Criminal Code, as follows:—

899. No plea in abatement shall be allowed.

(2) Any objection to the constitution of the grand jury may be taken by motion to the court, and the indictment shall be quashed if

the court is of opinion both that such objection is well founded and that the accused has suffered or may suffer prejudice thereby, but not otherwise.

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The fact that the private prosecutor took no part in the deliberations on the subject of the accusation seems to me conclusive against this appeal. His having been summoned and sworn as a grand juror seems to furnish no ground of objection. He was bound to obey the summons and be sworn. It was not competent for him to refuse, for the very good reason that the conduct of the matter lay in the hands of the Crown officer and might not come before that grand jury or they might be directed by the learned trial judge, under such circumstances, if he saw fit for good reasons to refrain from dealing with it.

We are asked to presume, notwithstanding the statement of fact contained in the question which is the boundary of any appellate court's jurisdiction herein, that in fact the private prosecutor so summoned as a grand juror did take part in the deliberations in question herein as such grand juror.

In other words, we are asked to presume not only against the stated fact but also against the presumption of law that he did so.

The presumption of law is that he did not and that the Crown officer in charge saw to it as part of his duty, if aware of his being a grand juror, that he was properly instructed in that regard either by the foreman or the learned trial judge or himself, and that due order of law was observed.

Possibly he was a witness and, as such, before the grand jury for such length of time as the requirements of giving his evidence or otherwise relative to the presentation of the evidence in accordance with what convenience in the case might demand. Nothing

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further can be presumed as to the fact of his presence there.

Then it is said he appeared with the grand jury when its foreman presented the "true bill" in court.

Again there is no presumption to be drawn therefrom. For aught we know he may merely have taken a seat in the places assigned in the court-room for the grand jurors which he was entitled to do, for many proper reasons. Other bills may, for example, have been returned by the foreman to the court at the same time as this, or have been expected to have been so presented.

The mere presentation by the grand jurors of a bill forms no part of their deliberations and determination. That is disposed of in the grand jurors' room and the finding there written is simply handed in to the court. Often judges presiding at a busy court direct, as they may, that the foreman alone or such number of jurors as directed may do so, without the whole panel appearing.

And, assuming the worst that can be said of a private prosecutor appearing under such circumstances, it is specially directed by the final part of the statute I quote that unless the accused has suffered prejudice thereby the indictment must not be quashed.

I cannot find anything deserving serious consideration in all that has been urged by appellant's counsel to maintain this appeal. To do so would, I submit, be a reversion to technicality which the Criminal Code and its predecessors did so much during last century to eliminate from the law, in order that justice might be done.

I have assumed in favour of the decent administration of justice, but am not to be taken as expressing any opinion, that in law a convicted man is entitled

to go free simply because his accuser formed one of those grand jurors who presented his case for trial. I express no opinion on that legal issue, nor shall I till need be.

The appeal should be dismissed.

ANGLIN J. (dissenting).—The defendant appeals to this court under sections 1013(3) and 1024 of the Criminal Code from the judgment, on a case reserved under section 1014(2), affirming the verdict and conviction recorded against him on a charge of perjury. The opinion of the majority (Archambeault C.J., Lavergne and Cross JJ.) was delivered by Mr. Justice Cross. Carroll and Pelletier JJ. dissented on only one of the reserved questions; viz., whether a motion to quash the indictment had been properly rejected, which is therefore the subject of the present appeal.

On the 3rd of November, 1914, one Bachand, who had been unsuccessfully prosecuted at the instance of the defendant on a charge of attempted murder, laid a complaint against the defendant of having committed perjury in the course of that prosecution. The defendant having been committed for trial, his case came before the Court of King's Bench, in October, 1915. At this term of the court Bachand was a member of the grand jury. He was present in the jury-box when the grand jury was charged with the consideration of the indictment preferred against the defendant, and again when a true bill was returned. Before the defendant pleaded to the indictment a motion was made on his behalf that it should be quashed because of the presence of Bachand as a member of the grand jury, and also because Bachand had said to one Brault, also a grand juryman, the following words:—

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C'est de valeur ce procés là, mais au point où on est rendu là, il va falloir que moi ou Verroneau parte de Coaticook,

which Brault had repeated to other members of the grand jury, while they were assembled for deliberation.

In the reserved case the learned judge makes the following statement:—

> Avant adjudication sur cette motion, il fut établi devant la cour qu'en effet Denis S. Bachand avait été assigné comme grand juré pour le dit terme d'octobre, mais qu'il n'avait aucunement pris part aux délibérations du grand jury sur l'accusation portée contre Verroneau. Il fut aussi établi que les paroles susdites avaient été dites par Bachand à Brault et que ce dernier les avait rapportées dans la salle des délibérations aux autres grands jurés; mais il n'a été aucunement établi que ces paroles aient influencé ces derniers et qu'elles aient eu pour effet de déterminer leur rapport.
>
> Il est vrai que Bachand était dans la boîte des grands jurés quand ceux-ci ont rapporté l'acte d'accusation comme bien fondé contre l'accusé.

In the respondent's factum it is stated that the fact that Bachand took no part in the deliberation upon this case

> was proved by the affidavits of two witnesses before the court.

These affidavits are not in the record and, although their production has been demanded, are not forthcoming. In view of the strict provisions as to the secrecy of all that transpires in the jury-room, and the terms of the grand jurors' oath, I find it difficult to understand how the learned judge was in a position to make the statement which he does as to the abstention of Bachand from taking part in the deliberations on this case. *Rex* v. *Marsh*(1), at page 237; *Rex* v. *Willmont* (2); Greenleaf on Evidence, par. 252; Taylor on Evidence, par. 943; Archbold, Criminal Pleading (23 ed.), page 103; 4 Blackstone's Com. par. 126. I am likewise at a loss to appreciate the force of the learned judge's observation:—

(1) 6 A. & E. 236. (2) 30 Times L.R. 499.

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Il n'a été aucunement établi que ces paroles aient influencé ces derniers et qu'elles aient eu pour effet de déterminer leur rapport.

As at present advised I incline to think that we should ignore both the statement that Bachand took no part in the deliberations upon the charge against Veronneau and also the statement that it was not established that the repetition of what he had said to the juror Brault influenced the grand jury.

But if we are bound by these statements made in the special case, it should be pointed out that it does not appear (as indeed it could not without impropriety, Taylor on Evidence, para. 943) whether the bill against Veronneau was returned by the vote of more than seven members of the grand jury; nor is there an explicit statement that Bachand did not vote upon the bill as a grand juryman although he had refrained from taking part in the deliberation, Bachand having been present in the jury-box when the jury was charged with the consideration of the case against the defendant, and again when the bill was returned, his presence in the jury-room while it was under deliberation seems to be a reasonable inference which is in nowise negatived in the case submitted.

The question reserved for the consideration of the court is stated in the following terms:—

Le fait que Denis S. Bachand avait été assigné comme grand juré affectait-il la légalité de la constitution du grand jury, et ce dernier pouvait-il légalement rapporter comme bien fondé, l'acte d'accusation porté contre Verroneau, Bachand n'ayant aucunement pris part aux délibérations qui eurent lieu au sujet du dit acte d'accusation, et la décision de cette Cour renvoyant la motion de l'accusé, était-elle celle qui devait être rendue?

In answer to the appeal counsel for the Crown takes the position that there is no right of challenge to a grand juryman individually, that the remedy of an accused person in the case of a disqualified grand juryman was, prior to the Criminal Code, by plea in

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abatement, that such pleas have been abolished (Crim. Code, sec. 899), that a motion to quash in lieu thereof is permitted only in the case of an "objection to the constitution of the Grand Jury" (*ibid.*) and that an objection that a member of the grand jury was not indifferent because of alleged interest is not an objection to the constitution of the grand jury. The *King* v. *Hayes*(1). His position, therefore, is that, although it should be assumed that Bachand took part in the finding of the true bill against Veronneau, and even that his vote was necessary to its return, nevertheless Veronneau would be without redress because the law affords him no remedy. In the alternative he maintains that, in view of the statements in the reserved case, that Bachand had taken no part in the deliberation of the grand jury, and that it was not proved that his conversation with Brault, though repeated to the grand jury, had in fact affected them, the court cannot properly hold, although the objection should be deemed well founded, that "the accused has suffered or might suffer prejudice thereby."

It seems unnecessary to consider the somewhat debated question whether there is a right of challenge to the polls in the case of a grand jury. I appreciate the force of the argument *ab inconvenienti* pressed in the *Sheridan Case*(2), and incline to the view that under the old practice an objection to a grand juryman would be properly made when the accused was arraigned either by plea in abatement or by motion to quash the indictment. I agree with Mr. Justice Cross that either course would seem to have been open, the latter, however, being the only method available when, as may often happen, the defendant first became aware of the ground of objection after he had pleaded

(1) 9 Can. Crim. Cas. 101. (2) 31 How. St. Tr. 543.

"not guilty." Since the adoption of the provision of the Criminal Code abolishing all pleas in abatement the remedy is by motion to quash.

I also agree with Cross J. that the view that the phrase "any objection to the constitution of the grand jury" (Crim. Code, 899, sec. 2), covers only objections based on lack by jurors of qualifications expressly prescribed by provincial statute law, or on disqualification of the officer charged with the duty of selecting and summoning the grand jury, seems to be too narrow. Anything which destroys the competency of the grand jury as a whole or the competency of any of its members, I think, affects the constitution of that body and affords a ground of objection which may be raised by a motion to the court under section 899. A grand juror may be well qualified as to all the cases on the docket save one and wholly unfit to pass upon that one. As to that case the jury would not be properly constituted while he sat upon it.

In the *King* v. *Hayes*(1), the contrary view was taken, apparently based largely upon what, with respect, would appear to have been a misconception of section 662 of the Criminal Code then in force.

> Every person qualified and summoned as a grand or petit juror, according to the laws in force for the time being in any Province of Canada, shall be duly qualified to serve as such juror in criminal cases in that Province.

Apart from any question as to the constitutional validity of this section as a provision dealing with the constitution of the court rather than with criminal procedure, it should be noted that the qualification which it declared sufficient was not merely that prescribed by the provincial statute law, but qualification

> according to the laws in force for the time being in any Province of Canada.

(1) 9 Can. Crim. Cas. 101.

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I know of no law in force in any province which has taken away the common law right to object to a juror *propter affectum* or deprived an accused in the Province of Quebec of the right, which exists, as in Ontario and the other older provinces, before conviction for an indictable offence, to have his case passed upon first by a body of impartial grand jurors and afterwards by a petit jury likewise composed of indifferent men. 4 Blackstone's Com. para. 306.

The disqualification of interest—*propter affectum*—rests upon the common law maxim, "that no man is to be a judge in his own case," which, as Lord Campbell said in *Dimes* v. *Grand Junction Canal Co.*(1),

it is of the last importance * * * should be held sacred. And that is not to be confined to a cause in which he is a party but applies to a cause in which he has an interest.

The presence of one interested justice on a bench of magistrates renders the court improperly constituted and vitiates the proceeding, although the majority, without reckoning his vote, favoured the decision: *Reg.* v. *Justices of Hertfordshire*(2). The same rule is applicable to a grand jury. *The Queen* v. *Inhabitants of Upton St. Leonards*(3). The case last cited is also particularly in point because of the statement made by Bachand to Brault, and repeated to the other grand jurors, which not only put Bachand's interest in the prosecution beyond doubt, but was of a character

not unlikely to influence the grand jury in their decision.

The reasoning and grounds of decision of Peters, J., in *The Queen* v. *Gorbet et al.*(4), commend themselves to my judgment rather than those which prevailed in the *King* v. *Hayes*(5).

(1) 3 H.L. Cas. 759.
(2) 6 Q.B. 753.
(3) 10 Q.B. 827.
(4) 1 P.E.I. Rep. 262.
(5) 9 Can. Crim. Cas. 101.

As already stated I am unable to agree with the view taken by Mr. Justice Cross that evidence was legally received that the juror Bachand, though apparently present in the grand jury room, did not participate in the discussion of Veronneau's case. It would, in my opinion, be a practice fraught with very grave dangers to enter upon any such inquiry. The illegality of the presence of a mere stranger in a jury-room is illustrated by the recent case of *Goby* v. *Wetherill*(1). The presence of a person disqualified by interest, himself a member of the body, must be still more objectionable. Moreover, as already pointed out, the statement that Bachand did not take part in the deliberations of the grand jury on the Veronneau case not only does not negative his presence in the jury-room, but is not inconsistent with his having voted on the finding. The true principle, however, is that upon which the decisions in *Reg.* v. *Justices of Hertfordshire*(2), and *Rex* v. *Lancashire Justices*(3), and *Reg.* v. *Meyer*(4) proceed. As Blackburn J. said, in the case last cited,

> we cannot go into the question whether the interested justice (juror) took no part in the matter (*i.e.*, in the discussion of the case).

See also for a different application of the same principle, *Reg.* v. *London County Council*(5), at page 196.

As to the statement of Bachand to grand juror Brault, repeated by the latter (probably in Bachand's presence) in the jury-room, it was of a character calculated to influence other jurymen and it is impossible to know whether it did or did not in fact influence them. Mr. Justice Cross was under the erroneous impression that

(1) [1915] 2 K.B. 674.
(2) 6 Q.B. 753.
(3) 75 L.J., K.B. 198.
(4) 1 Q.B.D. 173.
(5) [1892] 1 Q.B. 190.

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the learned trial judge had found that the communication did not affect the decision of the grand jury.

All that the special case states is that:—

Il n'a été aucunement établi que ces paroles aient influencé ces derniers et qu'elles aient eu pour effet de déterminer leur rapport.

The effect of Bachand's statement upon the grand jury is a field of inquiry not open to us. The statement was improperly before them. It had all the weight of a communication from one of the body itself. The defendant is entitled to have it assumed that it produced some effect.

The accused has been deprived of the substantial right of having his case passed upon by a duly qualified and unbiased grand jury, and it was, in my opinion, quite impossible when the motion to quash was disposed of in the trial court to affirm that he had not suffered or might not suffer prejudice thereby. *Rex* v. *Willmont*(1); *Allen* v. *The King*(2). To hold, as was apparently held by one learned judge in the *Hayes Case*(3), at page 118, that, because the appellant was subsequently convicted by a petit jury at the trial, to which he was compelled to proceed upon the rejection of his motion to quash, it cannot be said that he was really prejudiced by anything which concerned the action of the grand jury, would entail a denial of redress in any case after conviction, however gross the improprieties accompanying the finding of the indictment, however prompt the action of the defendant in taking exception thereto, and however erroneous the rejection of his objections.

In my opinion, the motion to quash the indictment should have been granted and the question submitted should be answered accordingly.

(1) 30 Times L.R. 499.
(2) 44 Can. S.C.R. 331.
(3) 9 Can. Crim. Cas. 101.

BRODEUR J. (dissident).—Il s'agit dans cette cause d'un appel de la décision de la Cour du Banc du Roi maintenant l'acte d'accusation porté contre l'appelant.

L'appelant, Véronneau, et M. Denis S. Bachand sont évidemment deux citoyens importants de la ville de Coaticook. L'un deux, en effet, est un médecin et l'autre est un citoyen dont la fortune est assez considérable pour être qualifié comme grand juré.

Ce sont deux ennemis invétérés et ils ont jugé à propos de vider leur querelle devant les cours criminelles du pays.

Veronneau avait d'abord porté une accusation de tentative de meurtre contre Bachand, mais après procès ce dernier fut acquitté. A son tour, Bachand a porté une accusation contre Veronneau l'accusant de s'être parjuré dans ce procès de tentative de meurtre.

Le magistrat chargé de l'enquête préliminaire a trouvé matière à procès contre Véronneau sur l'accusation de parjure et un acte d'accusation a été soumis au grand juré.

Coincidence assez extraordinaire, nous trouvons que parmi les membres du grand jury se trouvait être Bachand lui-même. Aussi quand l'acte d'accusation a été rapporté comme bien fondé, Véronneau a fait motion pour le casser sur le principe que le jury n'était pas legalement constituté, vu que parmi les jurés se trouvait être son propre accusateur.

Une preuve par affidavit a été faite à ce sujet et il paraît avoir été établi à la satisfaction du juge qui présidait au procès que Bachand n'avait pas pris part aux délibérations. Il ne nous dit pas cependant si Bachand était dans la chambre où les jurés ont délibéré.

Il est en preuve également que Bachand aurait dit à l'un de ses collègues du grand jury qu'au point où

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on étaient rendues les choses "il va falloir que lui ou Véronneau parte de Coaticook."

Il a été prouvé également que Bachand était dans la boîte des grands jurés quand ceux-ci ont rapporté l'acte d'accusation comme bien fondé contre Veronneau.

La question qui se présente est donc de savoir si le jury était validement constitué pour rapporter l'acte d'accusation en question. Il n'y a pas de doute sur le fait que Bachand était membre du grand jury et qu'il a été assermenté comme tel.

Le juge qui présidait au procès a réservé pour la décision de la cour d'appel la question suivante:—

> Le fait que Denis S. Bachand avait été assigné comme grand juré affectait-il la légalité de la constitution du grand jury et ce dernier pouvait-il légalement rapporter comme bien fondé l'acte d'accusation porté contre Verroneau, Bachand n'ayant aucunement pris part aux délibérations qui eurent lieu au sujet du dit acte d'accusation et la décision de cette cour renvoyant la motion de l'accuse était-elle celle qui devait être rendue?

Les rôles d'accusateur et de juge sont, d'après les principes primordiaux de notre organisation judiciaire, absolument incompatibles; et la Couronne l'a si bien compris que dans la cause actuelle elle a prouvé que l'accusateur, Bachand, n'avait pas pris part aux délibérations qui ont eu lieu sur l'acte d'accusation porte contre Veronneau.

Les faits qui nous sont rapportés par le juge et qui font la base de la question réservée ne sont peut-être pas aussi détaillés qu'ils devraient l'être. Ainsi, par exemple, je crois qu'il aurait été bien important de savoir si Bachand était resté ou non, pendant les délibérations du jury. Le juge déclare simplement qu'il n'a pas pris part aux délibérations. Cela veut-il dire qu'il n'était pas présent dans la chambre où le jury a délibéré? J'étais enclin d'abord à croire que le fait de mentionner qu'il n'avait pas pris part aux

délibérations aurait pu être interprété comme encluant sa présence mais qu'il n'avait pas assisté. Mais, réflexion faite, je considère que la meilleure interprétation qui puisse être donnée à cette expression du juge est que Bachand était présent mais qu'il n'a nullement pris part aux délibérations.

Je considère que dans les circonstances le jury n'était pas légalement constitué pour porter un acte d'accusation.

Chitty dit:—

> This necessity for the grand inquest to consist of men free from all objection existed at common law and was affirmed by the statute 11 Henry IV., ch. 9, which enacts that any indictment taken by a jury, one of whom is unqualified shall be altogether void and of no effect whatever. So that if a man be outlawed upon such a finding, he may, on evidence that one of the jury was incompetent, procure the outlawry against him to be reversed.

Le grand jury dans le cas actuel pouvait être légalement constitué pour entendre d'autres causes qui lui seraient soumises; mais, en tant que la cause de Veronneau est concernée, je considère qu'il n'était pas légalement constitué.

Je ne saurais, par conséquent, concourir dans l'opinion exprimée dans la cause de *Reg.* v. *Hayes*(1). Je crois que le principe qui a été énoncé dans la cause de *Reg.* v. *McGuire*(2), est plus acceptable et plus conforme à notre organisation judiciaire.

Pour ces raisons, je serais d'opinion que l'acte d'accusation proféré contre Veronneau devrait être annulé et que l'appel devrait être maintenu avec dépens.

Appeal dismissed.

Solicitor for the appellant: *Chas. C. Cabana.*
Solicitor for the respondent: *Jacob Nicol.*

(1) 9 Can. Crim. Cas. 101. (2) 4 Can. Crim. Cas. 12.

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*Oct. 10.

DONALD LLOYD CAMPBELL (PLAINTIFF) .... APPELLANT;

AND

ANNIE ELIZABETH DOUGLAS AND ANOTHER (DEFENDANTS) .... RESPONDENTS.

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

Sale of land—Consideration—Exchange of properties—Mortgage—Indemnity to vendor—Evidence.

In 1912 D. advanced money to P., who conveyed to him certain properties, in Ottawa, Ont., including one on LeBreton Street. In 1913, P. entered into an agreement with C. to exchange the LeBreton Street property for lots on Lisgar Street, which was carried out by conveyances between C. and D. In his deed C. stated that the consideration was "an exchange of lands and $1.00," and conveyed the lots on Lisgar Street, subject to certain mortgages, the description being followed by the words, "the assumption of which mortgages is part of the consideration herein." C. was obliged to pay these mortgages, and brought suit against D. to recover the amount so paid.

Held, affirming the judgment of the Appellate Division (34 Ont. L.R. 580), that the case was not within the rule of equity whereby the purchaser of an equity of redemption may be obliged to indemnify his vendor against liability for the mortgage. *Small* v. *Thompson* (28 Can. S.C.R. 219) distinguished.

Held, also, that parol evidence was properly received to shew the relations between P. and D.; that D. received the conveyance from C. merely as P.'s nominee, and held it afterwards only as security for his advances to P.; that he never claimed to be owner and never went into possession except as P.'s agent; and that he was not a purchaser of the property, but only a mortgagee.

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, Anglin and Brodeur JJ.

(1) 34 Ont. L.R. 580.

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The facts are sufficiently stated in the above head-note.

J. R. Osborne for the appellant. Douglas was a purchaser of Power's land, not a mortgagee. *Perry* v. *Meddowcroft*(1).

Whichever he was, he assumed the mortgages as part of the consideration, and, therefore, is liable in this action. *Small* v. *Thompson*(2), *Waring* v. *Ward*(3), and *Adair* v. *Carden*(4) are not applicable, in view of such assumption.

The assumption of the mortgages amounted to an express covenant to pay them. Even if it did not, as appellant would not have conveyed without this clause for assumption such a covenant should be read into the contract. *Pioneer Bank* v. *Canadian Bank of Commerce*(5).

Hogg K.C. for the respondents referred to *Corby* v. *Gray*(6), *Mills* v. *United Counties Bank*(7), and *Walker* v. *Dickson*(8).

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed.

In stating the nature of the claim, I cannot do better than quote the words of the Master of the Rolls in the comparatively recent case of *Mills* v. *United Counties Bank, Ltd.*(9):—

> The claim is based on this ground. It is said that, according to the settled law of the court, a purchaser of an equity of redemption is bound under an implied obligation, or, as it is sometimes put, an obligation of conscience, to indemnify the vendor against the liability

(1) 4 Beav. 197.
(2) 28 Can. S.C.R. 219.
(3) 7 Ves. 332.
(4) 29 L.R. Ir. 469.
(5) 34 Ont. L.R. 531.
(6) 15 O.R. 1.
(7) 81 L.J. Ch. 210.
(8) 20 Ont. App. R. 96.
(9) [1912] 1 Ch. 231, at p. 236.

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on the mortgage debt; and, in an ordinary case, that is, I think, obviously according to justice and common sense. If a property is worth £10,000 and is subject to a mortgage of £5,000, and the purchaser only pays the vendor £5,000 and gets the property, it would be almost shocking to say that in that case the vendor would be liable on the covenant to pay the full sum of £5,000 to the first mortgagee, and that the purchaser was under no obligation to indemnify him.

Now, I doubt whether the proposition is of so general and unqualified a character as contended for. It is to be noticed that, in the example given by the Master of the Rolls, he is speaking of a case where the property in the hands of the purchaser is sufficient to answer the mortgage debt. The same assumption is made in other cases where the doctrine has been discussed. But, if we remember that, as the courts hold, the obligation is one of conscience alone, can it be said that the obligation holds equally good where the pledge has proved worthless or indeed to be worth no more than the purchaser paid?

Again, Lord Justice Fletcher Moulton, in the case above referred to, speaking of the doctrine of *Waring* v. *Ward*(1), that there is an implied covenant, says:—

It relates, I think, to every case where you can reasonably imply that it was the intention of the parties that that should be done, but I doubt whether it applies to any other case.

Now, can we reasonably imply that it was the intention of the respondent, who was not in reality the purchaser, to indemnify the appellant against the mortgages?

This perhaps brings us to the point of the case on which the judgment appealed from proceeds, viz., that this is not a simple case as between the appellant and respondent of the relation of vendor and purchaser. I agree with the court that the circumstances and nature of the transaction are such as to rebut the implication of an unqualified personal liability on the part of the respondent.

(1) 7 Ves. 332.

The courts are not, in my opinion, called upon in such cases to inquire too particularly into transactions often of a complicated nature and to consider whether they establish a case in which the expressed agreements between the parties ought to be supplemented by implied ones.

It is, of course, always open to a vendor to secure himself properly on a sale of the property, and, though there may be cases in which it is so clearly a matter of conscience for the purchaser to indemnify him that the court will imply a covenant where none was expressed, yet I do not think such implication of liability is to be lightly made.

The transactions out of which the claim arises seem to have been of the usual character of speculation in inflated values during a land boom. In these there are purchases, mortgages, exchanges, resales, shuffling of every description, until the speculation collapses, when disputes arise over the damages, which the courts are called on to unravel. Whilst the parties are entitled to the protection of any legal rights they may have, these are not cases in which the law need be strained for their relief.

DAVIES J.—I am of opinion that this appeal should be dismissed for the reasons given by Mr. Justice Hodgins J.A., speaking for the majority of that court, in which reasons I concur.

IDINGTON J.—The appellant conveyed certain lands to the late C. A. Douglas, and claims that he is entitled to recover from his grantee's representatives, now respondents, the amount of certain mortgages which existed upon the property conveyed at the time when the grant was made, because the conveyances described

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the property as subject to these mortgages, and then added,

> the assumption of which mortgages is part of the consideration herein.

The grantee never executed the conveyance, and, therefore, his representatives cannot be held liable at common law.

The definition of a covenant in Comyn's Digest, A. 2, vol. 3, p. 263, deals with what may amount to a covenant on the assumption that the covenantor had executed the deed.

This is not the deed of an alleged covenantor. Any relief, therefore, that the appellant, whose deed it is, can have must rest upon equity.

To understand what that equity may be, we find the following in the deed in question:—

> Witnesseth that, in consideration of an exchange of lands and the sum of one dollar of lawful money of Canada, now paid by the said party of the second part to the said party of the first part (the receipt whereof is hereby by him acknowledged), he the said party of the first part doth grant unto the said party of the second part in fee simple all and singular, * * *

and then follows the description of the lands and mortgages ending as already stated.

When we try to get the meaning out of this, in order to do equity, we find there never was any exchange of lands between the grantor and grantee, and we are told that the transaction referred to was one between one Power and the grantor in this deed.

How can that found any equity entitling appellant to the relief claimed as against this grantee or his representatives?

And when the relation of the parties is further investigated, the matter becomes, if possible, more hopeless, for it turns out that all the grantee had to do with the matter was that Power, who seems to have

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been a speculator who had resorted to this grantee for advances on more than one occasion, and had, in the result, transferred to him, obviously as security, a number of properties on such terms as, if possible, to give their transaction the form of a sale or a conditional sale.

It is one of these properties which the grantee was asked to release and substitute therefor the lands now in question.

To accommodate appellant and Power he assented. Hence this conveyance to him.

At the time when this conveyance was made the time limited for Power to redeem had not expired.

I need not follow the remarkable complications that existed beyond all this, for I am unable to find any equity upon which appellant can rest and establish a claim to recover from a man who never was either a purchaser from him or covenantor bound to him.

Whether appellant might have found other equities of which something could have been made by bringing all the parties, including deceased, before the court, we need not trouble ourselves to consider, for no such claim is made.

On the case made, the appeal seems to me hopeless.

The contention that we must presume Power would make, and made default, does not seem to render the appellant's case any better.

The many cases where courts of equity have enforced obligations resting upon a purchaser as against those claiming under him, where obviously the prospective or subordinate purchaser (which shall we call this man?) has claimed, to enjoy the property, and been held bound in such case to implement the obligations of the purchaser, do not seem to me to furnish as a precedent anything like this case. Here the

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property evidently was not worth holding on to or asserting any claim to.

The whole of the dealings between Power and the deceased Douglas seem to have been in equities, and no obligation is shewn binding Douglas to Power to assume and pay the mortgages.

I think the appeal should be dismissed with costs.

ANGLIN J.—Notwithstanding Mr. Osborne's forceful argument in support of the contrary view taken by Magee J.A., who dissented in the Appellate Division, I agree with the learned judges who formed the majority of that court that, read in the light of the circumstances as disclosed by the evidence, in my opinion properly received, the recital in the description of the property in the deed from Campbell to Douglas, that the assumption of mortgages upon the property conveyed was part of the consideration for the transfer, does not amount o a covenant by the grantee to indemnify the grantor against such mortgages. That consideration is stated elsewhere in the deed to be "an exchange of lands and the sum of $1.00." The portion of it of which the assumption of the mortgages formed part, *i.e.*, the exchange of lands, was made between Campbell and Power. Douglas was not a party to it. He took the conveyance of the property given in exchange by Campbell merely as Power's nominee, and not as purchaser, or beneficial owner, but as security and as a mortgagee. As is pointed out by Hodgins J.A., *Small* v. *Thompson*(1), cited by the learned trial judge, was a clear case of express covenant.

Having "regard to all the circumstances of the case and to all the relations subsisting between the

(1) 28 Can. S.C.R. 219.

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parties," as we must, it is, I think, clear that they had no intention that Douglas should assume liability to indemnify Campbell. No reasonable implication of such an intention can arise. In its absence, the essential basis of the equitable obligation alternatively relied on by the appellant is lacking. *Mills* v. *United Counties Bank*(1). Resembling it very closely in its facts, the case at bar seems to me to be not distinguishable in principle from *Walker* v. *Dickson*(2), which, I may be permitted to say with respect, was, in my opinion, well decided.

During the argument it occurred to me that the appellant might invoke the doctrine of estoppel. But, on further consideration, I am satisfied that two essential elements of an estoppel are not present. The respondent neither uttered any word nor did any act inconsistent with his true position in regard to the property, or which would justify the appellant in assuming that he took the conveyance instead of Power, with whom Campbell had made the agreement for exchange, otherwise than as Power's nominee and for security. The appellant did not change his position to his prejudice in consequence of the deed being made to Douglas. He still retains any rights against Power which the agreement for exchange gave him.

I would dismiss the appeal with costs.

BRODEUR J.—I am of opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Osborne & Broadfoot.*
Solicitors for the respondents: *Hogg & Hogg.*

(1) 81 L. J. Ch. 210, at p. 215. (2) 20 Ont. App. R. 96.

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*May 10.
*Oct. 16.

THE CANADIAN NORTHERN RAILWAY COMPANY (DEFENDANTS) .. } APPELLANTS;

AND

MICHAEL PSZENICNZY (PLAINTIFF) .... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Railways—Negligence—Construction of statute—"Railway Act," R.S.C. 1906, *c.* 37, *s.* 306—*Constitutional law—"Civil rights"—Jurisdiction of Dominion Parliament — Provincial legislation — "Employers' Liability Act," R.S.M.*, 1913, *c.* 61—*Paramount authority—"Operation of railway"—Limitation of actions—Conflict of laws.*

An employee of a Dominion railway company sustained injuries while engaged in unloading rails from a car alleged to have been unsuitably equipped for such purposes. The unloading of the rails was for the convenience of the company in using them to replace other rails already in use on the constructed tracks. An action was brought to recover damages, under the Manitoba "Employers' Liability Act," R.S.M., 1913, ch. 61, within two years from the time of the accident, the limitation provided by section 12 of that Act, but after the expiration of the limitation of one year provided, in respect of actions against Dominion railway companies, by the first sub-section of section 306 of the "Railway Act," R.S.C., 1906, ch. 37. The fourth sub-section of section 306 provides that such railway companies shall not be relieved from liability under laws in force in the province where responsibility arises.

Held, affirming the judgment appealed from (25 Man. R. 655), that, in the exercise of authority in respect of railways subject to its jurisdiction, the Parliament of Canada had power to enact the first sub-section of section 306 of the "Railway Act," R.S.C., 1906, ch. 37, providing a limitation of one year for the commencement of actions against Dominion railway companies for the recovery of damages for injury sustained by reason of the construction or operation of the railway. *Grand Trunk Rway. Co.* v. *Attorney-General for Canada* ((1907) A.C. 65), applied.

Per Fitzpatrick, C.J. and Davies, Anglin and Brodeur JJ. (Idington J. *contra*).—The fourth sub-section of section 306 of the "Railway

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

Act," R.S.C., 1906, ch. 37, does not so qualify the limitation provided by the first sub-section thereof as to admit the application, in such cases, of a different limitation provided under provincial legislation. *Greer* v. *Canadian Pacific Rway. Co.* (51 Can. S.C.R. 338) followed.

The unloading of rails for the convenience of a railway company to be used in replacing those already in use on the constructed permanent way is included in "operation of the railway" under the first sub-section of section 306 of the "Railway Act," R.S.C., 1906, ch. 37. Idington J. *contra.*

The judgment appealed from (25 Man. R. 655) was reversed, Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment maintaining the plaintiff's action entered by Prendergast J. on the verdict of the jury at the trial.

The circumstances of the case are stated in the head-note.

O. H. Clark K.C. for the appellants. The judgment appealed from is erroneous in holding that sub-section 4 of section 306 of the Dominion "Railway Act" restricts the application of sub-section 1 of that section to causes of actions which do not arise under the laws of the province where the liability was incurred. We refer to *Greer* v. *Canadian Pacific Rway. Co.*(2), *per* Anglin J. at page 351; *Canadian Pacific Rway. Co.* v. *Roy*(3), and *West* v. *Corbett*(4). Under the laws in force in Manitoba, an action by a servant against his master for common law negligence must be begun within six years, and if brought under the "Employers' Liability Act" it must be brought within two years. The effect of section 306 is to cut down the time for bringing a common law action against a Dominion railway company to one year and, therefore, a servant suing a Dominion railway company for com-

(1) 25 Man. R. 655.
(2) 51 Can. S.C.R. 338.
(3) [1902] A.C. 220.
(4) 47 Can. S.C.R. 596.

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mon law negligence is restricted to one year. It follows that a servant suing a railway company for negligence under the "Employers' Liability Act" would have to bring his action within the same time.

M. J. Gorman K.C. for the respondent. The injury was not sustained by reason of the "construction or operation" of the railway. The work upon which the appellants were engaged at the time of the accident was a work of renewal or maintenance, and not of construction or operation. The real proximate cause of the injury was the negligence of the appellants' foreman in using a defective roller. That is not "construction or operation" of the railway, or any part of it, but the negligence of a foreman who so carelessly exercised his superintendence that the injury was sustained. *Canadian Northern Railway Co.* v. *Robinson*(1), *per* Davies J. at page 397, Duff J. at page 401, and Anglin J. at page 409; and, on the appeal to the Privy Council(2), *per* Lord Haldane at page 745.

Sub-section 2 of section 306 limits the application of sub-section 1 to those cases where "the damages or injury alleged were done in pursuance of and by the authority of this Act or of the Special Act." The action of the appellants in replacing rails was not done in pursuance of and by the authority of the Act. There was no duty imposed by the Act to do this. It has not even been suggested that it was necessary. It was a purely voluntary act, not founded upon any duty or responsibility. Nor was the negligent action of the foreman in using the defective roller done in pursuance of and by the authority of the Act. *Lyles* v. *Southend-on-Sea Corporation* (3), *per* Vaughan

(1) 43 Can. S.C.R. 387.
(2) [1911] A.C. 739.
(3) [1905] 2 K.B. 1.

Williams, L.J., at page 13. The limitation applies only to actions brought in respect of injuries caused directly, and not indirectly, by the construction or operation of the road, and is not intended to apply to suits founded upon injuries to civil rights unconnected with railway legislation in its true sense. The appellants are subject to the provisions of the "Employers' Liability Act," R.S.M., 1913, ch. 61, sec. 12, providing a limitation of two years for the commencement of actions. *Canada Southern Rway. Co.* v. *Jackson* (1).

Sub-section 4 of section 306 qualifies sub-section 1 and excludes its operation where the injury complained of comes within the jurisdiction of and is specially dealt with by the laws of the province in which it takes place, provided that such laws do not interfere with the powers of the Dominion Parliament respecting railway legislation. By its position in the Act, it applies against the railway company provincial laws imposing liability for wrongful acts or negligence so far as these laws do not encroach upon Dominion powers. Sub-section 1 prescribes the limitation in the case of actions for damages arising within the provisions of the "Railway Act," while sub-section 4 makes it clear that there was no intention to affect the laws in force in any of the provinces where a liability of a company arises under those laws or to impose a limitation less than that imposed by the provincial law. *British Columbia Electric Railway Co.* v. *Turner*(2), *per* Idington J. at page 487; Abbott, Railway Law, page 209; Maxwell on Statutes (5 ed.), page 463.

Section 306 applies only to cases in which the damage arises from the execution or neglect in the execution of the powers given to or *bonâ fide* assumed by com-

(1) 17 Can. S.C.R. 316. (2) 49 Can. S.C.R. 470.

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panies enabling them to construct and maintain their railway, and does not and was not intended to apply to cases where damages have been caused by reason of the default or neglect of a company or its servants in the construction or operation of the road. *North Shore Rway. Co.* v. *McWillie*(1), *per* Gwynne J. at page 514.

THE CHIEF JUSTICE.—The plaintiff's claim for damages is alleged in his factum to have arisen in these circumstances:—

The plaintiff was a labourer and at the time of receiving the injury he was employed with others by the defendant in unloading steel rails from a box car, in which they had been shipped to the defendant, to a flat car, for more convenient distribution along the railway. The company at the time was replacing the old track with heavier rails.

It appears, therefore, that the injury complained of was sustained by reason of the construction and operation of the railway and the question to be decided is, does the limitation of section 306, para. 1 of the "Railway Act" apply, the action not having been commenced within the year.

Assuming, as I think we must, that it was competent to the Dominion Parliament to pass this legislation I am satisfied that the language of paragraph 1 is sufficiently comprehensive to include all claims for damages, whether they arise at common law or under a statute. The claim was originally made at common law and under the statute, but was finally submitted to the jury as an action under the provincial "Workmen's Act."

I have reluctantly come to the conclusion that paragraph 4 of section 306 gives the respondent no assistance. That paragraph is applicable to the cause of action and means that if an accident occurs for which

(1) 17 Can. S.C.R. 511.

the company would be liable either at common law or under some special provincial statute, nothing contained in the Act, and no inspection had under the Act, will in any wise diminish or affect any such liability or responsibility. Here it is admitted that there was originally a good cause of action, but the suit to enforce the claim was not brought within one year next after the occurrence out of which the cause of action arose. Prescription under the civil law is a manner of discharging a debt by lapse of time. A debt or obligation, on the other hand, is not affected by a statute which says it may not be enforced after a certain period of time. The statute, in paragraph 1, does not affect the cause of action, it merely fixes one year as a reasonable time within which an action may be brought to enforce that right of action.

I do not think that the case of *Greer* v. *Canadian Pacific Railway Co.*(1) is applicable. The courts below disposed of that case on the ground that the injury complained of was caused by something done in pursuance and by authority of the "Railway Act," (*per* Anglin J. at page 350), and in that conclusion the majority of this court concurred. Here we have to deal with a case of negligence.

I would allow although with much regret.

DAVIES J.—I am of opinion that this appeal must be allowed. I cannot doubt that the injuries of which the plaintiff complains were sustained by him "by reason of the construction or operation of the railway" within the meaning of those words in section 306, ch. 37 of the Revised Statutes of Canada, 1906, the Dominion "Railway Act," nor do I doubt that sub-section 1 of that section was *intra vires* of the Dominion Parliament.

(1) 51 Can. S.C.R. 338.

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The court below held, for different reasons assigned by the judges, that this section of the "Railway Act" was not applicable to the negligence complained of and that the limitation in the "Employers' Liability Act" of the province for bringing the action within two years was the governing section and not section 306 of the Dominion "Railway Act" which fixed the time at one year.

At the time, however, when the judgment was given the judgment of this court in the case of *Greer* v. *Canadian Pacific Railway. Co.*(1) had not been reported and was not called to the attention of the court below.

That case is now reported and determined that sub-section 1 of section 306 of the "Railway Act," R.S.C. (1906) ch. 37, applied to injuries caused by the *negligent* construction or operation of the railway and that sub-section 4 did not restrict or affect the limitation in sub-section 1.

I was one of the judges who dissented from the judgment in *Greer's Case*(1); but, of course, I am bound by it and I am quite unable to distinguish the appeal now before us from that judgment, though I freely admit the difficulty of reconciling the 4th sub-section of section 306 with the rest of the section.

For this reason I would allow the appeal and dismiss the action with costs it not having been brought within the limitation prescribed in section 306 of the "Railway Act."

IDINGTON J. (dissenting).—The only question raised herein is whether or not section 306 of the "Railway Act" can be relied upon as a bar to an action under the Manitoba "Employers' Liability Act"

(1) 51 Can. S.C.R. 338.

which enables a recovery for damages suffered by an employee under such circumstances as in question herein by action brought during the period of two years from the happening of the accident.

The Court of Appeal for Manitoba were unanimous in holding it was not, but *Greer* v. *The Canadian Pacific Railway Company*(1), though decided then, had not been reported.

Whether the decisions of that case by the Ontario courts, which were reported, were cited or considered does not appear. They were accepted by the majority of this court as correct.

The only question now left is whether or not that case is distinguishable in principle from this.

I, with great respect and some hesitation, find in the stress laid in the opinion of two of my brother judges, composing the majority deciding that case, upon section 297 of the "Railway Act," that the cases are distinguishable.

It is conceivable that a burning of refuse including old ties on the track was rendered imperative by that section.

If that view is accepted, though it was not mine, then the company acting under the paramount authority of the "Railway Act" and discharging a duty created thereby could not be held bound by any Act of the legislature in conflict therewith and, as a corollary thereto, the applicability of the limitation of action in section 306 of the "Railway Act" may be arguable.

There is nothing of that sort in this case.

It cannot be pretended, at least so far it has not been since the legislation questioned in, and the decisions in the case of *In re Railway Act of* 1904(2), and

(1) 51 Can. S.C.R. 338. (2) 36 Can. S.C.R. 136.

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the same case under the name of *Grand Trunk Railway Company* v. *Attorney-General of Canada* (1), that the "Employers' Liability Act" or similar legislation does not bind the railway companies.

Subject therefore to the limitations imposed upon me by the decision in the *Greer Case*(2) thus understood, I remain of the opinion I expressed therein and for the reasons assigned in that case.

The case of *Canadian Northern Railway Company* v. *Anderson*(3) cited therein, in my opinion, seems much in point. That was a case arising out of work carried on for purposes of construction. The sole difference is that this is a case of a man engaged in the transportation of rails intended for construction or repair and renewal, and that was a case of a man engaged in procuring ballast to be transported and used in construction. Yet in that case leave was refused by the Judicial Committee to appeal from our decision(4).

The enactment of sub-section 4 of section 306, now in question, by the last revision of the statutes places it under the limitation clause therein as if germane thereto and thus emphasizes its purpose and effect.

But quite independently of such relation it is in substantially the same form in which it has remained ever since the session of 1868, immediately after Confederation; and was obviously designed by the change of expression then adopted to render effective just such provincial legislation as now in question.

It helps nothing to trace its history beyond the enactment of said 31 Vict. ch. 68, sec. 40, when the

(1) [1907] A.C. 65.
(2) 51 Can. S.C.R. 338.
(3) 45 Can. S.C.R. 355.
(4) 45 Can. S.C.R. vii.

laws of a province were excepted as well as anything in the "Railway Act" itself.

The argument set up in the appellant's factum that to give effect to it in the way contended for in the judgments of the learned judges of the court below, would destroy the effect of the decision in *Roy* v. *The Canadian Pacific Railway Company*(1) is answered by the fact that it was relied upon therein and held not to have such effect.

To give effect to the argument herein for appellant would go a long way to destroy sub-section 4 of any efficacy whatever. As a matter of law I incline to think the section never was necessary to protect those entitled to claim under such legislation as the "Workmen's Compensation Act" or the "Employers' Liability Act" in question here. But it clearly was the design of the Parliament of Old Canada in providing against railway accidents, of which some shocking illustrations were present to the minds of everyone in the Canada of those days and doubtless led to the enactment of the statute in which the substance of this section is first found.

It was intended no doubt to brush aside any possibility of any one ever arguing that such provisions as then enacted were intended to affect the civil rights of any one.

That was, as already stated, extended to protect the right of any one acquiring rights under provincial legislation from anything in the "Railway Act" including the section, now section 306, sub-sections 1 and 2.

Again it was at the same time as the Act was revised, in 1903, that this section was placed as a subsection of section 242 in that Act.

(1) [1902] A.C. 220.

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The character of that revision was radical in many respects and intended to protect the public in many ways as, for example, by the creation of a Board of Railway Commissioners and in relation to the very subject of the limitations of actions against railways, was so amended as to change the original words used in that regard "by reason of the railway" to the words "by reason of the construction or operation of the railway" and adding sub-section 2 which is now sub-section 3 of section 306.

The railway companies had obtained conflicting decisions as to the meaning of the words "by reason of the railway" but never succeeded in bringing contracts within the range of that limitation. To make clear that it should not sub-section 2 of said section 242 was adopted. And, as if to make clear that provincial or other legislation should not be affected by the limitation clause, it put the present sub-section 4 of section 306 under the same caption.

However clumsy the effort there cannot be much doubt of the intention to let it be treated as if part of the limitation and qualifying it.

It effectually did so if we should only read it literally by itself as preserving for those entitled to relief under any provincial legislation to the full effect thereof including the limitation of any action resting thereon.

Of such legislation that now in question is part and must stand unimpeached or unaffected by a limitation statute designed for other purposes than in any way controlling or affecting anything save that strictly within the operation of the "Railway Act" itself.

If the usual rule governing statutory limitations of actions is adhered to, the text of section 306, sub-sections 1 and 2, cannot be extended to apply to such

legislation as the Act in question herein and the collocation of sub-section 4 should put it beyond peradventure.

The appeal should be dismissed with costs.

ANGLIN J.—For reasons which it deemed sufficient Parliament has thought it desirable to give to every railway company under its jurisdiction the protection of a statutory limitation of one year after the time when the damage has been suffered within which all actions or suits against it for indemnity for any damages or injury sustained by reason of the construction or operation of the railway must be brought. If this "law is truly ancillary to railway legislation," although it should deal with and affect civil rights in the province and should overlap provincial legislation, it is *intra vires* and must prevail in cases which fall within its scope. *Grand Trunk Railway Co.* v. *Attorney-General for Canada*(1). Many reasons may be surmised why Parliament should consider it advisable, if not necessary, for the efficient and satisfactory working and management of their undertakings, that railway companies should be relieved from the necessity of preserving records of accidents and keeping available as witnesses for more than a year employees and other persons who may be in a position to give evidence as to them. With the merits of such a policy we are not concerned. So long as Parliament has not, under the guise of railway legislation, enacted what is not such but is truly legislation as to civil rights, its authority may not be questioned. I am unable to say that this vice is present in sub-section 1 of section 306 of the "Railway Act," which, though frequently before the courts, has never been challenged as *ultra vires*.

(1) [1907] A.C. 65.

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That the injury suffered by the respondent was sustained in the operation of the railway in my opinion does not admit of doubt. As their Lordships of the Judicial Committee said in *Robinson* v. *Canadian Pacific Railway Co.*(1),

> such operation seems to signify the process of working the railway as constructed.

In loading and unloading freight and goods upon railway cars the company's servants are assuredly engaged in the process of working the railway. It was negligence in the providing of means for such operation that caused the injury for which this action is brought. That actions based on such negligence are within the protection afforded by sub-section 1 of section 306 has been held in several cases in this court. *West* v. *Corbett*(2); *Canadian Pacific Railway Co.* v. *Robinson*(3); *Greer* v. *Canadian Pacific Railway Co.*(4).

But, it is urged, the Manitoba "Employers' Liability Act" gives a new statutory remedy for such an injury when sustained by an employee of the company and provides a special period of limitation within which an action under it may be brought. To such a case, it is argued, the general limitation of the Dominion "Railway Act" does not apply. I am somewhat at a loss to appreciate the ground of distinction suggested between rights of action arising under the common law of the province and rights of action created or conferred by provincial statutes where there is a question of the application to them of paramount Dominion legislation. The question is not, as it was in *Robinson* v. *Canadian Pacific Railway Co.*(5), which of two pro-

(1) [1911] A.C. 739.
(2) 47 Can. S.C.R. 596.
(3) 43 Can. S.C.R. 387.
(4) 51 Can. S.C.R. 338.
(5) [1892] A.C. 481.

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vincial limitation sections governs. If it were, a very strong argument could be made for applying the special provision found in the statute conferring the right of action. The question is whether a provision of a Dominion Act, framed in terms making it applicable to all actions against Dominion railway companies for infringement of civil rights in the course of the construction or operation of the railways which cause injury or damage, should be held inapplicable in cases where by provincial legislation a defence that would otherwise be available to railway companies, as employers, has been taken away, because the provincial legislation has annexed to the right to maintain an action in such cases the condition that it shall be brought within two years. The right of action in the present case, although it exists by virtue of the "Employers' Liability Act" having taken away the defence of common employment, is, nevertheless, for damages or injury sustained by reason of the operation of the railway and as such, in my opinion, falls within and is governed by the period of limitation prescribed by section 306 of the Dominion "Railway Act." To hold differently would be improperly to allow otherwise valid provincial legislation to prevail over *intra vires* Dominion legislation in a field in which they overlap. *Compagnie Hydraulique de St. Francois* v. *Continental Light, Heat and Power Co.*(1).

The history and construction of sub-section 4 of section 306 were recently considered in *Greer* v. *Canadian Pacific Railway Co.*(2), and, for the reasons there stated by Mr. Justice Duff and myself, I am of the opinion that sub-section 4 does not render sub-section 1 inapplicable to the case at bar.

(1) [1909] A.C. 194.

(2) 51 Can. S.C.R. 338.

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The appeal should be allowed with costs in this court and in the Manitoba Court of Appeal, and judgment should be entered dismissing the action with costs.

BRODEUR J.—I concur in the opinion of Mr. Justice Anglin. This appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Clark & Jackson.*
Solicitors for the respondent: *Murray & Noble.*

116581

PERCY CHARLES BONHAM (OWNER OF THE BARGE "MAGGIE,") (PLAINTIFF). } APPELLANT;

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*May 18, 19.
*Oct. 16.

AND

THE SHIP "HONOREVA" (DEFENDANT) .... } RESPONDENT.

ON APPEAL FROM THE QUEBEC ADMIRALTY DIVISION OF THE EXCHEQUER COURT OF CANADA.

Admiralty law—Navigation of canal—"Narrow channel"—Marine Department Regulations, rule 25—Starboard course—Fairways and mid-channels—"Canada Shipping Act," R.S.C. 1906, *c.* 113, *s.* 916 *—Collision—Liability for damages—Canal Regulations, rule* 22*— Right of way.*

The steamboat "Honoreva" was under way going up the Soulanges Canal and approaching a bridge across the channel which was swung open when she was about 300 feet below it. The steam tug "Jackman" was then observed descending the canal, with the current, at a greater distance above the bridge and also under way. The "Honoreva," in attempting to pass first through the abutments of the bridge (a space of about 100 feet in width), and keeping a course in mid-channel, came into collision with the barge "Maggie," which was being towed by the "Jackman," and the barge was injured and sunk. In an action for damages against the "Honoreva" she counterclaimed for damages sustained by her owing, as alleged, to the negligent navigation of the tug-and-tow.

Held, that the vessels thus navigating the canal were, at the place where the collision occurred, in a "narrow channel;" that article 25 of the rules of the Marine Department respecting the passage of vessels, which requires them when safe and practicable to keep to the starboard in fairways and mid-channels, applied to the navigation of the vessels in question, and that the "Honoreva," having failed to obey that rule, was in fault within the meaning of section 916 of the "Canada Shipping Act," R.S.C., 1906, chap. 113; that there was no negligence proven on the part of the tug-and-tow, and that the "Honoreva" was, therefore, solely liable for the damages resulting from the collision.

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

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Per Davies and Anglin JJ.—Under sub-section *b* of article 25 of the rules of the Marine Department, the down-going tug-and-tow had the right of way, notwithstanding that the up-going vessel may have been closer to the bridge when it was opened, and that the tug-and-tow were not obliged to stop and make fast to posts until the up-going vessel had passed, as is required by the 22nd rule of the "Canal Regulations" in regard to vessels approaching a lock.

APPEAL from the judgment of the Exchequer Court of Canada affirming the decision of Dunlop J., in the Quebec Admiralty Division of the Exchequer Court of Canada, by which the plaintiff's claim for damages was dismissed with costs, and the defendant's counterclaim, on a reference for reconsideration, was maintained.

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

J. A. H. Cameron K.C. for the appellant.
Heneker K.C. and *Chauvin K.C.* for the respondent.

THE CHIEF JUSTICE.—I concur in the conclusion reached by Mr. Justice Idington.

DAVIES J.—I concur in the opinion stated by Mr. Justice Anglin.

IDINGTON J.—This is an appeal against the judgment of the Exchequer Court maintaining a judgment of Mr. Justice Dunlop in favour of respondent.

The appellant sued as owner of the barge "The Maggie" sunk and lost or damaged by reason of a collision with the respondent in the Soulanges Canal when being towed by the tug "Frank Jackman" down said canal and about to enter the Red River bridge, crossing said canal.

It seems quite clear that the collision took place west of the bridge and, according to respondent's

factum, when her stern was opposite the "West Rest Pier."

The respondent was moving westerly and the tug-and-tow easterly.

The bridge is a swing bridge and when opened rests with either end on a cement pier. The easterly one is known as the "East Rest Pier" and the westerly one as the "West Rest Pier."

The entire distance between the easterly side of the "East Rest Pier" and the westerly side of the other is a little over three hundred feet. The entire length of the bridge is a little over two hundred and twenty feet. It swings on a pivot half way between these piers. It is less than forty feet in width and occupies in itself but little space.

The water channel between the cement walls on either side of the canal underneath the bridge and its sweep of space in opening or closing and between these piers is one hundred and two feet in width—or a few feet less in width than the general width of the canal for a long distance on either side of the bridge.

The water is of the same depth between the cement walls belonging to the bridge structure and that in the bottom of the canal on either side thereof.

In fact, the only practical difference in the channel passing under the bridge and that in the part after the bridge is passed, is that the cement walls are about perpendicular and the bank of the rest of the canal slopes up on each side thereof from the bottom of the general depth of the water. In considering this case and the draught of the respondent and circumstances herein the difference is of little consequence.

The rule of the road applicable to the case of meeting vessels is article 25, sub-sec. (*a*) which reads as follows:—

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Article 25 (a). In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel,

enforced, as it seems to me, by article 17 of the "Canal Rules and Regulations," which reads as follows:—

17. In all cases of vessels meeting in a canal, their passing shall be governed by the then existing rules and regulations of the Marine Department respecting the passage of vessels; and any violation of such rules shall subject the owner or person in charge of the offending vessel to a penalty of not less than two dollars and not exceeding twenty dollars.

The observance of these rules on the part of the respondent would have avoided the collision in question.

A little regard for the rights and safety of others on the part of respondent would also have avoided the collision.

There never perhaps can be framed rules that will serve the infinite variety of circumstances arising in navigation and hence due care and use of a little common sense must be held binding upon all concerned as well as the due observance of the written law.

Whether any two vessels should ever attempt to meet and pass each other in such a place as between the walls and piers at and under this bridge must depend largely on the size and structure of the craft involved in the movement.

No one would pretend that two row-boats or two small launches or small tug-boats without any tow should never attempt to pass each other in that part of the canal simply because there was a swing bridge overhead.

Nor do I imagine that two such vessels as respondent, or as she and the tug and tow in question, should try to do so.

Having outlined the situation and what I con-

ceive to be the law applicable, there are a few outstanding contentions set up which I wish to dispose of without pretending to enter upon all the points of dispute raised herein.

The appellant claims that his vessel had the right of way because there is a current and he was moving with the current.

I am not inclined to dispute his contention in a proper case but his tug-and-tow failed to reach the place where they might have asserted such a right and they failed to signify, either by what some assert is the usual practice or in any other way, the intention to claim what I assume, without expressing any definite opinion, might have been their right.

Moreover, counsel at the trial did not in launching this case found anything upon that pretension. All involved therein seems to me should be set aside from consideration herein.

The respondent's pilot and others pretend they did not see the tug-and-tow till within three hundred feet. All I need say is that, in my opinion, if they did not they should have seen them earlier, as it was broad daylight and no reason why a proper lookout should not have observed the tug-and-tow when a mile away as those on the latter, with probably less chance of observation, did see respondent at that distance.

I can find no excuse therefor unless I find it in the anxiety for dinner or laziness. Nay, more, if a proper lookout had been kept the pilot in charge should have known the situation better and governed himself accordingly.

If he had done so he would not or should not have persisted in keeping to the centre line of the narrow channel when it was so easy to have kept to the star-

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board without running the slightest risk or inconvenience.

If he had tried to get into a position where he would have been enabled to observe the letter of the law when he reached the place where the collision took place, he would then have put his vessel on the starboard side of the channel and there would have been no such collision as took place unless there had been more unjustifiable conduct on the part of the tug-and-tow than appears.

The letter of the law, to say nothing of the reasonable conduct called for under the the circumstances on the part of the pilot had he realized as he should have done the actual situation, demanded that the respondent ought to have been at her point of progress where the collision took place on her own side of the channel.

For these reasons I think the appeal should be allowed and the respondent be condemned to pay damages.

The case of *Davies* v. *Mann*(1) is, strangely enough, relied upon by respondent.

I should rely upon it as furnishing that law of reason and common sense (which ought to be identical) which forbade the respondent, if due care and proper outlook had been kept, from running down this tug-and-tow even if, by the folly of their managers, tethered like the donkey in the wrong place.

My difficulty in the case begins there, however.

At common law the respondent in such a case would be cast for the whole damages.

Can we find anything in the conduct of the tug-and-tow to blame?

Giving due heed to the excuses put forward for

(1) 10 M. & W. 546.

being placed where they were I cannot quite excuse them for taking all the risks they did.

It seems impossible to be quite sure whether the effect of the movement of respondent in the water produced all the results in the movement of the tow which are described.

It would have been so easy after whistling its intentions, by a single blast, of going to starboard for the tug to have tried to remain still for a few minutes or to have got to the starboard side and tried to remain so still, when it had evidently lost its chance of priority in entering the bridge area that I cannot acquit it of all blame.

I think it was the minor offender. It was smaller than respondent and the insolence of the stronger, who will not be just, cannot be too often rebuked and made to bear the consequences of disregarding the rights of others.

I shall be governed by others of this court taking my view of respondent's action in allotting the relative shares to be borne of the damages.

The counterclaim of course fails, in my view, and no need for entering upon the law bearing upon the case in that regard.

I may, however, remark that those disposed to take the case of the ships "*A. L. Smith*" and "*Chinook*" v. *Ontario Gravel Freighting Co.* (1), for their guide, should observe that there the tug-and-tow were both owned by and under the direction of one common owner.

ANGLIN J.—An outstanding and most material fact, found by the learned trial judge, affirmed on appeal to the Exchequer Court and supported by the evidence

(1) 51 Can. S.C.R. 39.

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of the witnesses for the defence as well as that of the witnesses for the plaintiff, is that, when the collision which forms the subject of this action occurred, the up-coming steamship, the "Honoreva," was in mid-channel. If she was rightly there—if she had an exclusive right of way—if it was the duty of the down-going tug-and-tow at their peril to have avoided her, then the judgments in appeal are well founded. They rest on this basis, held by the learned trial judge, and affirmed by the learned judge of the Exchequer Court, as a matter of law and upon the construction of the rules deemed applicable to the circumstances. If, on the other hand, the down-going tug-and-tow had right of way, or if both vessels were equally entitled to the right of passage through the bridgeway, then the "Honoreva" was at fault in holding the mid-channel and the judgments in her favour cannot be supported.

If the judgments in appeal depended on findings of fact, made upon conflicting evidence, I would be disposed not to interfere with them. In regard to several questions of fact, however—some of them important, others probably not vital—I am, with great respect, of the opinion that conclusions have been reached which indicate a grave misapprehension of the evidence. For instance, the learned trial judge states:—

> The "Honoreva," when she was about to enter the opening of the bridge and when it was not possible for her to stop or to turn back, observed a steamer towing a large barge coming in the opposite direction.

The plaintiff's witnesses agree in stating that they saw the "Honoreva" when she appeared to be six or seven arpents (1150-1300 feet) below the bridge, they themselves being about the same distance above. The defendant's pilot, Daignault, says that the "Honoreva" was 300 feet below the bridge when he saw the down-

coming tug immediately on the opening of the bridge. He adds that the tug was then a quarter of a mile, or 1,320 feet, above the bridge, the two boats according to this estimate being over 1,600 feet apart. Yet the learned trial judge says:—

The pilot, Daignault, swears that the tug was about 300 feet away when it was first seen by those on board the "Honoreva."

Daignault adds that he concluded, when he first saw the tug on the opening of the bridge, that he would have time to pass through before the tug and barge would enter. He says he did not tie up to the right side of the canal below the bridge because he believed he had time to pass through; and that if he had anticipated the boats meeting in the bridgeway, he would, as a prudent man, have waited below the bridge. He went on because he was convinced that he had time to pass through. From this evidence it is abundantly clear that the "Honoreva" could have stopped below the bridge after her pilot saw the approaching tug-and-tow.

When the bridge was opened the "Honoreva" was ascending the canal in mid-channel at a speed of about four miles an hour. She probably slowed down to 2½ or 3 miles an hour while passing through the bridge. The tug-and-tow were descending at a speed of about 5 miles an hour and maintained that speed. I have no doubt that the "Honoreva" was in fact considerably nearer to the bridge than were the tug-and-tow and that the estimate of witnesses for the plaintiff as to the distance of the "Honoreva" below the bridge when they first saw her is erroneous. I accept Daignault's statement that she was then about 300 feet below the bridge.

The learned judge further holds that Daignault would have seen the tug sooner if the latter had

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whistled to have the bridge opened. He might have heard such a signal, although those on board the tug did not hear the like signal given by the "Honoreva;" but, according to the evidence, the bridge until opened probably obstructed the view and would have prevented the tug-and-tow being seen from the "Honoreva;" and Daignault says he saw the tug as soon as the bridge was opened.

In the fifth paragraph of the statement of defence, it is stated that chief officer Denwoodie of the "Honoreva" was on the forecastle head on the lookout. No doubt he should have been there. There is no suggestion that there was any other lookout. Denwoodie gives this evidence:—

Q. Did you see the accident? A. No.
Q. Where were you? A. I was getting dinner in the saloon.
Q. Therefore you know nothing about the accident? A. No.
Q. You were downstairs? A. Yes.

The failure of those in charge of the "Honoreva" to see the tug earlier, if the bridge did not prevent it, was probably due to this absence of lookout. The tug is blamed for not having signalled for the opening of the bridge. But it was opened on the signal of the "Honoreva" given when she was 500 feet below the bridge and while the tug was still over 1,300 feet above it. There was no obligation upon her to give an unnecessary signal.

Shortly after the opening of the bridge, signals were exchanged between the two vessels to indicate upon which side they intended to pass one another. The learned judge states:—

The "Honoreva" blew one blast of her whistle notifying the "Jackman" that she wished to pass her port to port, at the same time putting her helm to port. This latter signal was answered properly by the "Jackman."

The fact, as deposed to by the plaintiff's witnesses

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and also by the pilot Daignault, is that the "Jackman" first signalled by one blast of her whistle for a starboard course and that the "Honoreva" by a like signal replied accepting that course. There is no evidence that the "Honoreva" first signalled for a starboard course. If, as the learned judge says, and plaintiff's witnesses thought was the case, the "Honoreva" put her helm to port when the signal for a starboard course was given (a fact which the "Honoreva's" witnesses deny), she must have reverted to the mid-channel course very shortly afterwards, because the testimony of Daignault and of all the other witnesses is explicit that in passing through the bridge she held the mid-channel. If the helm of the "Honoreva" was momentarily put to port, as the learned judge finds, that fact affords an explanation of the statement of the plaintiff's witnesses that, if the "Honoreva" had held the course then taken, or the course they properly assumed she had taken, in view of her response to the "Jackman's" signal, the passage could have been safely effected and the collision would not have happened. Indeed, Vernier, the captain of the tug, appears to have been under the mistaken impression that the "Honoreva" had gone to starboard when she answered the tug's signal, had maintained a starboard course when coming through the bridge piers and, as he puts it, "sheered" to mid-channel only very shortly before the collision. According to the evidence of Daignault the "Honoreva" maintained her mid-channel course until she was clear of the bridge, and her helm was then put to port. Very shortly afterwards—according to the evidence of the assistant engineer, Stewart, either a couple of seconds before or a couple of seconds after the collision (he puts it both ways)—the engines of the "Honoreva," which had

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been at "dead slow forward" were reversed to "full speed astern." The effect of the change of helm and reversal of engines probably was to deflect the bow of the "Honoreva" slightly to starboard at the moment of the collision and to throw her stern somewhat to port. This accounts for the fact that the vessel was struck 30 feet abaft her stem. But, as deposed to by the bridge keeper, Sauvé, and other witnesses, the "Honoreva" still occupied the mid-channel at the moment of the collision. The learned judge of the Exchequer Court says that this testimony of Sauvé corroborates the evidence for the "Honoreva." As the learned trial judge puts it:—

The "Honoreva" proceeded to pass through in mid-channel. The "Honoreva" had not only entered the bridge but had *practically* passed through before the collision occurred.

It may, therefore, be taken as conclusively established that when the collision occurred the "Honoreva" was still in mid-channel.

In order to make the situation clear it is advisable to state a few other material facts which the evidence seems to place beyond doubt.

The "Honoreva" was 240 feet long by 36 feet wide and, as laden, drew about 14 feet.

The tug "Jackman" was 65 feet long and between 13 and 14 feet wide. The barge "Maggie" was 175 feet long, 26 feet, 4 inches wide. She was light. The distance between the stern of the "Jackman" and the bow of the barge was between 20 and 35 feet. The Soulanges Canal has a uniform width at the bottom of the channel of 100 feet, and its banks a slope of two feet to one. The approximate depth of water is between 16 and 17 feet. At the Red River bridge the width at top and bottom alike is 100 feet clear between piers.

There is a current down the Soulanges Canal of about one mile an hour. There were at the time of the collision, and there still are tying-up posts on the north, or right bank ascending, below the Red River bridge. At the date of the collision there were no tying-up posts on the south, or right hand side descending, above the Red River bridge; such posts have since been placed there.

The tug "Jackman" passed clear of the "Honoreva" which was struck 30 feet abaft her stem by the barge "Maggie," whose captain says:—

Il m'a frappé en joue de ma barge, à peu près trois (3) pieds en avant de mon bateau de côté.

The force of the collision drove the "Maggie" against the south pier of the bridge with such violence that she received injuries which subsequently caused her to sink.

Since the "Honoreva" was in the mid-channel, if not slightly to the south of it, she occupied at least 18 feet of the 50 feet of channel south of the centre line. It follows as an indisputable physical consequence that the port side of the tug was more than 18 feet to the south of the centre line of the channel and the port side of the barge nearly that distance south of the centre line when the collision occurred. This bears out the statement of the captain of the tug that he had placed his helm to port and taken the starboard side of the canal from the moment that he signalled to the "Honoreva" his intention to take that course. The evidence of the captain of the tug is that at the moment of the collision the tug was 6 or 7 feet from the south pier of the bridge and the captain of the barge says that the barge was 8 or 10 feet north of the line of the face of that pier. There is no contradiction of these statements. The tug had already entered the piers of the bridge

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when the collision occurred; the barge was still some 25 feet above them. As the learned trial judge finds,

> The "Honoreva" * * * had practically passed through before the collision occurred.

When about 150 feet away from the "Honoreva," the tug, already well to the starboard side of the canal, turned still farther to the right, but the barge did not immediately take the new direction, possibly owing to there being but a single tow line. In the effort to pull away from the "Honoreva" the tug also increased its speed. The barge maintained its course for a few seconds—up to the time of the collision, the defence witnesses insist—a circumstance which accounts for the fact that at the moment of collision, while the starboard side of the tug was within 6 or 7 feet of the south pier, the starboard side of the barge, although she was wider, was still from 8 to 10 feet north of the pier line. But it also shews that the course maintained by the barge had kept her port side from 13 to 15 feet south of the centre line of the channel. Yet the case has been treated in both the lower courts as if the tug-and-tow had maintained a mid-channel course until collision was imminent and had then first sought to pass to the starboard side of the channel. The learned judge of the Exchequer Court says:—

> I think it is evident the captain of the tug miscalculated the space between the "Honoreva" and the port shore and ported her helm too late and then to make up for her negligence put on extra speed preventing the tug from colliding but throwing the barge to port.

The captain of the tug states that, although already well to starboard, he turned still farther to starboard, when a short distance from the "Honoreva" because he then realized that she was persisting in her mid-channel course and that collision was inevitable unless he could succeed in bringing the tug and barge farther to the

south. With the "Honoreva" occupying 18 feet of the 50 feet of channel to the south of the centre line, there was left for the barge, 26 feet, 4 inches wide, only 32 feet of clear way to pass through.

Apart from the fact that there were no tying-up posts on the south side of the canal above the bridge, which affords most cogent evidence that down-going vessels were not expected to stop, there is uncontradicted testimony, if, indeed, it be necessary, that, whereas it is comparatively easy to stop a steamer ascending against the current, it is more difficult to stop a down-going steamer, and that when the down-going steamer is accompanied by a tow it is dangerous to attempt to stop or even to slacken speed. Had the "Jackman" slowed and thus lost control of her tow in the current, a very strong case of negligent navigation might have been made against her. The learned trial judge speaks of a "common custom and rule" that:—

> No two vessels are allowed to cross each other in going through the opening of the bridge, which is the narrowest part of the canal; the first one arriving has the right to proceed through the bridge, the other being tied up or at least remaining a sufficient distance to enable the first vessel to get clear of the bridge, which, it appears by the evidence, the "Jackman" did not do.

I find no such rule in the record and no evidence of any such custom. Testimony bearing upon this particular matter is given by the bridge-keeper, Hector Sauvé, an independent witness, who says:—

> Q.—Lorsque deux (2) bateaux viennent en sens inverse, est-ce que c'est l'habitude pour les bateaux qui remontent le courant d'accoster plus bas que le pont? R.—C'est presque toujours ce qu'ils font; surtout la nuit.
>
> Q.—Ils laissent passer le bateau qui descend, et passent après? R.—Oui. Ils s'en rencontrent quelqu'un; mais la plus grande partie attendent en bas; ils se rangent à côté, ils arrêtaient complètement; il y en a d'autres qui passaient pareil.
>
> Q.—Mais la prudence est de modérer en bas? R.—Ils peuvent passer la même chose.

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Although the pilot Daignault urges that because the tug-and-tow were so much farther above the bridge the "Honoreva" had the right of passage, he also says that if two vessels are about the same distance from the bridge the down-going boat has the right of passage.

Daignault says that his object was to pass through the bridge and clear it before the tug-and-tow entered and that it was because he thought he had time enough to do this that he proceeded instead of tying-up below. Yet he also states that when about to enter the bridge he reduced the speed of his vessel from about 4 miles an hour to dead slow—2¾ miles an hour—although he then realized that the tug-and-tow were coming down fast—he thought at more than 5 miles an hour. Daignault also makes the following statement:—

> Q.—Juste avant la collision, avez-vous cru que la collision était possible, avez-vous craint qu'il y aurait collision? R.—Non monsieur.

This makes it clear, if further proof were needed, that the tug and barge were well to the starboard side of the canal, because Daignault of course knew the "Honoreva" was in mid-channel. He also gives the following answers:—

> Q.—A quel moment avez-vous donné le signal de faire vitesse en arrière sur votre bateau? R.—Du moment que j'ai vu que la barge venait sur nous autres.
>
> Q.—Et, est-ce qu'à ce moment-là vous aviez tourné votre gouvernail de manière à diriger votre navire à droite? R.—Oui, monsieur.

Read with the evidence last quoted, this would indicate that the helm of the "Honoreva" was put to port only when Daignault at the last moment realized that a collision was imminent. Moreover, although Daignault swears that the reverse signal was given at the same time—he says a minute and a half before the collision—it was obeyed only a second or two before, or a second or two after, the collision according to the evidence of Stewart, who was then in

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charge of the engines. Stewart was not qualified to act as an engineer—a direct violation of the statute, 8 Edw. VII., ch. 65, sec. 20, amending R.S.C. 1906, ch. 113, sec. 631, sub-sec. 1.

Finally, it was stated by Henry Newbold, the engineer of the "Honoreva," and by David Fitzpatrick, her captain at the date of the trial, both witnesses for the defendant, that there was plenty of water to permit of the "Honoreva" having passed quite close to the north pier of the bridge, that it was quite safe and practicable for her to have kept to the starboard side and within 5 feet of the north pier, in passing through the bridge. This evidence is uncontradicted. She was in fact 32 feet, if not more, south of the north pier.

Under section 24 of chapter 35 of the Revised Statutes of Canada, 1906, the "Railways and Canals Act,"

> The Governor in Council may, from time to time, make such regulation as he deems proper for the management, maintenance, proper use and protection of all or any of the canals.

Regulation 17, enacted by the Governor in Council under this statute, provides that:—

> In all cases of vessels meeting in a canal their passing shall be governed by the then existing rules and regulations of the Marine Department respecting the passage of vessels.

Article 25 of the—

> RULES for NAVIGATING the GREAT LAKES, including GEORGIAN BAY, their connecting and tributary waters, and the ST. LAWRENCE RIVER as far east as the lower exit of the LACHINE CANAL and VICTORIA BRIDGE of Montreal,

adopted by order-in-council, 20th April, 1905, and amended 18th May, 1906, is as follows:—

> (a) In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.
>
> (b) In all narrow channels where there is a current and in the Rivers St. Mary, St. Clair, Detroit, Niagara and St. Lawrence, when two

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steamers are meeting, the descending steamer shall have the right of way and shall before the vessels shall have arrived within the distance of half a mile of each other give the signal necessary to indicate which side she intends to take.

Section 916 of the Revised Statutes of Canada, ch. 113, (The "Canada Shipping Act"), enacts that—

> If in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any of such regulations (for preventing collisions and for distress signals, of which the foregoing article 25 is one) the vessel or raft by which such regulations have been violated shall be deemed to be in fault unless it can be shewn to the satisfaction of the court that the circumstances of the case rendered a departure from said regulations necessary.

If, as I think, the Soulanges Canal is a narrow channel, the "Honoreva" was guilty of a breach of paragraph (*a*) in having failed to keep to the starboard side of the fairway or mid-channel after the approach of the tug-and-tow became known. There is nothing to indicate that it was not safe and practicable for her to do so.

In passing through the bridgeway the "Honoreva" was undoubtedly in a narrow channel where there is a current. She was meeting the descending tug-and-tow. The latter under clause (*b*) had the "right of way." In reasonable compliance with clause (*b*) the tug signalled for a starboard course. The "Honoreva" accepted that course by responding with a like signal. It was her clear duty thereafter to have taken and kept the starboard side of the channel. In distinct contravention of clause (*b*) she maintained a mid-channel course up the moment of the collision. She did so at her peril. There is no room for doubt that the collision between the "Honoreva" and the "Maggie" was occasioned by the non-observance by the "Honoreva" of the regulation contained in article 25. There were no circumstances in the case rendering a departure from that regulation necessary. On the contrary, the

evidence of the defence witnesses themselves is that, instead of maintaining a mid-channel course with her starboard side 32 feet to the south of the north pier of the bridge as she did, the "Honoreva" could with perfect safety have passed through the bridgeway within 5 feet of the north pier and in such a manner that she would have been well to the starboard side of the fairway or mid-channel. She could, while keeping the starboard side, have maintained a space of about 14 feet between her and the north pier. Her non-observance of article 25 clearly occasioned the collision. Had she obeyed it no collision would have occurred. She must, therefore, be deemed to have been in fault under section 916 of the "Canada Shipping Act."

Regulation 22 of the Canal Regulations, passed under the authority of section 24 of the "Railways and Canals Act" above quoted, is as follows:—

(*a*) It shall be the duty of every master or person in charge of any vessel on approaching any *lock or bridge* to ascertain for themselves, by careful observation, whether the lock or bridge is prepared to allow them to enter or pass, and to be careful to stop the speed of any such vessel in sufficient time to *avoid a collision with the lock or its gates, or with the bridge or other canal works;* any violation of this regulation shall subject the owner or person in charge of such vessel to a penalty of not less than five dollars, and not exceeding two hundred dollars.

(*b*) All vessels approaching *a lock*, while any other vessel going in the contrary direction is in or about to enter the same, shall be stopped and be made fast to the posts placed for that purpose, and shall be kept so tied up until the vessel going through the lock has passed. Any violation of this provision shall subject the owner or person in charge of any such vessel to a penalty of not less than four dollars and not exceeding twenty dollars.

Paragraph (*a*) of this article relates to both locks and bridges, but is has to do not with the safety of vessels passing through them, but with the safety of the structures themselves, its purpose being, as the paragraph states,

to avoid collision with the lock or its gates or with the bridge or other canal works.

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This paragraph has no application to the present case. Paragraph (*b*), on the other hand, applies only to vessels approaching a lock, and has no application to vessels approaching a bridge. The distinction between the language of the two paragraphs is marked. In the present case we are dealing not with vessels approaching a lock but with vessels approaching a bridge. Yet the learned trial judge would appear to have applied paragraph (*b*). He says the "Jackman" violated rule 22 in that:—

> She should have slowed down at a reasonable distance from the bridge or tied at the posts provided for that purpose.

He apparently entirely overlooked the fact that there were no "posts provided for that purpose" to which the "Jackman" could have tied. Again he refers to "the rule" that—

> No two vessels are allowed to cross each other in passing through the opening of the bridge which is the narrowest part of the canal. The first one arriving has the right to proceed through the bridge, the other one being tied up or at least remaining at a sufficient distance to enable the first boat to get clear of the bridge, which it appears from the evidence the "Jackman" did not do.

This misapprehension as to the application of rule 22 is the foundation of the learned judge's judgment, which rests upon his view that because the "Honoreva" was about to enter the bridgeway, clause (*b*) required that the down-going "Jackman" and her tow should have been stopped, made fast to posts and kept tied up until the up-going vessel had cleared the bridge. Not only is there no such rule applicable to the case of a bridge, but, according to the evidence of the bridgeman, Sauvé, who was in the best position to know about it, although both vessels had the right to pass through simultaneously, and vessels do frequently so pass through the bridge in opposite directions, the more usual practice is for the up-going vessel to tie up below

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the bridge and await the passage of the down-going boat.

The pilot, Daignault, on his own admission, saw the down-going tug-and-tow when he was in a position to have stopped the "Honoreva" and tied her up and allowed the tug-and-tow to pass. He chose not to do so. He says he proceeded because he thought he had time to get through the bridge and clear it before the tug-and-tow would enter. He perceived that "the tug was coming down quickly." Elsewhere he says he thought its speed exceeded 5 miles an hour. Nevertheless he had the speed of the "Honoreva" changed to "dead slow" and, in direct violation of article 25 of the rules of the road, he still maintained his course in mid-channel.

Daignault says that sometime after replying to the "Jackman's" signal for a starboard course he gave three short blasts of his whistle by which he intended to call upon the tug to moderate its speed, but that the tug did not reply. Those upon the tug deny having heard any such signal. Assuming that it was given, Daignault must have known the difficulty and danger of slackening the speed of a down-going tug-and-tow owing to the current and, having received no response, he should not have assumed that the tug captain would attempt anything of the kind. He should have made allowance for the tug's encumbered condition. The "*Independence*"(1), at pages 115-6. Without asserting that it was the duty of the "Honoreva" to have tied up below (but see *Montreal Transportation Co. and The "Norwalk"*(2), at pages 441-2; *The "Talabot"*(3), at page 195; *The "Ezardian"*(4); "*Earl of Lonsdale*"(5)),

(1) 14 Moo. P.C., 103.
(2) 12 Can. Ex. R. 434.
(3) 15 P.D. 194.
(4) [1911] P. 92.
(5) Cook's Adm. Rep. 153.

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or questioning her right to have proceeded through the bridgeway simultaneously with the tug-and-tow, if those in charge of her saw fit so to proceed they were bound to conform to article 25 of the rules of the road by keeping to the starboard side of the fairway. To do so was safe and practicable and they had themselves assented to the adoption of that course. There were no circumstances which excused, still less rendered necessary, a departure from the regulation. They maintained the mid-channel course at their own peril. They thereby put themselves in fault and must be held answerable for the consequences.

On the other hand, was there fault on the part of the tug-and-tow which contributed to the collision? Their right to pass through the bridge is clear. In doing so their duty was likewise prescribed by article 25—it was to keep to the starboard side of the fairway. That they did so seems, upon all the evidence, to be beyond question. From the moment that the tug entered the bridgeway the facts in evidence prove that neither tug nor barge was at all near the mid-channel. The "Honoreva," by wrongfully occupying the mid-channel, took up 18 feet of the waters which should have been left open for the passage of the tug-and-tow. The latter were thus obliged to attempt the difficult feat of passing the up-coming steamer with a clear way only 32 feet wide, although the width of the barge was 26 feet, 4 inches. Assuming that she should succeed in exactly maintaining the middle of the 32 feet thus left to her, there would be only 2 feet, 10 inches on the port side between her and the "Honoreva" and only 2 feet, 10 inches on the starboard side between her and the bridge pier. Fitzpatrick, captain of the "Honoreva," gives this evidence:—

Q.—How close to the pier or wharf would it have been safe to go? A.—Within 10 feet—within 5 feet, but as a general rule the farther off the safer you are.

The "Honoreva" had no right to force the tug and barge into a position where they had only 32 feet of water in which to navigate. Complaint is made that the tug went farther to starboard when only 150 feet from the "Honoreva" and that the barge, owing to its having a single tow line, did not immediately follow but maintained its course or even sheered slightly to port. Assuming this to be the case, the manœuvre of the tug was made when collision seemed imminent and in an attempt to escape. The "Honoreva," whose fault created the critical situation, cannot complain of the failure of this manœuvre. The captain of the tug did the best he could in an emergency which he had no reason to anticipate the "Honoreva" would create. The tug-and-tow were already so well to starboard that pilot Daignault, who of course knew that his own ship was in mid-channel, did not expect a collision until immediately before it occurred. Why should the captain of the tug have anticipated it earlier? In fact, notwithstanding the very small margin of safety left to him, he appears to have taken the step he did to avoid or minimize the impending collision before anything was done on the "Honoreva" for that purpose.

Complaint is also made of the speed of the tug. But there is no evidence that this was excessive. On the contrary, the evidence is that she was travelling at the rate of about 5 miles an hour, whereas the canal regulations appear to contemplate a speed up to 7½ miles an hour.

Again it is charged that the tug was at fault in not slackening speed in answer to the signal of the "Honoreva." Upon the evidence I incline to the view that that signal, if given, was not heard. Not

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only has no specific rule been cited which imposed an obligation on the tug to slacken her speed, but had she in doing so lost control of the barge, as might not improbably have happened owing to the current, she would have laid herself open to a charge of negligent navigation.

Under such circumstances the statutory rule requiring that steamships approaching one another so as to involve risk of collision shall slacken speed, or stop and reverse if necessary, cannot be invoked.

It is further urged that there was no person at the helm of the "Maggie." There is some suggestion of this in the defence evidence—but it is rather a surmise than a statement of fact. The pilot, Daignault, merely says that he "did not remark anybody at the wheel of the barge." There is nothing more. On the other hand, the evidence of Captain Castonguay is perfectly clear and satisfactory on this point. He took the wheel from Laferrière when the tug signalled for a starboard crossing. His evidence is corroborated by Josephus Thauvette who had given over the wheel to Laferrière a short time before. The barge probably did not at once take the new direction given it by the tug just before the collision. But this does not prove either the entire absence of a man at the wheel, or that, if there, he neglected his duty, or that anything he could then have done would have prevented the collision.

On the whole in my opinion, the only proven fault which clearly contributed to causing the collision was the flagrant breach by the "Honoreva" of the provisions of article 25 of the rules of navigation, which required her to keep the starboard side of the fairway. While the utmost skill may not have been displayed in the management of the tug and the barge when colli-

sion was imminent, while it may be that if there had been a bridle between them as well as a tow rope, the collision would have been avoided (I think this extremely doubtful), there is not, in my opinion, any sufficient proof of fault such as would impose liability upon them. Marsden on Collisions, p. 3; *The "Cape Breton"* v. *Richelieu and Ontario Navigation Co.*(1), at page 591; *The "Arranmore"* v. *Rudolph* (2), at page 185.

I would for these reasons set aside the judgment of the learned judge of the Admiralty Court, and the confirmatory judgment in the Exchequer Court, and would direct that judgment be entered for the plaintiff declaring him entitled to the damages for which he sues and the costs of this action as well as of the appeals to the Exchequer Court and to this court, condemning the defendant and its bail in such damages and costs, and directing that an account should be taken by the registrar of the Admiralty Court, assisted by merchants, of the amount of such damages, with the usual provisions for report, etc. The counterclaim should also be dismissed with costs throughout.

BRODEUR J.—I am of opinion that this appeal should be allowed with costs and that the "Honoreva" should be held entirely liable for the collision.

Appeal allowed with costs.

Solicitor for the appellant: *J. A. H. Cameron.*
Solicitors for the respondent: *Heneker, Johnson & Lemesurier.*

(1) 36 Can. S.C.R. 564. (2) 38 Can. S.C.R. 176.

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*Oct. 10.
*Oct. 18.

CHARLES W. TAIT (PLAINTIFF)....APPELLANT;

AND

THE BRITISH COLUMBIA ELECTRIC RAILWAY CO. (DEFENDANTS)........................... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Appeal—Jurisdiction—Action in county court—Concurrent jurisdiction with superior court—Construction of statute—R.S.C., 1906, *c.* 139, *ss.* 37*b*, 70, "*Supreme Court Act*"—*R.S.B.C.*, 1911, *c.* 51, "*Court of Appeal Act*"—*R.S.B.C.*, 1911, *c.* 53, "*County Courts Act*"—*Motion for new trial—Re-hearing on appeal.*

An action in a county court in British Columbia to recover $578, damages for injuries sustained, alleged to have been caused through negligence, was dismissed by the county court judge after the evidence for the plaintiff had been put in; the defendants offered no evidence, but asked for dismissal on the evidence as it stood. The plaintiff appealed to have judgment entered in his favour or, alternatively, to have the case remitted to the county court to have damages assessed, or for such further order as might be deemed proper by the Court of Appeal. The appeal was dismissed and the judgment appealed from affirmed. The British Columbia "Court of Appeal Act" (R.S.B.C., 1911, ch. 51, sec. 15, sub-sec. 3), provides that every appeal shall include a motion for a new trial unless otherwise stated in the notice of appeal. On motion to quash an appeal to the Supreme Court of Canada on the grounds that the notice prescribed by section 70 of the "Supreme Court Act," R.S.C., 1906, ch. 139, had not been given within 20 days from the date of the judgment appealed from and that the action was not of the class in which a county court had concurrent jurisdiction with a superior court, under section 37*b* of the "Supreme Court Act" limiting appeals to the Supreme Court of Canada.

Held, Duff J. dissenting, that no appeal could lie to the Supreme Court of Canada.

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

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Per Fitzpatrick C.J. and Idington J., (Duff and Anglin JJ. *contra*).—As the case was not one in which a county court is given concurrent jurisdiction with a superior court, under section 40 of the "County Courts Act," R.S.B.C., 1911, ch. 53, the Supreme Court of Canada had no jurisdicton to entertain the appeal. *Champion* v. *The World Building Co.* (50 Can. S.C.R. 382), referred to.

Per Anglin J.—In the circumstances of the case the judgment of the Court of Appeal for British Columbia should be regarded as a judgment upon a motion for a new trial, within the meaning of section 70 of the "Supreme Court Act," R.S.C., 1906, ch. 139, and, notice not having been given as thereby provided, there could be no appeal to the Supreme Court of Canada. *Sedgewick* v. *Montreal Light, Heat and Power Co.* (41 Can. S.C.R. 639), and *Jones* v. *Toronto and York Radial Railway Co.* (Cam. S.C. Prac. 432), referred to.

Per Duff J., dissenting.—The judgment from which the appeal is asserted was not a judgment upon a motion for a new trial but a decision on the merits of the case upon an appeal by way of re-hearing by the Court of Appeal for British Columbia which had before it all the evidence necessary for that purpose. There being no ground on which either party could have demanded a new trial, section 70 of the "Supreme Court Act" had no application to the appeal to the Supreme Court of Canada. *Sedgwick* v. *Montreal Light, Heat, and Power Co.* (41 Can. S.C.R. 639) followed. Further, the County Court derived its jurisdiction in the case in question from the provisions of section 30, sub-sec. 1, of the "County Courts Act" (R.S.B.C., 1911, ch. 53), and section 22 of that Act shews that this jurisdiction is concurrent; consequently, the County Court possessed "concurrent jurisdiction" with the Supreme Court of British Columbia within the meaning of section 37*b* of the "Supreme Court Act," R.S.C., ch. 139, notwithstanding that the word "concurrent" is not employed in either of those sections of the "County Courts Act."

MOTION to quash an appeal from the judgment of the Court of Appeal for British Columbia (10 West. W.R. 523), affirming the judgment of McInnes Co.J., in the County Court of Vancouver, dismissing the plaintiff's action with costs.

The circumstances in which the motion to quash the appeal to the Supreme Court of Canada was made are stated in the head-note.

W. N. Tilley K.C. supported the motion.
R. M. Macdonald contra.

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THE CHIEF JUSTICE.—This is an action for damages brought in the County Court, in British Columbia, in which the plaintiff claimed some $560. His action was dismissed at the trial and this judgment was affirmed by the Court of Appeal. The plaintiff now appeals to the Supreme Court of Canada and the case is set down for hearing on the "Western List." No question of jurisdiction is raised in the respondents' factum, but they launched a motion on 16th June, last, returnable on the first day of this session of this court in which they asked to have the appeal quashed for want of jurisdiction. The Supreme Court Rules provide, by rule 4, that, within fifteen days after security is approved, the respondent shall move to quash for want of jurisdiction, and rule 5 provides that, upon service of the motion, all further proceedings shall be stayed unless a judge of the Supreme Court should otherwise order. The bond appears to have been made in June, although the exact date is not given, but the order allowing it is dated 2nd June, so that notice of motion was given promptly by the respondent. Notwithstanding the rules, the appellant has proceeded to print his case on appeal and file his factum and the respondents have also filed their factum, nobody appearing to pay any attention to rule 5 which stayed proceedings and which was expressly passed to avoid costs being incurred of the printing where the court might have no jurisdiction.

The jurisdiction of the court turns, in part, on the view to be taken of section 37(*b*) of the "Supreme Court Act" which gives an appeal where the amount in dispute is $250 or upwards and the court of first instance has concurrent jurisdiction with a superior court. The cases in which the County Court, in British Columbia, shall have concurrent jurisdiction

with the Supreme Court of that province are set out in the Revised Statutes of British Columbia, ch. 53, sec. 40, and none of these covers an ordinary case of damages as to which the County Court is given express jurisdiction up to $1,000 by section 30 of the Act. If there is jurisdiction in this case, it means that every action in a county court in British Columbia, between $250 and $1,000 is appealable to the Supreme Court of Canada. There is no doubt that the Supreme Court of the province has jurisdiction in every kind of action, including the actions in which special jurisdiction is conferred upon the County Court and other inferior courts, but this cannot mean that because the Supreme Court always has concurrent jurisdiction with inferior courts an appeal therefore will lie. Our Act surely means that an appeal lies here only in a case where the inferior court is given concurrent jurisdiction with the superior court in matters which, without some express provision, would alone be cognizable by the superior court. *Vide Champion* v. *The World Building Co.*(1).

Mr. Justice Idington desires that I should add that he remains of the opinion expressed in the *Champion Case*(1).

The motion to quash should be allowed with costs.

DAVIES J. agreed that the appeal should be quashed with costs.

IDINGTON J. also agreed that the appeal should be quashed with costs, adding that he remained of the opinion he expressed in the case of *Champion* v. *World Building Co.*(1)

(1) 50 Can. S.C.R. 382.

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DUFF J. (dissenting).—The ground of the application is that this is an appeal from a "judgment upon a motion for a new trial" within the meaning of section 70 of the "Supreme Court Act."

The circumstances are that, at the conclusion of the plaintiff's, appellant's, case, in a trial in the County Court of Vancouver, the defendants, respondents, moved for judgment and the trial judge granted judgment dismissing the action. The plaintiff, appellant, then appealed to the Court of Appeal praying, by his notice of appeal, a judgment of that court

> reversing the judgment appealed from and directing that judgment be entered for the plaintiff for the sum of $578.59 or such other sum as to the Court of Appeal may seem meet or, in the alternative, remitting the said action to the County Court to have the damages assessed or such further order or judgment as to the said Court of Appeal may seem meet.

The plaintiff's complaint upon which the action was brought was that he had been wrongfully run down by one of the defendants' cars and the defence was contributory negligence. This defence the learned county court judge held to have been established. The Court of Appeal, in hearing the appeal, was exercising the powers conferred upon it by section 116 of the "County Courts Act," section 6 of the "Court of Appeal Act" (R.S.B.C., 1911, ch. 51), and order 53, rr. 1-3*a*; these last mentioned rules providing that all appeals "shall be by way of re-hearing" and that the Court of Appeal

> shall have all the powers and duties * * * of the court or judge appealed from * * * to draw inferences of fact and to give any judgment or order which ought to have been made and to make any such further or other order as the case may require.

The plaintiff had, as above mentioned, completed his evidence in the County Court and the Court of Appeal had before it all the materials necessary to enable it to give judgment for the plaintiff, if he was in law entitled to it, on the facts established by that

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evidence. The defendants having deliberately taken the position that they were entitled to judgment on the evidence as it stood were not (if the Court of Appeal should be against them on the main issue) entitled as of right to demand that the case be remitted to the County Court even for the assessment of damages. No ground was or could be suggested for granting a new trial to the appellant if he should be held not entitled to judgment on the evidence before the Court of Appeal.

The Court of Appeal gave judgment dismissing the appeal on the ground that the defence of contributory negligence was proved and that the judgment of the county court judge dismissing the action was right.

In these circumstances it seems clear that section 70 of the "Supreme Court Act" has no application. The judgment of the Court of Appeal was a judgment upon an appeal "by way of re-hearing" in which the plaintiff prayed judgment for a specified sum for which he alleged judgment ought to have been given in the County Court on the evidence adduced before that court; it was a judgment declaring that, on that evidence, the County Court was right in refusing him judgment and dismissing his action. The plaintiff now appeals to this court asking that this judgment of the Court of Appeal be reversed and that judgment be given in his favour for the sum claimed in his action.

The fact that by the plaintiff's notice of appeal in the Court of Appeal alternative relief was prayed as well as the fact that the Court of Appeal had power to deal with the appeal by remitting the case to the County Court are nothing to the purpose. By section 15, sub-sec. 3, of the "Court of Appeal Act" every appeal includes an application for a new trial unless the notice of appeal expressly states otherwise.

It could not be argued that every appeal brought by

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such a notice is necessarily a "motion for a new trial" within section 70; it could not be so argued for the reason that until you looked into the merits you could not say that on the materials before the Court of Appeal it was not the duty of the Court of Appeal to give judgment in favour of the appellant.

That is precisely applicable to this case in which the Court of Appeal had, in fact, all the necessary materials before it and the defendants (respondents) had elected at the trial to stand on that material and to ask that the issues between them and the plaintiff should be determined according to the effect of that material.

In *Sedgwick* v. *Montreal Light, Heat and Power Co.*(1), at page 642, this court unanimously concurred in the following statement of the law:—

> In my view the words "motion for a new trial," in section 70, should be read as meaning "motion for a new trial only" and not as including cases in which the motion is substantially for other relief and only as an alternative for a new trial;

and, in that case, the court having decided unanimously that a motion for judgment *non obstante veredicto* could not succeed, but that, on the ground of misdirection, a new trial should be granted pursuant to the alternative claim in the appellant's motion in the court below, for the reason mentioned in the above quotation from the judgment of my brother Anglin, held that the appeal was not an appeal from a judgment on a motion for a new trial and that section 70 had, therefore, no application.

The second objection was suggested from the bench —an objection of which I desire to speak with the greatest respect because it has the support of the opinion of my brother Idington expressed in his judg-

(1) 41 Can. S.C.R. 639.

ment in *Champion* v. *The World Building Co.*(1), at page 386. The objection arises in this way: The jurisdiction of this court to entertain an appeal such as this, where the action out of which the appeal arises did not originate in a superior court, rests upon section 37, sub-section *b*, of the "Supreme Court Act" which provides that in such a case, in the provinces of Nova Scotia, New Brunswick, British Columbia and Prince Edward Island, this court shall possess jurisdiction to entertain an appeal from any final judgment of the highest court of final resort where—

the sum or value of the matter in dispute amounts to two hundred and fifty dollars or upwards, and in which the court of first instance possesses concurrent jurisdiction with a superior court.

The point made against the appeal is that the jurisdiction of the County Court of Vancouver to entertain the plaintiff's action was not a jurisdiction that satisfied the condition

the court of first instance possesses concurrent jurisdiction with a superior court.

Were it not for the difference of opinion among the members of this court I should have said that the objection was demonstrably untenable. The jurisdiction of the County Court to entertain the plaintiff's action is given by section 30 of the "County Courts Act," sub-sec. 1, and the powers the County Court possessed in exercising that jurisdiction are set forth in section 22. These provisions are as follows:—

Sec. 22.—Every county court shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such court such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as

(1) 50 Can. S.C.R. 382.

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might and ought to be done in the like case by the Supreme Court. 1905, ch. 14, sec. 22.

Sec. 30, sub-sec. 1.—In all personal actions where the debt, demand, or damages claimed do not exceed one thousand dollars.

Within the natural meaning of the words "concurrent jurisdiction" clearly the jurisdiction of the County Court in respect of actions coming within section 30, sub-sec. 1, is "concurrent" with that of the Supreme Court. It is said, however, that in applying section 37, sub-sec. *b*, to British Columbia a restricted meaning must be attached to the phrase "concurrent jurisdiction;" that the classes of actions falling within the description contained in sub-sec. *b* must be limited to actions brought before the County Court under the authority of section 40 of the "County Courts Act" which establishes and defines the equitable jurisdiction of county courts and in which this language appears:—

The said county courts shall also respectively have and exercise, concurrently with the Supreme Court, all power and authority of the Supreme Court in the actions or matters hereinafter mentioned.

A good many reasons could be adduced to shew the fallacy of this line of argument but I shall limit myself to two. First. The provisions of the Act relating to the jurisdiction conferred by section 30 are as apt and sufficient to shew that the jurisdiction thus conferred is "concurrent" with the jurisdiction of the Supreme Court as is the language quoted in section 40 although in the first mentioned provisions the word "concurrent" itself is not employed.

Secondly. The underlying assumption of the argument is that sub-section *b* of section 37 of the "Supreme Court Act," in its application to appeals from British Columbia, must be governed in the interpretation of it by reference to the British Columbia legislation touching the jurisdiction of the county

courts, in other words, that sub-section *b*, as regards such application, was framed with a view to such provisions. If that be the assumption upon which sub-section *b* is to be read, it is sufficiently obvious that, consistently with the supposition that the legislature was not actuated by the merest caprice, the argument cannot be sustained. That is so, for this reason—which would occur immediately to persons familiar with the operation of the county court jurisdiction in British Columbia. By far the most important jurisdiction of the county courts in many respects is what is known as the "mining jurisdiction," "Mineral Act," R.S.B.C., 1911, ch. 151, sec. 140; "Placer Mining Act," R.S.B.C., 1911, ch. 165, sec. 154. The county court by virtue of the provisions of the "Mineral Act" and the "Placer Mining Act" has "all the jurisdiction and powers of a court of law and equity" in a great variety of actions in respect of subjects touching mines, the business of mining, water-rights relating to mining, including among other things personal actions where the debt or damages claimed arise directly out of the business of mining, suits for foreclosure or redemption in relation to mining property, actions of ejectment or trespass in relation to such property, actions between employers and employees, actions for supplies to persons and companies engaged in mining, in all cases without limitation as regards amount or value. It is, of course, inconceivable, or perhaps one should say hardly conceivable, that any legislature dealing with the subject of appeals to this court arising out of actions in county courts in British Columbia should have deliberately enacted, or in its enactments have intentionally used language having the effect that the jurisdiction in appeal of this court should be limited to appeals aris-

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ing out of actions of the classes enumerated in section 40 of the "County Courts Act" (where, speaking generally, the amount or the value of the thing involved is limited to $2,500), thereby denying the right of appeal to suitors in the "mining jurisdiction" of the county court in cases involving tens or hundreds of thousands of dollars. Yet such is, beyond question, the intention that must be attributed to the Dominion Parliament in enacting section 37*b* in so far as it relates to British Columbia in order to sustain the objection I am discussing.

The motion should be dismissed with costs.

ANGLIN J.—Although by his notice of appeal to the Court of Appeal for British Columbia the plaintiff nominally asked for an order directing judgment to be entered in his favour, or in the alternative remitting the action to the County Court to have damages assessed, the action, having been dismissed at the close of the plaintiff's case and without any evidence for the defence having been heard, practically the only relief open was a new trial. Substantially the plaintiff's motion to the Court of Appeal was for a new trial only, and the judgment of the Court of Appeal should, in my opinion, be regarded as a judgment upon a motion for a new trial within the meaning of that phrase in section 70 of the "Supreme Court Act." The notice prescribed by section 70 not having been given, I think the appeal should, on this ground, be dismissed.

This disposition of the motion is quite consistent with the decisions in *Sedgewick* v. *Montreal Light, Heat and Power Co.*(1), and *Jones* v. *Toronto and York Radial Railway Co.*(2), p. 432.

(1) 41 Can. S.C.R. 639. (2) Cam. S.C. Prac. (2 ed.) 432.

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I adhere to the view which I expressed in *Champion* v. *The World Building Co.*(1) as to the construction of section 37*b* of the "Supreme Court Act."

Appeal quashed with costs.

Solicitors for appellant: *Bird, Macdonald & Ross.*
Solicitors for respondents: *McPhillips & Smith.*

(1) 50 Can. S.C.R. 382.

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*Nov. 16.
*Dec. 11.

THE GLEN FALLS INSURANCE COMPANY AND OTHERS (DEFENDANTS) ... APPELLANTS;

AND

P. ADAMS (PLAINTIFF) ... RESPONDENT.

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

Appeal—Amount in controversy—Joinder of defendants—Separate contracts.

A., by order of a master, was allowed to prosecute one action against three insurance companies on three separate policies and obtained from the Appellate Division judgment against each for an amount less than $1,000 though the amounts in the aggregate exceeded that sum.

Held, following *Bennett* v. *Havelock Electric Light Co.* (46 Can. S.C.R. 640) that the defendants were in the same position as if a separate action had been brought against each and as none of them was made liable for a sum exceeding $1,000 no appeal would lie to the Supreme Court of Canada.

MOTION to quash an appeal from the decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial by which the plaintiff's action was dismissed.

Respondent's counsel claimed that the Court had no jurisdiction to entertain the appeal as under the circumstances, which are stated in the headnote, there was no sum exceeding $1,000 in controversy.

W. L. Scott for the motion referred to *Bennett* v. *Havelock Electric Light Co.*(1); *Stephens* v. *Gerth*(2); *Bain* v. *Anderson & Co.*(3).

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

(1) 46 Can. S.C.R. 640.
(2) 24 Can. S.C.R. 716.
(3) 28 Can. S.C.R. 481.

Leighton McCarthy K.C. contra cited *Robinson, Little & Co.* v. *Scott & Son.*(1).

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

IDINGTON J.—I am unable to distinguish this case from that presented in the case of *Bennett* v. *Havelock Electric Light Co.*(2), in relation to the right to appeal and therefore think following that decision the motion to quash must prevail with costs.

DUFF J. concurred in the judgment quashing the appeal.

ANGLIN J.—Under the judgment of the Appellate Division the plaintiff has recovered against three defendants sued in one action upon independent claims arising out of three separate contracts for amounts each individually less than $1,000 but in the aggregate exceeding that sum. He had been allowed by order of the master in chambers, presumably in order to save expense, to proceed with this single action,

setting out the separate amounts claimed * * * as against each defendant respectively,

instead of being obliged to discontinue it and commence a separate action against each defendant upon its own contract and then have the three actions consolidated. It was stated at bar that this order was made in the exercise of power conferred by R.S.O., 1914, c. 183, s. 158, s.-s. 1. But that provision would appear not to extend to actions brought upon separate and unconnected policies—it deals with

several actions brought for the recovery of money payable under *a contract of insurance.*

Probably the order was made under the more com-

(1) 38 Can S.C.R. 490. (2) 46 Can. S.C.R. 640.

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prehensive terms of the Ontario Consolidated Rule 320. The plaintiff was afterwards allowed to prosecute a single appeal from the judgment at the trial to the Appellate Division, and the judgment of that court allows "the plaintiff's said appeal."

These facts, in my opinion, do not give jurisdiction to this court to entertain the proposed appeals of the defendants. The recovery against each defendant is for a sum less than $1,000 and is upon a contract on which that defendant alone is liable. The appeal of each defendant is only against the judgment affecting it. It has no concern in the contract or liability of either of the other defendants. Though for convenience their appeals would, no doubt, be heard together, and probably upon a single appeal case, the appeal of each defendant is nevertheless a distinct and separate appeal in which the matter in controversy is its own liability and nothing else. I think the motion to quash must prevail. *Bennett* v. *Havelock Electric Light Co.*(1) is a decision in point. Indeed, in that case the liability of the several defendants arose out of a single transaction and it was even contended that as directors, guilty of misfeasance their liability was joint and several. Nevertheless an attempted joint appeal to this court was quashed, the judgment of the Court of Appeal (reversing, as in this case, that of the trial judge dismissing the action) having held each defendant liable only for $1,000 and costs. If there was not jurisdiction in that case there certainly cannot be in this.

BRODEUR J.—I am unable to distinguish this case from the case of *Bennett* v. *Havelock Electric Light Co.*(1), which was decided by this court on the 22nd

(1) 46 Can. S.C.R. 640; Cameron's Supreme Court Practice (2 ed.) 278.

February, 1912, and which is mentioned in Cameron's Second Edition, p. 278.

In that case of *Bennett*(1) an action had been instituted against several defendants as directors of the company respondent, asking that they be condemned to pay an amount of $4,700 being the amount of alleged secret and dishonest profits. The Divisional Court had ordered that the plaintiffs could recover against each of the defendants the sum of $1,000.

In the present case the insurance companies, defendants, were sued by virtue of different contracts for an alleged loss of the premises insured. The companies were allowed to plead separately and the cases were tried as one case in order to reduce the cost of "enquête" under the provisions of article 158 of chap. 183 R.S.O. The amount to which each company was condemned was below $1,000.

What we should consider in this case in order to determine the jurisdiction in question is not the aggregate amount for which the respondents were sought to be made liable, but the position is the same as if proceedings had been taken separately against each of the defendants.

I have come to the conclusion that under the provisions of section 48, sub-section (*c*), the matter in controversy in the appeal does not exceed for each of the defendants the sum of $1,000, and that we have no jurisdiction.

The motion to quash should be granted.

Appeal quashed with costs.

Solicitors for the the appellants: *McCarthy, Osler, Hoskin & Harcourt.*

Solicitors for the respondent: *McGaughey & McGaughey.*

(1) 46 Can. S.C.R. 640.

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*Nov. 20.
*Dec. 11.

LAURA E. SHARKEY (PLAINTIFF) .... APPELLANT;

AND

THE YORKSHIRE INSURANCE COMPANY (DEFENDANTS) ...... RESPONDENTS.

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

Insurance—Stallion—Accident or disease—Conditions—Attachment of risk.

S. applied for insurance on a stallion "for the season" the application in a marginal note stating "term 3 mos." and, in the body of the document, that the insurers would not be liable until the premium was paid and the policy delivered. The policy as issued stated that the insurance would expire at noon on Sept. 7th, and insured against the death of the stallion, after premium paid and policy delivered, from accident or disease "occurring or contracted after the commencement of the company's liability." The policy was delivered and premium paid before four o'clock p.m. of 8th June; the horse had become sick early that morning and died before six o'clock p.m.

Held, affirming the judgment of the Appellate Division (37 Ont. L.R. 344), that the statement in the application "term 3 mos." coupled with that in the policy "date of expiry 7th Sept." did not override the express provision as to commencement of liability and make the risk attach from noon of June 7th; that the liability did not commence until the policy was delivered on June 8th; and as the horse died of an illness contracted before such delivery S. could not recover.

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.

This action is on a policy of insurance dated the 7th day of June, 1915, insuring the appellant against

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

(1) 37 Ont. L.R. 344.

death from accident or disease, during the currency of the policy, of a bay stallion named "Luron."

The application for the insurance is dated 29th May, 1915, and was for a "Class or Section No. One, Stallions all breeds for season of 3 months." The application also states "Term 3 mos., Expiry 7-9-16" being the 7th of September, 1916. In response to this application the policy was issued by the respondents, dated the 7th of June, 1915, which, as stated on its face, expired on the 7th of September, 1915, at noon. The premium charged, $32.50, was at the high rate of $3.25 upon each $100 for three months. This policy was sent by the respondents from its head office at Montreal to its agent in Petrolia on the 7th of June, 1915, the date it bears and was delivered on that date to the appellant and the premium collected.

The stallion was in perfect health at noon of the 7th of June when the appellant says that the policy went into force, but was taken ill on the 8th of June and died after the delivery of the policy and payment of the premium.

The respondents' contention and the judgment of the Appellate Division was based upon the following provision in the policy:—

> Now this policy witnesseth, that if after receipt hereof and payment by the Insured to the Company of the under noted premium for an insurance up to noon on the date of expiry of this policy any animal described in the Schedule below, shall during that period die from any accident or disease hereby insured against as after mentioned and occurring or contracted after the commencement of the Company's liability hereunder, and otherwise defined in the aforesaid proposal the Company shall be liable to pay to the insured, after receipt of proof satisfactory to the Directors, two-thirds of the loss which the said insured shall so suffer, but *pro rata* only with other existing insurance or sums recoverable from other parties and not exceeding the amount for which such animal is insured.

Sir George C. Gibbons K.C. for the appellant re-

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ferred to May on Insurance (4 ed.), sec. 400, p. 918; *Hallock* v. *Commercial Ins. Co.*(1), at page 275.

G. F. Macdonnell and *Oscar H. King* for the respondents cited *Canning* v. *Farquhar*(2), at pages 731-2, contending that appellant should have disclosed the horse's condition when paying the premium. There was an alteration in the risk which avoided the policy.

THE CHIEF JUSTICE.—I find myself obliged though with great reluctance to concur in dismissing this appeal.

The proposal was for an insurance for the season against the death of a stallion from accident or disease and I cannot see what right the respondent company had to insert without notice the provision in the policy limiting the liability to death from accident or disease occurring or contracted after the commencement of the company's liability. The provision was of great importance involving, of course, in this case the whole liability under the insurance.

In the proposal the appellant declared, as was no doubt the fact, that the horse was then in perfect health, and it was examined and reported on by the inspecting veterinarian on behalf of the company. The policy was issued within ten days after. Counsel for the respondent said that this provision was the only way in which live stock insurance companies could protect themselves. I cannot in the least understand what he meant. There is no reason why they should not insure in accordance with their own form of proposal against death from disease whenever contracted, whilst the risk of disease being contracted during the few days elapsing between the dates of the

(1) 26 N.J. Law 268. (2) 16 Q.B.D. 727.

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proposal and the policy would hardly, one may suppose, have been sufficient to deter them from accepting the insurance. Of course they were at liberty to make this or any other stipulation they pleased provided they did so in a proper manner and with due notice to the insured. What they were not at liberty to do was to accept the proposal, declare it to be the basis of the policy and then surreptitiously introduce a limitation of their liability and deliver the policy leaving the insured to suppose she had such an insurance as she applied for. It is precisely to guard against such practices that the "Insurance Act" (R.S.O. ch. 183) by the 8th Statutory Condition in section 194 provides:—

8. After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, *unless the company points out in writing the particulars* wherein the policy differs from the application.

This may have been done; the company should have had an opportunity to prove it.

Unfortunately the appellant has not raised this point and since it is not pleaded this court cannot give any effect to it.

The appeal must therefore be dismissed.

DAVIES J.—The real substantive question in dispute here is the exact time when "the liability of the company commenced" under the policy. Sir George Gibbons contended strongly that it began at noon on the date of the execution of the policy by the company, 7th June, and that as the sickness and death of the stallion insured happened after that date the company was liable to pay. The Court of Appeal, on the contrary, held that, on the true construction of the policy itself, the company's liability did not commence until after delivery and acceptance of the policy and

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that as at that time, on the 8th June, the horse was "sick unto death" and actually died within a few hours afterwards, no liability on the part of the company attached.

The language of the policy reads as follows:—

If after receipt hereof and payment by the insured to the Company of the undernoted premium for an insurance up to noon on the date of expiry of this policy, any animal described in the schedule below, shall during that period die from any accident or disease hereby insured against as after mentioned, and occurring or contracted after the commencement of the Company's liability hereunder, and otherwise defined in the aforesaid proposal the Company shall be liable to pay * * *.

The date of the expiry of the policy was stated in the policy as the 7th September, 1915. Sir George contended that although no specified term was mentioned in the policy itself, the proposal or application made by the plaintiff had written on its margin by the plaintiff's agent in pencil the words "term 3 months" and that as the expiry of the policy was definitely fixed as the 7th September in the policy, it must be construed once it came into operation as covering the whole period of three months and definitely fixing the commencement of defendants' liability as arising on the 7th June. But while the insurance statute, ch. 183, R.S.O., in its 156th section, enacts—

that the proposal or application of the assured shall not *as against him* be deemed a part of or be considered the contract of insurance

(except in a case not arising here) it is manifest that if the plaintiff himself invokes the terms of that proposal or application as definitely fixing the time from which the policy was to run, the court must look at the whole of that document and not at a part only. So looking, we find the application, which was dated 29th May, expressly providing:—

The Company's liability commences after payment of the premium and receipt of policy or protection note by the insured.

In this case there was no protection note and the plaintiff did not receive her policy or pay her premium until the afternoon of the 8th June. The horse died a few hours after such delivery, of a disease which it had contracted before such delivery, and if the application can under the circumstances I mention be referred to, it would conclusively settle when the company's liability commenced.

Apart from that, however, I concur with the reasons given by the judges of the Appellate Division that the language of the policy itself apart from the application settles the question. I have already quoted it.

As I construe that language, it covers insurance not for a period of three months but for such period from a time after delivery to and receipt by the insured of the policy up to the date of its expiry. No question arises as to this time of delivery. The insurance covers the period between those dates and the date the policy expires. The death of the animal must occur during that period, from a disease occurring or contracted after the commencement of the company's liability, and that liability, I hold under the words of the policy, did not commence until the delivery of the policy.

I would therefore dismiss the appeal.

IDINGTON J.—The appellant sues upon a policy of insurance issued by respondent, insuring her against loss by death of a stallion from accident or disease.

The operative covenant sued upon is as follows:—

> NOW THIS POLICY WITNESSETH, that if after receipt hereof and payment by the insured to the company of the undernoted premium for an insurance up to noon on the date of the expiry of this policy, any animal described in the schedule below, shall during that period die from any accident or disease hereby insured against as after mentioned, and occurring or contracted after the commencement of the company's liability hereunder, and otherwise defined in the aforesaid proposal the company shall be liable to pay to the insured, after receipt of proof

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satisfactory to the directors, two-thirds of the loss which the said insured shall so suffer, but *pro ratâ* only with other existing insurance or sums recoverable from other parties and not exceeding the amount for which such animal is insured.

The stallion died from a disease clearly contracted before the payment of the premium and before the delivery of the policy.

I am unable to expand the tolerably clear and explicit terms of this covenant whereby its operation is directed to something happening after its receipt and the payment of the premium, to cover a death which did not result from a disease contracted after the commencement of the company's liability thereunder, but from a disease contracted before the commencement of such liability.

The argument that the premium was obviously to cover three months and that as the policy was to expire on a day named which would make the policy operate retroactively a day or more before the time when its very clear terms indicate that it was the intention of the contracting parties that it should only begin to run after both the delivery of the policy and payment of the premium, seems clearly untenable.

The same line of argument, if maintained, might render the company liable to pay in case of the death of an animal weeks before the delivery of the policy or payment of the premium, which might well happen if the animal were at a long distance from the insured and insurer.

Such policies might exist and be effective as in analogous cases in marine insurance.

It all depends on the frame of the contract.

It is idle to rely upon dicta from authors or judges in relation to contracts in a form that lent another possible meaning than that which can fairly be put upon this one.

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As I read this contract it does not offend in its operative part against the clauses in the "Insurance Act" relied on by counsel for the appellant.

The recital, however, in this policy, I may be permitted to suggest, is not what I could rely upon as a compliance with section 156 of the "Insurance Act."

Indeed I think it unjustifiable but I cannot in this case see how I can, save by discarding it, give any effect to the section.

If we tried to go further, as invited by the argument of counsel, in the way of applying sub-section 1 of section 156, we could only destroy the contract but would be unable to construct another unless by unduly straining that clearly intended by the language used.

If, for example, the policy had been delivered, then even without payment, we might have an arguable case presented by virtue of sub-section 1 of section 159, whereby to set up or make operative the contract so amended by that sub-section. I pass no opinion thereon—indeed have none—and am merely trying to illustrate what may, by virtue of the statute, be possible, but here is impossible.

The appeal must be dismissed with costs.

DUFF J.—The language of the policy does not appear to admit of more than one construction; and one of the conditions of responsibility laid down is that the "accident or disease" shall occur or be contracted after the commencement of the "company's liability" under the policy and the "company's liability" does not commence before the payment of the premium. "Otherwise defined in the aforesaid proposal" upon which counsel for the appellant to some extent relies, is an adjective clause qualifying

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"accident or disease." In the contract now before us there is apparently no subject-matter to which these words can apply; but the form is a general form and the words might find their application where risks insured against fall within table four, and they are no doubt also intended to provide for special cases to which the form does not itself in terms refer.

ANGLIN J.—In view of the explicit directions of sub-section 1 of sec. 156 and of sub-section 1 of section 193 of the "Insurance Act" (R.S.O. 1914, ch. 164) and of the express prohibition of the sub-section 3 of the former section I am, with the appellant, unable to understand the reference of the learned Chief Justice of the Common Pleas to the proposal or application made by the assured for the purpose of defining the term of the contract of insurance sued upon, or for that of interpreting the phrase, "commencement of the company's liability" used in the policy. With respect, I am of the opinion that, under the statutory provisions above cited, the term of the insurance must, as against the insured at all events, be found in the language of the policy itself unaided by anything in the application or proposal for insurance. That, I think, is the clear effect of the legislation to which I have referred. Although the insured is not debarred from invoking the application in so far as he can derive aid therefrom in other respects, inasmuch as the statute by sub-section 1 of section 193 (made applicable by section 235) requires that "the term of the insurance" shall appear on the face of the policy, I doubt whether even he can invoke the application to extend the term as stated in the policy.

With the other learned judges of the Appellate Division I find it unnecessary to resort at all to the

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application in order to ascertain the beginning of the term of the insurance. With them I find the beginning of that term fixed in the policy as to the occurrence of death to be the time of the receipt of the policy and payment of premium, and as to the accident or disease occasioning the death to be—

the commencement of the company's liability hereunder,

i.e., under the policy. Sir George Gibbons argued that the use of these two distinct phrases indicates that "the commencement of liability" was meant to describe a moment of time different from and necessarily earlier than that at which the contract was made by delivery of the policy. Inasmuch as by sec. 159 of the statute the contract of insurance when delivered is

as binding on the insurer as if the premium had been paid

and this

notwithstanding any agreement, condition or stipulation to the contrary,

the risk attached from the moment of the delivery of the policy although the premium was not paid until afterwards. The contention that the use of two distinct descriptive phrases necessarily excludes an intention thereby to refer to the same event proceeds on the assumption that the policy was framed by a skilled draughtsman. A very cursory perusal of the document suffices to dispel any such illusion. Brief as the operative clause is, tautology is perhaps its most striking feature. It is, therefore, not surprising to find in it the same idea expressed—the same thing described—in different language.

Delivery of the policy took place on the 8th of June, before the death of the animal insured, but after it had contracted the disease which proved fatal. That disease, however, had only manifested itself on

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the morning of the 8th and the case proceeds on the footing that it was then first contracted. The policy bears date the 7th of June and was certainly executed on or before that day. The date of expiry of the risk is stated on the face of the policy to be the 7th September and in a table of "risks," likewise printed on the face of the policy, we find the item:—

> Stallions as against death from accident or disease during the currency of the policy.

It is at least questionable whether the adjectival phrase,

> during the currency of the policy,

in this item qualifies the words "accident or disease." I think it does not, but applies only to the word "death." At all events it should not in the case of disease be read as meaning disease first contracted during the currency of the policy. But I cannot think that this somewhat vague clause can affect the clear and explicit limitation of the risk in the operative provision of the policy to death from a

> disease contracted after the commencement of the company's liability hereunder.

The question is purely one of interpretation of the latter phrase.

Now there can be no doubt that there was no liability of the company before the delivery of the policy. Up to that moment there was no contract of insurance. The company might have entirely declined the risk. The applicant might have refused to accept the policy or to pay the premium. By force of the statute liability began upon delivery of the policy, though it should not otherwise have arisen until payment of the premium. Granted that it was possible for the parties to have provided by express stipulation

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on the face of the policy that the risk should be deemed to have attached before delivery, they have not done so. Sir George Gibbons contended that it sufficiently appears that the premium paid to and accepted by the company was based on a full three months' risk. I find nothing in the policy to indicate that to be the fact—nothing which justifies a conclusion that upon a basis either of contract or of estoppel the respondent should be held to have undertaken a risk or liability antedating the delivery of the policy. It is true that on the application—not in its body but in a marginal note on the upper left-hand corner—we find the words "Term 3 Mos." But, while that is so, we also find in the body of the same document this clause:—

> The company's liability commences after payment of the premium and receipt of policy or protection note by the insured.

It is this latter clause which is referred to by the learned Chief Justice of the Common Pleas as an aid in determining the limitation of the risk and defining "the commencement of the company's liability" as against the insured. While in my opinion it may not be so used on behalf of the insurer, on the other hand if, notwithstanding the explicit requirement of sub-section 1 of section 193 that the term of the insurance shall appear on the face of the policy, the insured may invoke the application in support of his contention that the risk was for a full period of three months (necessarily beginning on the 7th of June since the date of its expiry is fixed as the 7th of September) he must take that document as a whole and cannot escape the effect of its very clear and precise provision fixing the commencement of the risk as, in the absence of a protection note, the time of receipt of the policy. In the light of this provision the marginal note on the application form, "Term 3 Mos.", must, I think, be

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regarded as a classification of the risk rather than as intended to define its precise duration. In this view the 8th statutory condition, which might otherwise, though not invoked by the appellant, present a somewhat formidable difficulty to the respondents (see *Laforest* v. *Factories Ins. Co.*(1)), is inapplicable to this marginal note on the application.

On the whole case the conclusion reached in the Appellate Division seems to me to be right. The appeal should be dismissed with costs.

BRODEUR J.—The application for insurance in this case is dated the 29th day of May, 1915, and was a proposal applying to the respondent for insurance on a horse for a sum of one thousand dollars ($1,000).

In the body of the application there was a note that the company's liability would commence after the payment of the premium and the receipt of the policy by the insured.

No payment was made by the applicant when the application was signed. The policy was issued by the company in Montreal on the 7th day of June, 1915, and was mailed to their agent in Petrolia, the place of residence of the appellant. It appears that on the morning of the 8th the horse became sick. In the afternoon of the same day the policy was delivered and the premium paid and a few hours after the horse died.

The policy contained the following provision:—

If after receipt hereof and payment by the insured to the company of the undernoted premium for an insurance up to noon on the date of expiry of this policy, any animal described in the schedule below shall during that period die from any accident or disease hereby insured against as after mentioned, and occurring or contracted after the commencement of the company's liability hereunder, and otherwise defined in the aforesaid proposal the company shall be liable to pay, etc.

(1) 53 Can. S.C.R. 296.

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When the policy was issued on the 7th of June the horse was in good health; when it was delivered, however, it had become sick and the question is whether the company's liability began on the date of the policy or when the premium was paid and the policy delivered.

The stipulation above quoted shews that there was no liability on the part of the company until the policy was delivered. Then if the sickness existed at the time of the delivery of the policy the company would not be liable because it was formally stated that if the horse dies from a disease contracted before the delivery of the policy there will be no liability. That contract could not in my opinion be construed in any other way.

It was contended, however, by Sir George Gibbons in his argument that if the horse died before the delivery of the policy there would be no liability; but if the horse simply took sick before the delivery then, in such a case, the company would be responsible for the amount of insurance.

I am unable to find any such distinction in the clause above quoted. It seems to me clear that the liability begins at the time of the delivery of the policy and at the time of the payment of the premium and the condition of the policy was that if the horse died before the delivery of the policy or the payment of the premium, or if he died after but from a disease which had been contracted before the delivery of the policy, then in such case the loss would be not for the insurance company but for the owner of the horse.

It may be then, as a result of that construction, that the plaintiff was not fully insured for the three months which she contemplated; but we have a declaration in the application itself that the policy would not be in force before it was delivered and before

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the premium was paid. The appellant was aware of that condition, because it was on the document which she signed.

I am unable to come to any other conclusion than that the action of the plaintiff was properly dismissed by the Appellate Division and that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Moncrieff & Wilson.*
Solicitors for the respondents: *King & King.*

THE TRUSTS AND GUARANTEE COMPANY (DEFENDANTS) ...... } APPELLANTS;

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*May 5, 8.
*Oct. 24.

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Devolution of estates—Intestacy—Failure of heirs—Escheat—Royalty—Bona vacantia—Dominion lands—Constitutional law—Surrender of Hudson Bay Company's lands—Construction of statute—"B. N. A. Act, 1867"—"Dominion Lands Act"—"Land Titles Act"—"Alberta Act"—(Alta.) 5 Geo. V., c. 5, Intestate estates.

In 1911, certain lands of the Dominion of Canada, situate in the Province of Alberta, were granted in fee to a person who died, in 1912, intestate and without heirs, being still seized in fee simple of the lands.

Held, Idington and Brodeur JJ. dissenting, that the right of escheat arising in consequence of the intestacy and failure of heirs was a royalty reserved to the Dominion of Canada by virtue of the 21st section of the "Alberta Act," 4 & 5 Edw. VII., ch. 3, and belonged to the Crown for the purposes of Canada. *Attorney-General of Ontario* v. *Mercer* (8 App. Cas. 767), followed.

Per Davies and Anglin JJ.—It was not competent for the Legislature of the Province of Alberta, by the statute of 1915, 5 Geo. V., ch. 5, relating to the property of intestates dying without next of kin, to affect the rights so reserved to the Dominion of Canada.

Per Idington and Brodeur JJ.—Upon the grant of the lands in question by the Dominion Government they ceased to be Crown lands of the Dominion and royalties reserved to the Dominion could not attach thereto. Further, the effect of section 3 of the Dominion statute, 51 Vict. ch. 20, amending the "Territories Real Property Act," R.S.C., 1886, ch. 51, and declaring that lands in the North-West Territories should go to the personal representatives of the deceased owner thereof in the same manner as personal estate, constituted an absolute renunciation of all such claims to royalties by the Crown in the right of the Dominion of Canada.

The appeal from the judgment of the Exchequer Court of Canada, (15 Ex. C.R. 403) was dismissed.

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

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APPEAL from the judgment of the Exchequer Court of Canada(1), maintaining the prayer of the information filed by the Attorney-General for Canada and declaring that the lands in question, upon the death of the owner intestate and without next of kin, escheated to the Crown in the right of the Dominion of Canada.

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

Frank Ford K.C. for the appellants.
W. D. Hogg K.C. for the respondent.

THE CHIEF JUSTICE.—The Attorney-General for Canada by information filed in the Exchequer Court, claimed a declaration that certain lands in the Province of Alberta of which one Yard Rafstadt, who died intestate and without heirs, was formerly the owner had escheated to His Majesty in right of the Dominion of Canada.

The claim is similar to that put forward in the Privy Council in the appeal of *Attorney-General of Ontario* v. *Mercer*(2), by the Dominion Government in the name of the respondent. In that case the lands of which the deceased who died intestate and without heirs had been the owner were situate in the Province of Ontario. By the judgment it was held that lands escheated to the Crown for want of heirs belonged to the province and not to the Dominion. The ground of the decision was that although section 102 of the "British North America Act, 1867," imposed upon the Dominion the charge of the general public revenue as then existing of the provinces yet, by section 109, the casual revenue arising from lands escheated to the Crown after the Union was reserved to the provinces—the

(1) 15 Ex. C.R. 403. (2) 8 App. Cas. 767

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words "land, mines, minerals and royalties," therein including, according to their true construction, royalties in respect of lands, such as escheats.

What is now the Province of Alberta was formerly a part of the North-West Territories under the sole authority of the Dominion Government. Up to the time of the establishment of the province, by the statute 4 & 5 Edw. VII., ch. 3, there could be no doubt to whom the lands and their revenues belonged. Lest there should be any doubt as to the position of the public lands in the Province of Alberta the Act by which it was established provided by section 21 that all Crown lands, mines, minerals and royalties incident thereto should continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada. The words are practically the same as those in section 109 of the "British North America Act, 1867," from which they are doubtless taken whereby the like reservation was made in favour of the provinces.

I do not myself understand how, in face of the decision of the Judicial Committee, it can be contended that the same words which were held to reserve to the provinces the casual revenue arising from lands escheated to the Crown should now receive the opposite meaning and be held not to include royalties in respect of lands such as escheats.

I am not sure that it is very necessary to deal with the arguments put forward on behalf of the province. They seem to be largely those urged and expressly negatived in the *Mercer Case*(1). The present appellant in his factum claims that "the word 'royalties' has relation back only to mines and minerals." This was, perhaps, the main contention put forward by

(1) 8 App. Cas. 767.

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the Dominion in the *Mercer Case*(1), and their Lordships say, a p. 779:—

The question is whether the word "royalties" ought to be restrained to rights connected with mines and minerals only, to the exclusion of royalties, such as escheats, in respect of lands. Their Lordships find nothing in the subject, or the context, or in any other part of the Act, to justify such a restriction of its sense.

It is useless to ask us to find now that the word in the same subject and context has the opposite meaning to that placed upon it by their Lordships.

Judgment for the respondent on this appeal does not involve any decision as to the right of the legislature of the province to change the laws of inheritance. Lands escheat to the Crown for defect of heirs and this has nothing to do with the question who are a person's heirs. But altering the law of inheritance is one thing and appropriating the right of the Dominion on failure of heirs is quite another thing. This is what has been done by the Alberta statute, chap. 5 of 1915. The statute in terms deals with property of a person dying

intestate and without leaving any next of kin or other person entitled thereto.

It is because there is no one who can claim the property that the Crown takes it. There is no possibility of getting at this property through the deceased. The Crown does not claim it by succession at all, but because there is no succession.

In the *Mercer Case*(1), the Judicial Committee say:—

Their Lordships are not now called upon to decide whether the word "royalties" in section 109 of the "British North America Act, 1867," extends to other royal rights besides those connected with "lands, mines and minerals."

It is not necessary in the present case either to decide this question. The right of the Crown to *bona*

(1) 8 App. Cas. 767.

vacantia is a different one from the right to an escheat. No question as to the former right really arises in this case and I do not express any opinion as to whether it belongs to the Crown in the right of the Dominion or of the province. The question will have to be decided if necessary in a proper case.

I would dismiss the appeal with costs.

DAVIES J.—Concurred with ANGLIN J.

IDINGTON J. (dissenting).—One Rafstadt the registered owner of a quarter section in Alberta who had obtained a certificate of title therefor, under the "Land Titles Act," died intestate without leaving heirs at law or next of kin.

The land had been granted to him on the 25th of July, 1911, by the Crown acting through the administration of the Department of the Interior of Canada.

The claim made that the said land escheated to and became vested in the respondent in right of the Dominion of Canada has been maintained by the Exchequer Court and the appellant, the administrator, having sold the land and administered the estate of deceased, has been ordered by said court to account to the respondent in right of the Dominion.

I respectfully submit that there seems to be thus presented a curious confusion of thought at the very threshold of this litigation.

If, as claimed by respondent and as held below, the Act, upon which the appellant acted as administrator is *ultra vires*, then nothing which that court can do, or we in reviewing its action and maintaining same view can do, will be of any avail.

The title to the land is, in such view, in respondent or liable to become so vested upon inquisition duly

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found. The Crown certainly cannot desire that innocent persons purchasing from or claiming through the purchaser from the appellant should suffer loss, as they inevitably must when, if ever, it is finally determined that the Act apparently constituting the appellant owner was *ultra vires* and all it had done thereunder null and void.

If I were driven to entertain the same view I should feel much embarrassed in maintaining such a judgment fraught with such obvious consequences unless and until proper concurrent legislation had been enacted adopting and validating the appellant's sale and remitting the trial of the right to the proceeds to the courts to determine.

However praiseworthy saving costs and going directly to the point may be as a rule, there are some cases where it cannot be done properly. And if the correct conclusion is as held below the proceedings herein should be stayed or the action dismissed.

The respondent can have no claim to money improperly received by appellant or any one else in Alberta unless under such circumstances that he can properly affirm the transaction and be no party to something detrimental to some of his subjects.

Passing that phase of this litigation and coming to the issue attempted to be raised and decided herein, let us ask ourselves what an escheat is and consider the definition thereof as given in Stroud's Judicial Dictionary, vol. 2, page 639, condensed from Coke upon Littleton, as follows:—

> Escheat is a word of art, and signifieth properly when, by accident, the lands fall to the lord of whom they are holden, in which case we say the fee is escheated.

Then let us bear in mind that the very basis of the argument in support of the view contended for by

respondent herein is the tenure by which the land is assumed to have been held and that it has to be presumed a grant had been made by the lord of an estate which for want of heirs has come to an end, and by reason thereof the land has fallen to the lord who had made the grant. Such is the theory rested upon.

The respondent, it is claimed, must be held in this case to be the lord so entitled.

To make no doubt of the theory and its resting upon tenure as the basis of this claim we have but to consider the illustrations furnished by cases where the estate is held upon a copyhold tenure when the title escheats to the lord of the manor. See in Watson's "Compendium of Equity," the chapter on "Escheat and Forefeiture," page 187, and cases cited there, especially *Walker* v. *Denne*(1) at page 187, where Lord Loughborough, then Lord Chancellor, expressly says the title would not escheat to the Crown but to the lord of the manor. See also the more recent cases of *Weaver* v. *Maule* (2); *Gallard* v. *Hawkins*(3), and especially at pages 306-7.

This last mentioned case brings forward another view, dealt with in Watson's work at pages 186-7, where it is explained that, until 47 & 48 Vict. ch. 71, equitable estates did not escheat to the Crown for they were not the subject of tenure and where there was a conveyance or devise in trust and there was no heir of the grantor or testator the trustee held for his own use absolutely.

The case of *Burgess* v. *Wheate*(4), contains elaborate learning on the subject, and the much more recent case of *Cox* v. *Parker*(5), presents the law in a very

(1) 2 Ves. 170.
(2) 2 Russ. & M., 97.
(3) 27 Ch. D. 298.
(4) 1 Eden 177.
(5) 22 Beav. 168.

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concise judgment of Sir John Romilly, Master of the Rolls.

These cases and many others make clear that the escheat of land is dependent on tenure and the title to the land only falls to the Crown in case by reason of the nature of the tenure thereof under the Crown such is the legal result when there is no one left to take the legal estate.

Let us now consider the nature of the tenure of the lands in question herein and see if and how it can ever produce such a result as contended for by respondent herein.

If ever legislation could sweep away such a right as escheat in relation to land so far as dependent on tenure surely the enactment of 51 Vict. ch. 20, sec. 3, did so.

It enacted as follows:—

3. Section five of the said Act is hereby repealed, and the following substituted therefor:

5. Land in the Territories shall go to the personal representatives of the deceased owner thereof in the same manner as personal estate now goes.

That was a comprehensive declaration of the Dominion Parliament relative to the doctrine of tenure upon which alone the escheat of land so far as dependent on tenure could rest. It was an absolute renunciation by the respondent, by assenting thereto, of any such possible claim.

It was repeated in section 3 of the "Land Titles Act" of 1894.

And in the same session in which the Province of Alberta was created, and as declaratory of the policy of parliament in that regard, it was enacted by the respondent's assent given same day as the "Alberta Act" was assented to as follows:—

1. Upon the establishment of a province in any portion of the North-West Territories and the enactment by the legislature of that

province of an Act relating to the registration of land titles, the Governor in Council may, by order, repeal the provisions of the "Land Titles Act, 1894," and of any of its amending Acts in so far as they apply to the said province, and by such order, or by any subsequent order or orders, may adjust all questions arising between the Government of Canada and the Government of the province by reason of the provisions of this section being carried into effect.

In pursuance thereof the Alberta Legislature at its first session enacted a "Land Titles Act" carrying out the purpose so designed and by the language thereof put beyond doubt, so far as it could, the possibility of any such thing as escheat dependent on tenure. It enacted as follows:—

74. Whenever the owner of any land for which a certificate has been granted dies, such land shall, subject to the provisions of this Act, vest in the personal representative of the deceased owner, who shall, before dealing with such land, make application in writing to the registrar to be registered as owner and shall produce to the registrar the probate of the will of the deceased owner, or letters of administration, or the order of the court authorizing him to administer the estate of the deceased owner, or a duly certified copy of the said probate, letters of administration or order, as the case may be; and thereupon the registrar shall enter a memorandum thereof upon the certificate of title; and for the purposes of this Act the probate of a will granted by the proper court of any province of the Dominion of Canada, or of the United Kingdom of Great Britain and Ireland, or an exemplification thereof, shall be sufficient.

2. If the certificate of title for the land has not been granted to the deceased owner the personal representatives before being entitled to be registered under this section shall bring the land under this Act in the ordinary way.

3. Upon such memorandum being made, the executor or administrator, as the case may be, shall be deemed to be the owner of the land; and the registrar shall note the fact of the registration by a memorandum under his hand on the probate of the will, letters of administration, order or other instrument as aforesaid.

4. The title of the executor or administrator to the land shall relate back and take effect as from the date of the death of the deceased owner.

Surely the respondent by acting upon this local legislation stipulated for in the enactment of Parliament above quoted must be taken to have assented thereto as if bargained for when in pursuance thereof

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he by order-in-council repealed the "Land Titles Act" of 1894.

The grant in question herein was made in pursuance of that policy and registered in conformity therewith.

Does it not seem repugnant to reason that such a claim as escheat by virtue of tenure could be permitted to spring from such grants and rest upon such a foundation? That legislation by Parliament and legislature adopted and carried into force by said order-in-council was, I submit, as absolute and final a renunciation by respondent in right of the Dominion as could be conceivable.

It is argued, however, that by reason of the Dominion having retained the control of the disposition of the Crown lands in Alberta, it must be taken to have intended to reserve to itself such incidental sources of revenue as might result from escheat.

The "Alberta Act," by section 21 thereof, enacted as follows:—

21. All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the province under the "North-West Irrigation Act, 1898," shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, and shall apply to the said province with the substitution therein of the said province for the North-West Territories.

When we are called upon to interpret and construe this enactment I think we can refer not only to the whole scope of the Act but also as *in pari materiâ* the enactments passed in same session bearing upon the policy of Parliament in its relation to the powers to be conferred upon the Alberta Legislature and especially that enactment already referred to which provided for that legislature carrying out the policy of Parliament

relative to the tenure of lands and their transmission in cases of intestates.

Having due regard not only to the "Alberta Act" itself but also these other enactments, it seems inconceivable that whatever Parliament intended, it could ever have sought to reserve to the respondent in right of the Dominion any such thing as escheat dependent upon tenure of the land.

There remains, however, the question of the right of the Crown to become possessed of *bona vacantia* quite independently of tenure. That sometimes is spoken of as a right to an escheat.

Of the existence of that right, call it what we may, there can, in light of the authorities such as *Taylor* v. *Haygarth*(1), and in *In re Bond*; *Panes* v. *Attorney-General*(2); *Dyke* v. *Walford*(3), and *In re Barnett's Trusts*(4), be no doubt. Each is illustrative of the varying condition under which the right may exist.

And if the respondent had sued appellant to recover the proceeds of the estate left after its due administration the question would arise whether such balance could be treated as *bona vacantia* falling to respondent in right of the Dominion or in right of the Province of Alberta.

Then we should have to consider the neat point in light of the following provision of the "Alberta Act," 5 Edw. VII., ch. 3, sec. 3, as follows:—

3. The provisions of the "British North America Acts," 1867 to 1886, shall apply to the Province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, and if the said Province of Alberta had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces.

(1) 14 Sim. 8.
(2) (1901) 1 Ch. 15.
(3) 5 Moo. P. C. 434.
(4) (1902) 1 Ch. 847.

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Wherein do the provisions of the "British North America Acts" differ from those thus made applicable to the Province of Alberta?

It is said the provisions of the section 21, above quoted, make a difference.

True, the management of the Crown domain is reserved as a matter of public policy for the Dominion, but how can that touch anything turning upon the right of the respondent to recover *bona vacantia* on behalf of the Dominion?

There is nothing in the language of section 21 reaching so far as to require such a meaning to be given it.

There may arise cases similar to that which enabled the Court dealing with personal property in the hands of executors, in question in the case of *Taylor* v. *Haygarth*(1), cited above. Can it be said in such a case that *bona vacantia* derived from or being mere personal property is to be held recoverable by the respondent on behalf of the Dominion, instead of by him on behalf of the province?

Surely the reservation of the revenue from the sales and leasing of lands, mines and minerals is rather a shadowy foundation for such a claim. Yet there is nothing else in this "Alberta Act" distinguishing the status and powers of the new province from others in that regard which can be relied upon.

The right of the other provinces to escheat had been long determined in their favour by the case of the *Attorney-General for Ontario* v. *Mercer*(2), when the "Alberta Act" was passed and if there had been any such purpose as making a distinction in that regard against the new province it would have found expres-

(1) 14 Sim. 8.

(2) 8 App. Cas. 767.

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sion in the Act in some more explicit way than by such indirect language as used in section 21.

And when the claim to *bona vacantia* is made how can it rest upon the single line

All Crown lands, mines, minerals and royalties incidental thereto

for that is what the matter comes to?

There is nothing therein which in the remotest sense can extend to mere *bona vacantia* consisting of or derivable from personal property.

And with the claim thereto surely must fall also the claim to proceeds of real estate which had been declared at that time to become distributable as personal property.

And let us again observe the language of the first line of section 21 which defines nothing of that sort. Only the word "royalties" therein can be taken to have any possible semblance of meaning applicable to what is involved in the claim.

And these royalties are not presented as *jura regalia* but as "royalties incident thereto," *i.e.* incident to the "Crown lands, mines and minerals."

In common parlance we all know how the term "royalties" is used relative to the timber dues and any share of the minerals extracted under and by virtue of leases of mines or mining lands. How can such a term be made to have such an extended meaning as claimed herein?

The moment the lands are granted by the Crown they cease to be "Crown lands" and how a royalty can attach thereto puzzles one.

Again we must never forget that the whole subject of property and civil rights is relegated to the jurisdiction of the legislature of the province which can change the whole law of descent and constitute whomsoever or whatsoever it sees fit the heir at law or next

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of kin entitled to take the estate of an intestate or indeed if it saw fit could revoke the power to make a will and distribute the estates of deceased in such a way as it might determine.

To say that a legislature possessed of such plenary powers cannot enact such a law as declared by the judgment appealed from to be *ultra vires* seems to me somewhat remarkable.

I think the appeal should be allowed with costs throughout and the judgment appealed from be reversed.

ANGLIN J.—In this proceeding the Government of Canada seeks to recover from the administrator of one Yard Rafstadt, who died in November, 1912, in the Province of Alberta, intestate and without heirs or next of kin, the proceeds left in his hands, after satisfying claims of creditors, of land granted to the intestate in 1911, by letters patent issued from the Department of the Interior of Canada, of which he died seized.

The substance of an arrangement between the parties is that, if, upon the death of Rafstadt, the Crown in right of the Dominion of Canada was entitled to the land owned by him, either as an escheat or as *bona vacantia*, the net proceeds of the sale of such land in the hands of the administrator shall for all purposes be deemed the property of the Crown in right of the Dominion—that they shall represent the land.

A doubt was suggested as to the jurisdiction of the Exchequer Court to entertain this action on the ground that the money in question is in fact neither land escheated nor property of the Crown in right of the Dominion. The relief claimed by the information,

however, is primarily a declaration that the land owned by Rafstadt upon his death

escheated to and became vested in His Majesty the King in right of the Dominion of Canada.

That relief may properly be claimed in the Exchequer Court under 9 & 10 Edw. VII., (D.), chap. 18, sec. 2. The judgment has taken this declaratory form and a clause has been added, based upon the consent of parties, for the recovery by the Crown of the net proceeds of the sale held by the administrator.

The material facts were established by admissions and are fully stated in the judgment of the learned judge of the Exchequer Court.

Counsel for the appellant urges several distinct grounds of appeal:—

(1) That the right of property in the lands surrendered by the Hudson Bay Company to Her late Majesty Queen Victoria, was never vested in the Crown in right of the Dominion of Canada;

(2) That the right of escheat, if not vested in His Majesty in right of the United Kingdom, is vested in the Crown in right of the Province of Alberta;

(3) That the reservation made by section 21 of the "Alberta Act" does not include the royalties of escheat or *bona vacantia;*

(4) That under the Dominion "Land Titles Act," 57 & 58 Vict., ch. 28 (1894), the holder of a certificate of title obtained not merely an estate in the land but the full allodial rights therein and that it was, therefore, not subject to escheat;

(5) That under section 3 of that Act providing that

land in the Territories shall go to the personal representatives in the same manner as personal estate now goes, and be dealt with and distributed as personal estate,

the real property of a deceased owner became for all

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purposes personalty, and, while a case of *bona vacantia* might arise in respect of it, a case of escheat could not.

(1) I doubt if the appellant, claiming through a grant from the Canadian Government, should be heard to raise the first point, if it were otherwise tenable. But that all the property rights both of the Crown and of the company in those parts of the former Hudson Bay Lands which were not reserved for the company were vested in the Crown in right of the Dominion of Canada, is, I think, fully established. The original grant to the Hudson Bay Company; the "Rupert's Land Act," 31 & 32 Vict. (Imp.) ch. 105; the surrender by the Hudson Bay Company to the Crown; the addresses of the Senate and House of Commons of Canada to Her Majesty; and the Imperial order-in-council passed pursuant to the "Rupert's Land Act" contain the history of the arrangement and the steps by which the territory that had formerly been held by the Hudson Bay Company (saving the reserved sections) became vested in the Crown and subject to the legislative control of the Parliament of Canada.

That Parliament exercised the power thus conferred upon it of legislating in regard to the Crown lands in the territory thus acquired. The first "Dominion Lands Act," passed in 1872 (35 Vict. ch. 23), after designating them in the preamble as "certain of the public lands of the Dominion" enacted that the

lands in Manitoba and the North-West Territories * * * shall be styled and known as Dominion lands.

The Act further provided for the administration and alienation of these lands in a manner consistent only with the assertion of the existence in the Dominion of the fullest proprietary rights therein. These provisions are continued in the Revised Statutes of Canada, 1886, ch. 54, and the Revised Statutes of

Canada, 1906, ch. 55, and it is under the authority of that legislation that the patent or grant to Yard Rafstadt issued. Section 21 of the "Alberta Act," (4 & 5 Edw. VII., ch. 3) may also, if necessary, be invoked as legislation, within the power conferred on the Dominion Parliament by the "Rupert's Land Act," declaratory of the title and interest of the Crown in right of the Dominion in the public lands within the territorial limits of the Province of Alberta. On this branch of the case I concur in the conclusion reached by the learned judge of the Exchequer Court.

(2) and (3) The second and third points can be conveniently dealt with together. By the 21st section of the "Alberta Act," (4 & 5 Edw. VII., ch. 3), it is declared that

> All Crown lands, mines and minerals and royalties incident thereto * * * shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada.

In *Attorney-General of Ontario* v. *Mercer*(1), the Judicial Committee considered the provisions of section 109 of the "British North America Act" that

> All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union * * * shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situated or arise.

Their Lordships held that "royalties" in this context includes escheat. After discussing the meaning of the term "royalties" and the nature of the objects which it covers, they say, at page 779:—

> Their Lordships are not now called upon to decide whether the word "royalties" in section 109 of the "British North America Act" of 1867 extends to other royal rights besides those connected with "lands," "mines" and "minerals." The question is whether it ought to be restrained to rights connected with mines and minerals only, to the

(1) 8 App. Cas. 767.

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exclusion of royalties, such as escheats, in respect of lands. Their Lordships find nothing in the subject, or the context, or in any other part of the Act, to justify such a restriction of its sense.

The restriction of the reservation of royalties in the "Alberta Act" to those incident to Crown lands, mines and minerals, does not distinguish the case at bar from the *Mercer Case*(1), since their Lordships there proceeded on the assumption that only royalties "connected with lands, mines and minerals," are covered by section 109 of the "British North America Act" (p. 779); nor does the omission of the words "in which the same are situated or arise" from the section of the "Alberta Act" render the decision in the *Mercer Case*(1), inapplicable. The right of escheat is a royalty incident to "Crown lands," or lands belonging to the Crown, and that royalty or right in respect to such lands in Alberta is declared by the "Alberta Act" to continue to be vested in the Crown for the purposes of Canada. I am, therefore, of the opinion that escheats arising in the Province of Alberta at all events in respect of lands which belonged to the Crown at the date of the creation of that province were amongst the rights and sources of revenue excepted and reserved to the Dominion by section 21 of the "Alberta Act."

(4) The grant by the Crown to the Hudson Bay Company of the lands comprised in the territory granted to it was "in free and common soccage." All lands in that territory conveyed by the company to settlers or others prior to the surrender by the company to Her late Majesty Queen Victoria and the subsequent transfer to the Dominion were held by that tenure. By an Act of the Dominion Parliament passed in preparation for the assumption of control of Rupert's Land by Canada it was provided that

(1) 8 App. Cas. 767.

all the laws in force in Rupert's Land and in the North-Western Territory at the time of their admission into the Union shall, so far as they are consistent with the "British North America Act, 1867", with the terms and conditions of such admission approved of by the Queen under the 146th section thereof, and with this Act, remain in force until altered by the Parliament of Canada or by the Lieutenant-Governor under the authority of this Act, (32 & 33 Vict. chap. 3, sec. 5).

This legislation, which left in force English law as it stood in 1670, the date of the Hudson Bay Company's charter, subject possibly to some question as to the portions of the region which may have been first occupied by French settlers (Clement on the Constitution, (2nd ed.), p. 54, *n.* 4), was re-enacted after the actual admission of the territory into the Union (34 Vict. chap. 16). In 1886 the Dominion Parliament enacted that

All the laws of England relating to civil and criminal matters, as the same existed on the 15th day of July, 1870, shall be in force in the Territories in so far as the same are applicable to the Territories (49 Vict., ch. 25, sec. 3).

Since the statute of Charles II., free and common soccage has been the ordinary tenure on which freehold lands are held in England and it is the tenure prescribed in all the early colonial charters or patents in America (Blackstone, Lewis's edition, vol. 1, page 78, *n.* 1). The habendum in the patent to Rafstadt, put in by consent, was "in fee simple," making it clear that his estate was a fee simple to be held in free and common socage, to which the royalty of escheat has always been incident (11 Hals., page 24).

In the second volume of his commentaries (Lewis's edition, at page 104-5), Blackstone wrote:—

1. Tenant in fee simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and to his heirs forever; generally, absolutely and simply; without mentioning what heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee (feodum) is the same with that of feud or fief, and in its original sense it is taken

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in contradiction to allodium which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof hath *absolutum et directum dominium*, and therefore is said to be seised thereof absolutely in *dominico suo*, in his own demense. But feodum, or fee, is that which is held of some superior, on condition of rendering him service; in which superior the ultimate property of the land resides. And therefore Sir Henry Spelman defines a feud or fee to be the right which the vassal or tenant hath in lands, to use the same, and take the profits thereof to him and his heirs, rendering to the lord his due services; the mere allodial property of the soil always remaining in the lord. This allodial property no subject in England has; it being a received, and now undeniable principle in the law, that all the lands in England are holden mediately or immediately of the king. The king therefore only hath *absolutum et directum dominium:* but all subjects' lands are in the nature of feodum or fee; whether derived to them by descent from their ancestors, or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs which were laid upon the first feudatory when it was originally granted. A subject therefore hath only the usufruct, and not the absolute property of the soil; or, as Sir Edward Coke expresses it, he hath *dominium utile*, but not *dominium directum*. And hence it is, that, in the most solemn acts of law, we express the strongest and highest estate that any subject can have by these words:—"he is seised thereof *in his demesne, 'as of fee.'*" It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs forever: yet this dominicum, property or demesne, is strictly not absolute or allodial, but qualified or feudal: it is his demesne, as of fee: that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

In any part of the King's dominions where the English legal system prevails it would require legislation very clear and explicit indeed to take from the Crown its allodial interest and vest it in the subject. There is no such legislation in regard to land in Alberta, and, so far as it might affect the reservation in favour of the Dominion made by section 21 of the "Alberta Act," provincial legislation intended to have that effect would be *ultra vires*.

The appellant invokes the provisions of the Dominion "Land Titles Act," 1894 (57 & 58 Vict., ch. 28), making special reference to sections 3, 4 and 10, as indicating

the purpose of the Dominion Parliament to have been that in the North-West Territories a grant of land from the Crown followed by registration under the "Land Titles Act" should vest in the grantee the absolute or allodial title and that land so granted and registered should for all purposes be converted into and be subject to the incidents of personal property. But the definition in the Dominion "Land Titles Act" of 1894 of the word "grant" as meaning "any grant from the Crown of land *whether in fee or for years*" the definition of the word "owner" as meaning "any person or body corporate entitled to *any freehold or other estate or interest in land*," the provision of section 56 that

> the land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to (*a*) any subsisting reservations or exceptions contained in the original grant from the Crown,

and the provision of section 57 that

> Every certificate of title granted under this Act shall * * * be conclusive evidence * * * that the person named therein is entitled to the land included in the same for the estate or interest therein specified, subject to the exceptions and reservations mentioned in the preceding section,

afford striking and, I think, conclusive, proof that it was not intended by this legislation to affect any such radical change as would be involved in vesting in the grantees of Crown lands in the North-West Territories (as they then were) not merely the fee simple of the lands granted—"the strongest and highest estate that any subject can have"—but also the allodial rights of the Crown. While section 4 dispenses with words of limitation in transfers and provides that, if used, they shall have the like force and meaning as if used in connection with personal property, this provision does

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not apply to Crown grants and the effect of a transfer is declared to be to pass "all such right and title *as the transferror has*"—not the allodial rights in the land. While section 10 speaks of an "absolute estate," it so denominates an estate in fee simple, which may not be reduced by words of limitation to a limited fee or fee-tail. Far from indicating an intention to confer an allodial interest on grantees of the Crown these sections evince an intention that the greatest estate of a subject—that in fee simple— shall be the nature of the holding.

This statute was repealed as to Alberta by order-in-council of the 22nd July, 1906, authorized by statute 4 & 5 Edw. VII., chap. 18.

(4) and (5) Section 3 of the Act so repealed—reproduced in the Alberta "Land Titles Act"—is as follows:—

> Land in the Territories (Alberta) shall go to the personal representative of the deceased owner thereof in the same manner as personal estate now goes, and be dealt with and distributed as personal estate.

As originally introduced, in 1886 (49 Vict. ch. 26, sec. 5), the prototype of this provision read

> All lands in the Territories which by the common law are regarded as real estate shall be held to be chattels real and shall go to the executor or administrator of any person or persons dying, seised or possessed thereof as other personal estate now passes to the personal representative.

But this section was repealed in 1888 (51 Vict. ch. 20, sec. 3), and the provision then substituted read

> Land in the Territories shall go to the personal representative of the deceased owner thereof in the same manner as personal estate now goes.

No substantial change was made by the Act of 1894 (57 & 58 Vict., ch. 28, sec. 3, above quoted). The omission from these later enactments of the words "shall be held to be chattels real" is

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significant and shews that, at all events since 1888, whatever may have been the case under the Act of 1886, land is still land and it is only for purposes of descent and distribution that it is to be regarded as personalty. Otherwise it remains land and subject to all the incidents of land. On the death of an owner of land intestate and without heirs he leaves nothing to be dealt with as a subject of descent or distribution. On his death his estate in the land comes to an end and, *eo instanti*, the Crown, by virtue of the escheat, is seised of the land which had been his. There is nothing to pass to a personal representative.

The legislation relied upon is, no doubt, effective to convert into personalty, and to attach to it all the incidents of personalty, for purposes of succession and distribution, whatever estate or interest the deceased owner held in his real property. But it leaves untouched the allodial interest or "ultimate property" which remained resident in the Crown after the grant of the fee and by virtue of which, on the death of the owner intestate and without heirs, the fee having determined, the Crown was again seised of the land as it had been before the grant. Nothing passed to the personal representative of the owner. There was nothing upon which the provisions of section 3 could operate. The owner's interest simply ceased to exist. As put in *Attorney-General of Ontario* v. *Mercer*(1), at page 772,

> When there is no longer any tenant, the land returns by reason of tenure, to the lord by whom or by whose predecessors in title, the tenure was created * * * The tenant's estate (subject to any charges upon it which he may have created) has come to an end and the lord is in by his own right.

While it is no doubt competent to the legislature of the Province of Alberta, subject to the restrictions

(1) 8 App. Cas. 767.

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of section 21 of the "Alberta Act," to determine the tenure of land in that province and to amend the law of descent, it cannot deal with either of these matters so as to affect the rights by that section reserved to the Crown in right of the Dominion, including *inter alia* the right of escheat. In so far as it may purport to do so chapter 5 of the Alberta statutes of 1915 is *ultra vires*.

I would, for these reasons, dismiss this appeal with costs.

BRODEUR J (dissenting).—For the reasons given by Mr. Justice Idington, I am of opinion that this appeal should be allowed with costs throughout.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Hogg & Hogg.*

JAMES CARRUTHERS & CO. (PLAINTIFFS) .... } APPELLANTS;

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*May 22, 23.
*Oct. 24.

AND

ERNEST A. SCHMIDT (DEFENDANT) RESPONDENT.

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

Broker—Transactions of change—Sale of goods—Principal and agent—Action—Evidence—Parol testimony—Arts. 1206, 1233, 1235 *C.C.*

An action by a broker against his principal to recover commissions and expenses incurred in respect of sales and purchases of goods is not an action upon the contracts of sale or purchase, in which evidence in writing is required by clause four of article 1235 of the Civil Code, and proof may be made therein by oral testimony of the facts concerning the transactions as provided by article 1233 C. C. *Trenholme* v. *McLennan* (24 L. C. Jur. 305), overruled.

Judgment appealed from (Q.R. 24 K.B. 151), reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Montreal, by which the plaintiffs' action was dismissed with costs.

The plaintiffs, who were brokers and members of the Montreal Corn Exchange, were instructed by the defendant to purchase oats for future delivery and sale on his account in anticipation of a rise in the market. The plaintiffs carried out several transactions, according to alleged instructions, which resulted in a net loss, and brought the action to recover

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

(1) Q.R. 24 K.B. 151.

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the balance claimed to be due on settlements and for commission and outlay for freight and storage charges. The action was dismissed by the Superior Court on the ground that the plaintiffs had failed to adduce evidence of any memorandum in writing signed by the defendant, or by the customary brokers' bought-and-sold notes, shewing the actual purchase of the oats and their authority to make the purchases and sales on the defendant's account. This decision was affirmed by the judgment now appealed from.

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

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

A. W. Atwater K.C. and *Mailhiot* for the respondent.

THE CHIEF JUSTICE.—The only point for our decision in this case is whether the plaintiff, the present appellant, was entitled to give oral evidence as to the transactions which the respondent commissioned them to carry out on his behalf.

In a number of similar cases, including the case in the Privy Council of *Forget* v. *Baxter*(1), it has been pointed out that the onus is upon the plaintiff to prove, first, a mandate from the defendant to act for him in the several transactions which the plaintiff claims to have carried out on his behalf; and, secondly, the due execution of that mandate.

Articles 1233 and 1235 of the Civil Code, which are both in section III. of ch. 9, are, so far as is material, as follows:—

> 1233. Proof may be made by testimony—
> (1) Of all facts concerning commercial matters.
> (7) In cases in which there is a commencement of proof in writing.

(1) [1900] A.C. 467.

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In all other matters proof must be made by writing or by oath of the adverse party.

The whole, nevertheless, subject to the exceptions and limitations specially declared in this section and to the provisions contained in article 1690.

1235. In commercial matters * * * no action or exception can be maintained against any party or his respresentatives unless there is a writing signed by the former, in the following cases—

(4) Upon any contract for the sale of goods unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain.

As stated by the learned Chief Justice, delivering the judgment appealed from, it has been held by the courts of the Province of Quebec in similar cases that though the broker's authority may be proved by verbal testimony, yet article 1235 C.C. requires the purchase made thereunder to be proved by writing. I must with reluctance dissent from the latter of these propositions. The Chief Justice quotes the late Judge Cross saying in the case of *Trenholme* v. *McLennan*(1):

The plaintiff as a broker could by written contract, made out and evidenced by his own signature, bind two parties to a sale made by the one to the other through him, but when he attempts to bind one of the parties to himself, he requires, besides the verbal testimony as to his instructions, written evidence to establish the purchase, and this he cannot make for himself as against the party who instructed him to effect the purchase.

Article 1235 C.C. does not, however, say that there must be written evidence to establish the purchase; it says no action can be maintained against any party upon any contract for the sale of goods unless there is a writing signed by him. Now what writing can it be suggested the respondent could have given in a case like the present? No writing by him could be required for the purpose of the purchase which he had authorized the broker to make. Article 1235 C.C. is really only effective when the relations between the parties are those of seller and buyer and there is here no

(1) 24 L.C. Jur. 305.

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dispute between such; it is a question between principal and agent. Again I think it is necessary to distinguish between proving the purchase and proving the contract for sale; article 1235 C.C. is referring to executory not executed contracts such as are here in question.

I am assuming that the facts are as above stated and I desire to add that this judgment applies only in such cases. I say this because, though I have not gone at any length into the facts of the case, yet I see that in paragraph 22 of the amended declaration it is alleged that on the arrival of a quantity of oats at Montreal "the defendant failed to take delivery and to pay therefor." Any case in which the respondent is sued as a purchaser for failure to carry out his contract is governed by article 1235 C.C. and is not within this judgment.

Subject to this reservation I am of opinion that it was competent to the plaintiff appellant to give oral evidence under the provisions of article 1233 C.C. The appeal must be allowed and the action referred back for further hearing and decision.

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

IDINGTON J.—In an action like this by a broker for services rendered to a client in buying and selling grain for him I do not think the article 1235 C.C. must necessarily have any application.

The action is not within the express language of the article. It relates to executed or alleged executed contracts wherein the delivery not only of the part, but of the whole has taken place within the meaning of what such parties as these concerned herein attach to the word.

It is not suggested that there had been any failure of respondent to reap what he bargained for by reason of any default on the part of the appellant to procure the contracts or any of them in writing. I can conceive of a broker in failing to get for his client a written contract thereby leading him to make a loss. In such a case the question might come up under article 1235 C.C.

There seems nothing of that sort in the alleged transactions in question. They have all been fully executed or their existence denied.

There is nothing illegal in carrying on business by means of mere oral bargains. People may be foolish in not reducing their contract to writing but the contract once executed it matters not in the commercial world whether in fact reduced to writing or not.

I think the appeal must be allowed with costs.

ANGLIN J.—With very great respect I am of the opinion that there has been in this case a misconception of the purview and effect of article 1235 (4) C.C. which reads as follows:—

> 1235. In commercial matters in which the sum of money or value in question exceeds fifty dollars, no action or exception can be maintained against any party or his representatives unless there is a writing signed by the former, in the following cases:—
>
> 4. Upon any contract for the sale of goods, unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain.

It should be noted that although this provision deals with contracts for the sale of goods it is in the form of the fourth section of the English Statute of Frauds ("no action should be brought etc.") rather than in that of the old 17th section ("no contract shall be good"). The difference in effect between these two provisions is illustrated in the well-known case of *Leroux* v. *Brown*(1).

(1) 12 C.B. 801.

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An action such as this to recover an agent's commission and outlay on sales and purchases of goods is not, in my opinion, an action upon the contracts for the sales or purchases and therefore is not within clause 4 of article 1235 C.C. Moreover, while it might be a defence to such an action that the contracts made by the agent on behalf of his principal were unenforceable because not provable under article 1235 and that the agent had, therefore, not earned his commission, and was not entitled to re-imbursement of his outlay, no such question can arise in the case of executed contracts such as we are dealing with. Indeed, in an action upon the contract itself, where it has been executed, the statute will not afford a defence. *Green* v. *Saddington* (1); *Seaman* v. *Price*(2); Addison on Contracts (11 ed.), p. 26; 4 Amer. & Eng. Encycl., p. 982. I am unable to distinguish the decision of the Court of Queen's Bench in *Trenholme* v. *McLennan*(3), and I am, with great respect, of the opinion that it must be overruled.

The appeal should be allowed with costs.

BRODEUR J.—The appellants are brokers and members of the Montreal Corn Exchange and they claim from the respondent a sum of nearly $25,000 for the difference between the purchase and the sale price of oats made by them on behalf of the respondent.

The only question at issue before this court is the admissibility of parol evidence.

The trial judge decided that the transactions could not, on the authority of article 1235 of the Civil Code and of a judgment rendered by the Court of Queen's Bench in the case of *Trenholme* v. *McLennan*(3), be proved.

(1) 7 E. & B. 503. (2) 2 Bing. 437.
(3) 24 L.C. Jur. 305.

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That decision of the trial judge was confirmed by the Court of King's Bench, Justices Trenholme and Cross dissenting.

The appellant claims that the relations of the parties are those of principal and agent and not of vendor and purchaser, that the Statute of Frauds does not apply and that the question of admissibility of evidence is ruled by the provisions of article 1233 of the Civil Code.

There is no divergence of opinion between the parties as to the evidence of the contract of agency. They all admit that the plaintiff could prove by oral testimony the contract by which he was commissioned to buy and sell the goods in question. *Forget* v. *Baxter*(1), is authority for the proposition that the transactions by a broker in respect of sales and purchases of shares are

commercial matters within article 1233 of the Civil Code and might be established by parol evidence.

In the case of *Trenholme* v. *McLennan*(2), so much relied on by the respondent, the same proposition was also declared.

There is then no question as to the right of the plaintiff to prove by oral evidence his contract of agency.

But it is contended that if the transactions of the agent cover sales of goods, then a written contract or a memorandum as required by article 1235 (4) of the Civil Code, or the Statute of Frauds, is required.

I must say, in the first place, that the relations of the parties are not those of vendor and purchaser, but those of principal and agent.

It is not alleged in the action that the plaintiff sold goods to the defendant, but that the plaintiff in

(1) [1900] A.C. 467. (2) 24 L.C. Jur. 305.

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execution of his mandate bought and sold goods on behalf of the respondent. If the plaintiff can prove by witnesses that he was duly authorized or instructed by the defendant to purchase and sell oats, it seems to me that he has established all the facts which are necessary for the existence of their contractual relations. I do not see how it is possible to separate those relations.

The Statute of Frauds and the provisions of article 1235 (4) C.C. provide that in commercial matters no action can be maintained unless there is a writing signed by the defendant upon any *contract for the sale of goods*. It has reference to actions taken by the vendor against the purchaser, but it has no reference to instructions or mandate given by a person to purchase goods.

It is a well established rule of law that authority for an agent to sign a memorandum need not be given in writing. It may be given in any way in which an authority is conferred by law on an agent. It has been decided in England in the case of *Rochefoucald* v. *Boustead*(1), that an agent to whom land purchased on behalf of his principal has been conveyed will not be permitted to plead the statute against the principal for whom he is trustee and the latter may give parol evidence of the trust.

Applying that decision to the facts in this case, it shews that Schmidt could by parol evidence establish that those sales of goods were made on his behalf. If he can prove that himself by parol evidence, why should not the plaintiff have the same power?

I have given much consideration to the case of *Trenholme* v. *McLennan*(2), and especially to that part of the judgment where it is stated that

(1) [1897] 1 Ch. 196.
(2) 24 L.C. Jur. 305.

the plaintiff as a broker could by a written contract made out and evidenced by his own signature bind two parties to a sale made by the one to the other through him, but when he attempts to bind one of the parties to himself, he requires, besides the verbal testimony as to his instructions, written evidence to establish the purchase and this he cannot make for himself as against the parties who instructed him to effect the purchase.

What are the instructions which the broker received and which he has proved? It was to buy and sell goods for the principal. That was the contract alleged; that was a contract proved, and I do not see how those instructions can be disjoined as it has been done in that case of *Trenholme* v. *McLennan*(1).

I may add that this question has also come up before the courts in the United States and they have invariably decided with one exception that oral evidence could be made of the mandate alleged by the broker. *Holden* v. *Starks*(2); *Bibb* v. *Allen*(3); *Wilson* v. *Mason*(4); Amer. & Eng. Encycl. of Law (2 ed.), p. 984.

The fact that the contract entered into by the parties is not enforceable under the Statute of Frauds because not in writing does not affect the right of the broker to recover for his services.

I am of opinion that this appeal should be allowed with costs of this court and the court below and that the plaintiff should be permitted to adduce verbal evidence of the alleged mandate and of its execution.

Appeal allowed with costs.

Solicitors for the appellants: *Smith, Markey, Skinner, Pugsley & Hyde.*

Solicitors for the respondent: *Elliot, David & Mailhiot.*

(1) 24 L.C. Jur. 305.
(2) 159 Mass. 503.
(3) 149 U.S.R. 481.
(4) 158 Ill. 304.

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*Oct. 10.
*Oct. 18.

THE MONTARVILLE LAND COMPANY (DEFENDANTS) .... APPELLANTS;

AND

THE ECONOMIC REALTY, LIMITED (PLAINTIFF) .... RESPONDENT.

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

Appeal—Jurisdiction—Matter in controversy—"Supreme Court Act," s. 46 (b) and (c)—Action to remove cloud on title—Discharge of mortgage—Deferment of payment of accruing instalments—Title to land —Future rights.

The judgment appealed from maintained the plaintiff's action brought to obtain an order that it should not be obliged to pay certain deferred instalments of the price of land sold to it by the defendants with warranty against all hypothecs, save one for $2,000, until the discharge of certain other incumbrances alleged to be registered as affecting the said lands, and for costs of protest, etc., amounting to $33.90. On a motion to quash an appeal taken from this judgment to the Supreme Court of Canada,

Held, (Duff J. taking no part in the judgment), that, as there was no amount in controversy of the sum or value of $2,000, nor any matter in contoversy relating to the title to the lands or to matters wherein future rights thereto might be bound, the Supreme Court of Canada had no jurisdiction to entertain the appeal under the provisions of section 46, sub-sections *b* and *c* of the "Supreme Court Act," R.S.C., 1906, ch. 139. *Carrier* v. *Sirois* (36 Can. S.C.R. 221), applied.

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

The nature of the relief asked for by the plaintiff's action is stated in the head-note. The motion to

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

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quash the appeal was based on allegations that no money condemnation was asked for by the plaintiff's action except as to cost of a notarial protest, that neither the title to the land nor any future rights therein were in question, and that the entry shewn upon the certificate of the registrar of deeds relating to encumbrances on the land had no reference to a claim due either by the plaintiff or to the defendants, but the amount thereby secured appeared to be due to third persons who were not parties to the action and whose claim could not be affected thereby.

C. Dessaules K.C. supported the motion.
St. Germain K.C. *contra.*

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—This is a motion to quash an appeal from the Court of King's Bench, appeal side, Quebec, for want of jurisdiction.

The respondent company, appellant in the court below, bought from the company, now appellant, several lots of land with a clause in the deed of sale guaranteeing that they were free from certain incumbrances. The words are that the property is sold

franc et quitte de toutes hypothèques excepté celle de $2,000 mentionnée au dit acte.

The action is brought to have it declared that the purchaser, respondent, is not obliged to pay the instalment of its purchase price, now due, until another mortgage, which appears in the registrar's certificate, is discharged. The defendant, appellant, contends that this latter mortgage did not really affect the property, and on that point the controversy turned below. Our jurisdiction is dependent upon the amount of the demand or the nature of the action. Here there is no

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amount demanded and the matter in controversy does not come within section 46, sub-sections *b* or *c* of the "Supreme Court Act." The only question in dispute is as to the fulfilment of the vendor's obligation to deliver to the respondent a property free from a mortgage other than the one mentioned in the deed. *Vide Carrier* v. *Sirois*(1).

I am of opinion that the motion should be granted with costs.

DUFF J. was not present at the delivery of the judgment and took no part therein.

Appeal quashed with costs.

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(1) 36 Can. S.C.R. 221

SARAH ELIZABETH LEAMY AND OTHERS (SUPPLIANTS) .... } APPELLANTS;

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*May 17, 18.
*Nov. 7.

AND

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

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC... } INTERVENANT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Rivers and streams—Navigable waters—Floatability—Ownership of beds —Grant of Crown lands—Conveyance of bed of navigable waters— Title to land—Art. 400 C.C.

In the Province of Quebec, a river which, owing to natural obstructions, is capable only of floating loose timber (*flottables à bûches perdues*), in portions of its course may, at least from its mouth upwards until some such obstruction is reached be navigable and subject to the rule of law applicable to navigable waters. As the river in question for several miles from its mouth upwards to a point where its course is obstructed by rapids is in fact capable of being utilized for the purposes of navigation the bed of the stream for that distance forms part of the Crown domain. (Art. 400 C.C.)

Without express terms to that effect a Crown grant, made in 1806, of township lands in the territory now comprised in the Province of Quebec did not pass title to the grantee in the bed of navigable waters within the area described in the letters patent of grant. Idington J. dissented on the ground that the language of the letters patent in question was intended and was sufficiently explicit and comprehensive to convey to the grantee the bed of the navigable waters included within the limits of the description of the lands granted.

The judgment appealed from (15 Ex. C.R. 189), was affirmed, Idington J. dissenting.

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

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APPEAL from the judgment of the Exchequer Court of Canada(1), dismissing the suppliants' petition of right with costs.

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

The arguments on the appeal were heard on the 25th and 26th of May, 1915, and judgment was reserved. On the 17th of June, 1915, the Attorney-General for the Province of Quebec applied to the Supreme Court of Canada for leave to intervene in the appeal and to be heard as a party asserting a claim to the lands in question; permission was granted for the filing of the intervention and the appeal was subsequently re-heard on the issues therein raised. By the judgment now reported it was considered that, as the intervenant, in the factum filed on the intervention, had asked that the judgment of the Exchequer Court of Canada should be affirmed and the appeal dismissed it was unnecessary to determine, on this appeal, the respective rights in the lands of the Province of Quebec and of the Dominion of Canada. The appeal was dismissed with costs and it was ordered that there should be no costs allowed to any party on the intervention.

Aylen K.C. for the appellants cited *Maclaren* v. *Attorney-General for Quebec*(2); *McBean* v. *Carlisle*(3); *Hurdman* v. *Thompson*(4); *Attorney-General for Quebec* v. *Scott*(5), at page 615; *Watkinson* v. *McCoy*(6); *McPheters* v. *Moose River Log-Driving Co.*(7); *Perry* v.

(1) 15 Ex. C.R. 189.
(2) (1914) A.C. 258 at p. 264.
(3) 19 L.C. Jur. 276.
(4) Q.R. 4 Q.B. 409.
(5) 34 Can. S.C.R. 603.
(6) 63 Pac. Repr. 245.
(7) 5 Atl. Repr. 270.

Wilson(1); *Dixson* v. *Snetsinger*(2), at p. 243; *Graham* v. *The King*(3); and *Davidson* v. *The Queen*(4).

Chrysler K.C. for the respondent cited *Attorney-General for British Columbia* v. *Attorney-General for Canada*(5); *The Queen* v. *Moss*(6), at page 328; *Attorney-General for Quebec* v. *Scott*(7), at page 612; *Tanguay* v. *Canadian Electric Light Co.*(8); "B.N.A. Act, 1867," sec. 108, item 5, Sch. 3; and referred to "Documents relating to the Constitutional History of Canada, 1791-1818," published by the King's Printer for Canada, in 1914, page 13 and pages 61 *et seq.*

It was also argued that prescription had been acquired in virtue of long possession by the Crown.

Belcourt K.C. for the intervenant, cited *Lord Advocate* v. *Weymss*(9), at page 66, and *Gann* v. *Free Fishers of Whitstable*(10).

The bed of the Gatineau River, wherever navigable or floatable, is vested in the King in the right of the Province of Quebec, with the exception only of those portions thereof which, by virtue of the provisions of the "B.N.A. Act, 1867," may have become vested in the Dominion of Canada. We refer to the Quebec statute 6 Geo. V., ch. 17, inserting the following in the Revised Statutes of Quebec, 1909, after article 1524.—"1524 (*a*). Whatever may have been the system of Government in force, the authority which in the past has had the control and administration of public lands in the territory now forming the Province

(1) 7 Mass. 393.
(2) 23 U.C.C.P. 235.
(3) 8 Ex. C.R. 331.
(4) 6 Ex. C.R. 51.
(5) (1914) A.C. 153 at p. 169.
(6) 26 Can. S.C.R. 322.
(7) 34 Can. S.C.R. 603.
(8) 40 Can. S.C.R. 1.
(9) (1900) A.C. 48.
(10) 11 H.L. Cas. 192, at p. 206.

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of Quebec or any part thereof, has always had the power to alienate or lease, to such extent as was deemed advisable, the beds and banks of navigable rivers and lakes, the bed of the sea, the seashore and lands reclaimed from the sea, comprised within the said territory forming part of the public domain."

The intervenant submits that the evidence abundantly warrants the finding of the learned trial judge that that part of the Gatineau River which borders on lots 2 and 3 was at the date of the letters patent, and is now, navigable and floatable according to the law and jurisprudence on the question; and that the appellants have not established a title through Philemon Wright, assuming that the latter ever acquired any title thereto.

THE CHIEF JUSTICE.—This is a petition of right brought by the appellants to have it declared that they are the owners, and as such entitled to the possession of the bed of the River Gatineau within the boundary lines of lots 2 and 3 in the 5th range of the Township of Hull in the Province of Quebec.

The petition was dismissed by Mr. Justice Audette on two grounds (*a*) that the River Gatineau at the point in question is navigable and was so at the time the grant relied on by the appellants was made; (*b*) that the bed of the river was not included in the grant.

A river must surely be navigable if it is in fact navigated and I do not understand how it could be successfully contended that the River Gatineau is not, as it crosses the lots in question, "navigable and floatable." The appellants do not seriously dispute the finding of the trial judge to that effect. In their factum here they boldly take this position:—

Whether the Gatineau River, in the locality of the lots in question, is navigable or unnavigable, floatable or unfloatable,

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the ownership of the bed passed by the grant to their "auteur," Philemon Wright, and *McBean* v. *Carlisle* (1), is referred to. No one disputes or puts in question the point decided in that case. In Quebec a right of servitude in favour of the public undoubtedly exists for certain purposes over all streams, whether navigable or not. The question we have to decide, however, relates not to the use of the water, but to the ownership of the bed of the stream, and at once the distinction must be made between rivers which are navigable and those which are not. The beds of non-navigable and non-floatable streams are the property of the riparian owner *ad filum aquæ* (*Maclaren* v. *Attorney-General for Quebec*(2)), and pass with the grant of the *ripa*. On the other hand, from the very earliest days the courts of Quebec have held, and it is by the law of that province that this case must be decided, that the title to land which forms the bed of a navigable river can only be acquired by an express grant.

By French law the beds of all navigable rivers were deemed to be vested in the King as a public trust to subserve and protect the public right to use them as common highways for commerce. (Art. 400 C.C.) In France the King by virtue of his proprietary interests could grant the soil so that it should become private property, but his grant must be express (*In re Provincial Fisheries*(3), at page 527), and, in all cases, made subject to the paramount right of public use of the navigable waters which he could neither destroy nor abridge (Proudhon, "Traité du Domaine Public," Vol. 3, No. 734). As under the French law the beds of navigable streams were vested in the King of France

(1) 19 L.C. Jur. 276. (2) [1914] A.C. 258; 46 Can. S.C.R. 656
(3) 26 Can. S.C.R. 444.

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(*Fisheries Case,* 26 Can. S.C.R. 444), that title passed to the King of England by right of conquest. The laws of a conquered country remain in force unless and until they are altered and therefore the Crown now holds those lands upon the same trusts as before.

Since Confederation the title to beds of navigable rivers has been vested in the Crown in right of the province but the authority to legislate regarding the public right of navigation is, by the "British North America Act, 1867," assigned to the Dominion Parliament as coming within the subjects of trade and commerce and navigation which are among those enumerated in section 91 as within its exclusive authority.

In the United States courts it has been held that the power conferred upon the Federal Congress to regulate commerce extends not only to the control of the navigable waters of the country and the lands forming the beds thereof for the purposes of navigation, but also to authorizing the use of the beds of the streams for the purpose of erecting thereon piers, bridges and all other instrumentalities of commerce which, in the judgment of Congress, may be deemed necessary or convenient. The doctrine is very clearly stated in *Stockton* v. *Baltimore and New York Railroad Co.*(1).

It follows, therefore, that any legal title which might have become vested in a private individual must be subject to the same public trust and, therefore, subordinate to the rights of navigation and to the power of Parliament to control and use the soil in such navigable rivers, whenever the necessities of commerce and navigation demand. The right of Parliament to regulate trade and commerce and navigation

(1) 32 Fed. Rep. 9 at p. 11.

remains unaffected by the question as to whether the soil of the shore submerged is in the Crown in the right of the province or in the owner of the shore.

Mr. Justice Brodeur refers to the opinion of Sir L. H. Lafontaine in the "Seigniorial Case" to the effect that the grant by the Crown of the bed of a navigable river must be made in express terms. It is not to my knowledge that the opinion so expressed has ever been doubted.

The letters patent in this case make no reference to a river, and the diagram attached to the grant has nothing to indicate that the Crown or the grantee had any knowledge of the fact that the River Gatineau crossed the lots in question. In these circumstances, the petition of right must fail on the short ground that the River Gatineau, being a navigable stream at the locus in question, was not included in the grant which is silent with respect to it. The appeal should be dismissed with costs and there will be no costs on the intervention.

See Pothier and Troplong as to *défaut de contenance*.

DAVIES J.—The substantial questions raised upon this appeal were two: First, whether the appellants were entitled to a declaration as prayed that they were vested as proprietors with all those portions of the bed of the Gatineau River within the boundaries of lots 2 and 3 in the 5th range of the Township of Hull, Province of Quebec, as described in the Crown grant of 3rd January, 1806, whereby the Township of Hull was created.

For the purposes of this appeal, I assume the correctness of the findings of the trial judge that the suppliants had all the right, title and interest in the

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lots in question possessed by their original *auteur*, Philemon Wright, senior, under the said grant.

The second question, necessary to the determination of the first, was whether or not the Gatineau River was a navigable one from its mouth to Ironsides, just above which the first rapids and falls obstructing navigation begin? It is within this part of the river that the plaintiffs' claim is made.

In my judgment, the evidence shews conclusively that the river was a navigable one as far back as the memory of living witnesses went and was largely used as such by the great lumbering firm of Gilmour & Co. for about fifty or sixty years or more. The distance from its mouth to Ironsides is some four or five miles. The evidence places that fact of navigability beyond reasonable doubt.

Then comes the question—if that portion of the river in question, which embraces the locus in dispute, was navigable when the grant passed, did or could the grant operate to convey a title to the grantee in the river bed?

The boundaries of the Crown grant are general but no doubt cover and embrace this river bed and if such a grant could legally convey that part of the navigable four or five miles of the river to the grantee, as claimed, it no doubt did so.

Finding, as I do, however, the river from its mouth up to the rapids to have been a navigable one, I reach the conclusion that such navigable portion of it was not and could not be conveyed by the grant.

If the bed of such portion of the river as was navigable was intended to be conveyed express words to that effect would be necessary to be used, assuming the bed of a navigable river could be conveyed at all by the Crown without legislative authority.

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In the case of the grant before us no such express words are used nor is the river referred to at all in the grant or shewn at all upon the plan to which the description refers. It is conceded that no legislative authority for the grant existed. The contention of the suppliant is, however, that without express words and in the absence of legislative authority the Crown could by such general words as are used in the grant pass the title in the bed of a navigable river flowing through the lands granted.

It is the civil law and not the common law which governs in this case and the test of navigability is not a tidal but a practical one, namely—as a fact, is the river at the locus in dispute a navigable one? And, as I have held, its navigability for all practical purposes is unquestionable for four or five miles up from its mouth.

I cannot but think that this action was brought by the suppliants on a misunderstanding of the decision of the Privy Council in the case of *Maclaren* v. *The Attorney-General of Quebec*(1).

That case merely decided (1) that the general descriptions of the townships there in question, being bounded by the river, were not varied by the references to the posts and stone boundaries in the detailed descriptions (2) that the River Gatineau being one down which only loose logs could be floated was not a part of the Crown domain within article 400 of the Civil Code and that the appellant's lands on either side of the river extended *ad medium filum aquæ*.

Mr. Aylen attempted to apply the second finding of the Judicial Committee not only to the locus there in dispute but to the entire length of the river including

(1) [1914] A.C. 258.

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the navigable part of it below Ironsides which embraces the locus in dispute in this appeal.

The river beyond Ironsides, in its upper reaches, may not be navigable but one down which loose logs alone could be floated but, in my opinion, that fact and the legal consequences which flow from it cannot affect the four or five miles from its mouth to Ironsides the evidence with respect to which shewed conclusively that it was navigable for loaded barges, steamers and other kinds of river craft and was, as a fact, while the Gilmour lumbering company carried on their operations for a period covering fifty or sixty years, so navigated.

That portion of the river between its mouth and Ironsides is crossed by two bridges—one is a drawbridge to pass vessels through and the other a bridge of the Canadian Pacific Railway Co. 80 feet high and under which vessels passed. The booms and river improvements, which consist of piers, 1 to 12, running up the river from its west to its east side in a slanting direction, passed to the Dominion Government under section 108 of the "British North America Act, 1867."

In the case of the *Attorney-General of Quebec* v. *Fraser*(1), this court, of which I was a member, held that the River Moisie, in the Province of Quebec, for four of five miles up from its mouth till it reached the "falls," was a navigable river and, for that reason, a grant of lands bounded by the banks of that river did not convey to the grantee the bed of the river *ad medium filum aquæ*. In a summary of our holdings in that case formulated at the end of the reasons for the judgment of the court, delivered by Girouard, J., we say:—

(1) 37 Can. S.C.R. 577.

That the legal effect of the language of the patent with respect to the bed of the river, and the fishing rights therein, depends upon the determination of the question whether the Moisie at and in the four or five of its miles covered by the patent is navigable or floatable within the meaning of the law of Quebec, and that, adopting the test of navigability laid down by the Privy Council and hereinbefore quoted, we concur with the findings of the trial judge, and which findings are not questioned in the judgment of the court of appeal, that such river at such locality and from thence to its mouth, is so navigable and floatable.

That judgment was subsequently appealed to the Judicial Committee, *sub nomine Wyatt* v. *Attorney-General of Quebec*(1).

In their judgment, which affirmed the decision of this court, their Lordships approved of and incorporated in their reasons the summary of the judgment of this court including the part above quoted. The facts with respect to the navigability of the rivers Moisie and Gatineau a few miles up from their mouths and their non-navigability beyond that for nearly 200 miles are very similar and, in my opinion, the judgment of the Privy Council in *Wyatt* v. *Attorney-General of Quebec*(1) is very much in point on the disputed question in this case if it is not conclusive.

The result of that is to hold that the navigability of some miles of a river from its mouth, which is found and held, and the legal consequences which flow from that finding cannot be affected by the fact that, higher up, the river becomes, by reason of falls and rapids, unnavigable and capable only of carrying floating logs.

In the reasons for the judgment of their Lordships of the Privy Council in the *Maclaren Case*(2) delivered by Lord Moulton, his Lordship was most careful to define exactly what was being decided. He says, at page 274 of that case:—

(1) (1911) A.C. 489. (2) [1914] A.C. 258.

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But this is not all. The rights of the public in the River Gatineau are not in any way put in issue in this case. The parties to this appeal are substantially at one on the question of the private ownership of the bed of the River Gatineau. The only difference between them is as to which of two private owners possesses it. The appellants contend that the portion of the bed of the river which is in question passed to their predecessors in title, by the grants to Caleb Brooks in 1860 and 1865, and that to William Brooks in 1891. The respondent contends that it passed to the defendants under the grant to them in 1899. Neither party, therefore, sets up a title in the public. So far as the River Gatineau is concerned the decision of this case will do no more than decide whether or not the language of certain existing grants was sufficient to pass particular portions of that bed, or whether, after such grants were made, they still remained in the hands of the Crown so that it had power to grant them by a later grant.

Now it is attempted to apply some general observations made as to the River Gatineau being a navigable river or not to the entire river, including the locus near its mouth.

It does not seem to me that there was any intention on the part of the Judicial Committee to lay down any such rule as that contended for or to overrule or in any way call in question the previous decision of their Lordships with respect to the Moisie River being navigable for four or five miles from its mouth while above that, for nearly 180 miles, navigation was stopped by the falls and rapids of the river.

Lord Moulton, after saying that speaking generally no substantial help is obtained by the decided cases in Quebec as to navigable and floatable rivers until the appointment of the Seigniorial Commissioners under the Act of 1854 to settle the value of the Seigniorial rights which were then about to be abolished, says that the decisions of those Commissioners were

of the highest authority as to the law then prevailing in Lower Canada

to which an almost authoritative sanction has been given by statute. He further says:—

Turning to these seigniorial decisions and the judgments of the individual judges which accompany them, one cannot find any specific

reference to the status of the beds of rivers which were only "*flottables à bûches perdues.*" But, on the other hand, one finds clear statements that the seigniors became by their grant proprietors of the non-navigable rivers which passed through the fief subject to legal servitudes and to the *ad medium filum* rule.

His Lordship held that these decisions and the subsequent case of *Boswell* v. *Denis*(1),

justified their Lordships in regarding the answers to the seigniorial questions as meaning that rivers were not floatable in the legal sense of that term if they were only so *à bûches perdues,*

and that their Lordships approved of the decision of this court in *Tanguay* v. *Canadian Electric Light Co.*(2), where the precise point was so decided.

For the purposes of this case I conclude that the decisions on the seigniorial questions referred to by Lord Moulton with commendation and approval decided the law in Quebec to be that grants from the Crown did not without express words in them pass the beds of navigable rivers to grantees. In such a case as the grant before us purporting to convey certain lots of the Township of Hull through which the River Gatineau flowed and in which grant no reference at all was made to the river, the bed of the river for the four or five miles from its mouth where the river was navigable did not in my judgment pass to the grantee.

A third question was raised whether the possession of the Crown for so long a period as that proved, evidenced by the construction and maintenance of the twelve blocks or piers built upon the bed of the river and connected together by logs or booms, did not bar the plaintiffs' claim. In my opinion it did.

Re-stated shortly, my opinion is that a river such as the Gatineau, nearly 180 miles in length, may be in fact and in law navigable for miles from its mouth and

(1) 10 L.C.R. 294.
(2) 40 Can. S.C.R. 1.

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until the falls or rapids are reached which prevent further navigation while it may not be navigable above those obstructions.

That in the case of *Attorney-General of Quebec* v. *Fraser*(1) the point was so decided, and on appeal to the Privy Council was affirmed, and that by virtue of the civil law of Quebec in order to pass the bed of a navigable river from the Crown to the grantee express words and statutory authority must be shewn.

Lastly, the plaintiffs' claim in this case is barred by the Crown's possession of the bed of the river as proved by the evidence.

The appeal, therefore, should be dismissed with costs but no costs on the intervention.

IDINGTON J. (dissenting).—The appellants by petition of right sought to have it declared that under and by virtue of a grant on 3rd January, 1806, from the Crown to one Philemon Wright, of lots 2 and 3 in the 5th range of the Township of Hull, in what is now the Province of Quebec, he acquired the bed of the Gatineau River so far as running through the said lots as part of said grant, and that they by a series of transfers by way of conveyance, devise and inheritance, have acquired same. They claimed that respondent had taken and withheld same, or parts thereof, by means of structures erected in the river and booms so connected therewith for the purpose of retaining in store, temporarily or for long periods, logs, rafts and other material; and by the operation of the various devices in question has deprived them of sand and gravel of great value, and otherwise of the profits derivable from the ownership of said property.

(1) 37 Can. S.C.R. 577.

The respondent admitted the letters patent in question issued on said date, but denied apparently everything else and put appellants to the proof and further alleged that the Gatineau River where it flows through said two lots is and has always been a public navigable river and that the soil and bed of the said river is the property of respondent and not of appellant.

The learned trial judge suggested that the title to relief should be first tried and if any legal damages suffered, then a reference should be directed to determine the measure thereof.

He found the appellants had in fact acquired whatever title the original grantee had in said lots but in law he held that the grant in question did not pass any title to the bed of the stream.

The correctness of this latter holding must turn first upon the power of the Crown to make the grant and next upon whether in law the terms used therein are sufficiently clear to carry in them the intention to convey the bed of the stream free from any public right such as of navigation.

The power of the Crown so to grant must turn upon the nature of its title to such waste domains which it became seized of by statute or otherwise as result of the cession of 1759, and be subject to such restrictions, if any, as existed at the time in question.

I should feel reluctant to cast a possible doubt upon titles dependent upon the grants of the Crown by holding that the prerogative had been so limited in the scope of its authority by reason of what French law or custom may be found to have imposed upon the prerogative of the French Crown.

In so far as anything in question herein may depend upon the royal prerogative, the measure thereof I

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take it must be that recognized by English law as determining the same and, in the language of Lord Watson in the case of *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1), at page 441,

the prerogative of the Queen, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's colonial possessions as in Great Britain.

I may in adopting this opinion be permitted to add that I incline to think there are cases in which the prerogative may extend further in some colonies than it now may in England.

In some colonies the limitations imposed by statute, applicable to England or Great Britain only, may not be suitable to local colonial conditions even if English law so far as suitable thereto may have been introduced.

In measuring the rights acquired in Quebec before the cession from the French Crown, article 400 of the Code may be of value so far as respects the law of that earlier period.

In such cases whatever impliedly failed by French law to pass to the grantee must be presumed to have been preserved to the Crown and to have passed to the English Crown. In that sense the opinion of the learned judges of the Seigniorial Court must be always held of great value relative thereto.

What, however, we now have to deal with is of an entirely different nature. It arises out of the grant by the English Crown of part of the waste lands of the Crown, in Quebec, in 1806—sixty years before the Civil Code was enacted.

The result may or may not differ from a fair consideration of what might have been the effect of a

(1) [1892] A.C. 437.

similar grant if made by the French Crown before the cession. It conduces, however, to a clear conception of what we have to deal with herein to bear in mind that it is English and not French law which we have to consider and that article 400 C.C., so much relied upon, cannot help us herein.

To prevent misapprehension it may be observed that from the time article 400 C.C. came into force, in 1866, as part of the Civil Code, the Crown having assented thereto may be possibly bound thereby as to subsequent grants unless so far as expressly or impliedly modified by later legislation. I express no opinion upon that. All I am concerned with just now is to eliminate what to my mind is obvious error leading to confusion on a subject where there is so much apt to confuse, even when we have eliminated all that we possibly can which tends to mislead. And I may here observe that in the numerous cases I have referred to in the course of this inquiry, the only formally expressed reason I have found advanced for applying the test of French law in this regard is that assigned by the late Mr. Justice Gwynne in the case of *Dixson* v. *Snetsinger*(1), at page 242, when he quotes and relied upon 14 Geo. III. whereby it was enacted

> that in all matters of controversy relative to property and civil rights resort shall be had to the laws of Canada as the rule for the decision of the same.

I fail to see how that provision for the decision of rights in controversy between subject and subject relative to questions touching their property and civil rights can touch or measure the prerogative rights of the Crown relative to the Crown domain.

(1) 23 U.C.C.P. 235.

It is elementary that unless the Crown is reached by express words or necessary implication in any statute its rights or prerogatives are not affected thereby.

There is no such expression in the statute in question. Indeed there is much in the statute forbidding such implication, to say nothing of section 9 which provides that section 8 which confers said right shall not be extended to any lands that had been granted or should thereafter be granted by His Majesty to be held in free and common soccage.

I am not concerned with the outcome thereof. It might well be that where lands were granted and any dispute arose relative to them between subjects of the Crown their rights might be determined by French or other law, yet the rights of the Crown to deal with that ungranted would not be affected by any such rule.

I do not quarrel with the result of the decision in *Dixson* v. *Snetsinger*(1), which seems to have been rightly decided.

The rebuttable presumption of law which gives the riparian grantee of lands *ad filum aquæ* as his boundary might well be held in reason and common sense rebutted when such a claim is confronted by the facts involved when attempted to be applied to such a river as the St. Lawrence.

Fortunately we need not pursue that inquiry. The exigencies of this case are not such as to call therefor.

It is the range of possible activity of the English Crown in law over the waste lands thereof in an English colony which we have to deal with

(1) 23 U.C.C.P. 235.

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and whether or not the limits thereof are to be taken from what we find in relation thereto governing its action in England in regard to inland rivers, does not seem to me to make any practical difference for the purposes of this case.

The Gatineau River is far from tidal waters. The limitations upon the powers of the Crown in regard to tidal waters may therefore at once be eliminated from our consideration.

I think the law upon the subject may be accepted as expressed in Coulson & Forbes on the Law of Waters, at page 515 (3rd ed.), as follows:—

> The public right of navigation may exist in non-tidal as well as in tidal waters; and where it does so exist, the principles of law which have been stated with regard to tidal waters will equally apply.
>
> But in the case of non-tidal rivers, the right of passage does not exist as a public franchise paramount to all rights of property in the bed, but can only be acquired by prescription, founded on a presumed grant from the owners of the soil over which the water passes. It would not, therefore, appear to extend *primâ facie* to a right of passage over the whole of the navigable channel, as in the case of tidal rivers, but to be strictly limited to the extent of the right granted or user proved.

I assume that the law is thus correctly stated and hence a grant of the soil as well as right to fish might have been made by the Crown if possessed thereof in an inland river though navigable. Such I take it are the implications in the foregoing statement just quoted.

The doctrine laid down in the cases of *Malcomson* v. *O'Dea*(1), and *Gann* v. *The Free Fishers of Whitstable*(2), and many other cases seem to indicate that the Crown before Magna Charta had the power even in the case of tidal navigable waters to make a grant of the soil, but since the development of what is contained therein rather than what is expressed, the

(1) 10 H.L. Cas. 591. (2) 11 H.L. Cas. 192.

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Crown cannot now in England make such a grant of soil in such river as will exclude the public or create a several fishery.

This suggests the inquiry of whether or not the like limitations bind the Crown in the colonies. If the prerogative of the Crown in such cases is to be measured by that existent anterior to Magna Charta, assuredly there cloud be no doubt of the power to make a grant of the soil in any tidal navigable river and thereby exclude the public and hence much more so relative to inland navigable rivers or other waters.

It may well be observed that the historical side of the question as exemplified in the grants made in the early history of the English colonies in America may warrant us in saying that much wider powers than might be tolerated in England, if conceivable of exercise there, have been presumably duly exercised in colonies.

Though this case has been argued twice I have been unable to tempt counsel to help us in relation to the line of inquiry I thus suggest.

I presume counsel in so refraining have been well advised for the two-fold reasons, first that royal prerogative in these later and degenerate days, cannot be imagined to have possessed, even a long time ago, such powers (so repugnant to modern thought) as to render the resting of a claim thereon advisable; and next, that in any case it is the sand and gravel which would go with a rightful grant of the soil that appellants claim and possibly they attach little importance to the right thereto being subject to the public's reasonable rights of navigation. I therefore express no definite opinion on that aspect of the case.

The Crown certainly owned this soil in question and this river a hundred and ten years ago, and could

within the law as laid down in the cases of *Murphy* v. *Ryan*(1), followed by *Pearce* v. *Scotcher*(2); *Tilbury* v. *Silva* (3), without any great stretch of its prerogative grant both soil and river and let the public find its own way of reclaiming any uses thereon or thereof as they best might.

The case of *Hurdman* v. *Thompson*(4), and other like cases also support the appellants' contention relative to the power of the Crown to convey the soil in the bed of a navigable river. As they do not bind us I have tried to test the question by the application of general principles which should prevail.

The process adopted for disposing of this part of the wilderness to induce settlement thereof is outlined in the recitals in the grant. And in the instructions to Lord Dorchester, as Governor-General in 1791, some fifteen years before the grant in question both the learned trial judge and counsel arguing here seem to find the only guide to the meaning of said recitals.

I should much have preferred to have seen the instructions to Bouchette, the Surveyor-General, and the reports of the surveyors to him, accompanied as they doubtless were with their field notes, and default those illuminating records should have been glad to have had some reasonable explanation for their non-production.

Had such and the like information relative to the instructions to the Governor-General and Lieutenant-Governor, for the time being, been forthcoming or accounted for, we could probably approach the use of the fifteen-year old instructions to Lord Dorchester and use same with more confidence, than we can in the

(1) Ir. Rep. 2 C. L. 143.
(2) 9 Q.B.D. 162.
(3) 45 Ch. D. 98.
(4) Q.R. 4 Q.B. 409.

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absence thereof, that the inferences to be drawn therefrom are resting upon a sure foundation.

With such doubt and hesitation as must exist under such circumstances I assume that the instruction to Lord Dorchester and the terms of his commission give us at least a fair indication of the policy of the advisors of the Crown at that time and in all probability it continued for some years unchanged especially as the appointment of Lord Dorchester was coeval with the new departure in the Government of Canada.

The commission to Lord Dorchester contained direct authority for making grants of such kind as in question herein in the following terms:—

> And we do likewise give and grant to you full power and authority with the advice of our Executive Councils for the affairs of our said Provinces of Upper Canada and Lower Canada to grant lands within the said provinces respectively which said grants are to pass and be sealed with our Seal of such Province and being entered upon record by such officer or officers as shall be appointed thereunto shall be good and effectual in law against us Our Heirs and Successors: Provided nevertheless that no grants or leases of any of the trading ports in our said provinces shall under colour of this authority be made to any person or persons whatsoever until our pleasure therein shall be signified to you.

This was accompanied by instructions relative to the execution of this power as follows:—

> It is therefore Our Will and Pleasure, that all and every person and persons, who shall apply for any grant or grants of land, shall previous to their obtaining the same, make it appear that they are in a condition to cultivate and improve the same, and in case you shall, upon a consideration of the circumstances of the person or persons applying for such grants, think it advisable to pass the same, you are in such case to cause a warrant to be drawn up directed to the Surveyor-General or other officers empowering him or them to make a faithful and exact survey of the lands so petitioned for, and to return the said warrant within six months at farthest from the date thereof, with a plot or description of the lands so surveyed thereunto annexed, and when the warrant shall be so returned by the said surveyor, or other proper officer, the grant shall be made out in due form, and the terms and conditions required by these Our Instructions be particularly and expressly mentioned therein—and it is Our Will and Pleasure that the

said grants shall be registered within six months from the date thereof in the Registrar's office, and a docket thereof be also entered in Our Auditor's Office, copies of all of which entries shall be returned regularly by the proper officer to Our Commissioners of Our Treasury.

32. And for the further encouragement of Our Subjects, It is Our Will and Pleasure that the lands to be granted by you as aforesaid, shall be laid out in townships, and that each inland township shall, as nearly as Circumstances shall admit, consist of ten miles square; and such as shall be situated upon a navigable river or water shall have a front of nine miles, and be twelve miles in depth, and shall be subdivided in such manner as may be found most advisable for the accommodation of the settlers, and for making the several reservations for public uses and particularly for the support of the protestant clergy agreeably to the above recited Act passed in the present Year of Our Reign.

* * * * *

That no farm lot shall be granted to any one person being master or mistress of a family in any township so to be laid out, which shall contain more than 200 Acres.

It is our Will and Pleasure, and you are hereby allowed or permitted to grant unto every such person or persons such further quantity of land as they may desire, not exceeding one thousand acres over and above what may have heretofore been granted to them, and in all grants of land to be made by you as aforesaid, you are to take care that due regard be had to the quality and comparative value of the different parts of land comprised within any township, so that each grantee may have as nearly as may be a proportionable quantity of lands of such different quality and comparative value, as likewise that the breadth of each tract of land to be hereafter granted be one-third of the length of such tract, and that the length of such tract do not extend along the banks of any river, but into the main land, that thereby the said grantees may have each a convenient share of what accommodation the said river may afford for navigation or otherwise.

And illustrative of the spirit in which these instructions were conceived we find item 61 thereof deals with the Bay of Chaleurs, as follows:—

61. Whereas it will be for the general benefit of our subjects carrying on the fishery in the Bay of Chaleurs in Our Province of Lower Canada, that such part of the beach and shore of the said bay as is ungranted, should be reserved to Us, Our Heirs, and Successors, it is therefore Our Will and Pleasure that you do not in future direct any survey to be made or grant to be passed for any part of the ungranted beach or shore of the said Bay of Chaleurs, except such parts thereof as by Our Orders in Council dated the 29th of June and 21st of July, 1786, are directed to be granted to John Shoolbred of London, merchant, and to Mess'rs. Robin, Pipon and Company of the Island of Jersey, mer-

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chants, but that the same be reserved to Us, Our Heirs and Successors, together with a sufficient quantity of wood land adjoining thereto, necessary for the purpose of carrying on the fishery.

It certainly never was supposed than that the parts of unexplored and unknown rivers or margins of the sea should be put beyond the power of the local executive to grant same when deemed advisable.

Let is now apply the terms of the said commission and instructions to the dealing with the lands in question.

The survey made the lots in question run somewhat obliquely across the Gatineau River. So much so does this appear that whilst the instructions are followed literally by making the lots in the survey run at right angles to the Ottawa River, known to be navigable, no such attempt was made in that regard relative to the lands through which the Gatineau River ran.

What is the correct inference to be drawn from such a mode of treatment thereof? Is it not as plain as if we saw the surveyors doing the work that they, no doubt well instructed on the point, had arrived at the conclusion that the Gatineau River, as they found it, was not a navigable river and hence could not be treated as such.

Moreover, we must recall to mind what the conditions were relative to navigation a hundred and ten years ago when the powers of steam were unknown and nothing but the uses of the oar, or the pole, or the wind were available to navigate any river. When we see tugs operated by the use of steam or gasoline hauling vast loads of timber, or anything else floatable, we are apt to forget that this was not always so; and jump to the conclusion that streams which thereby can be made available for navigation and might now

make valuable navigable waters, could not, so long ago, be looked upon, or held to be, absolutely worthless for any such purpose; as they in fact were according to the means of navigation then known.

Again we must realize that the condition of the Gatineau at its mouth and for some miles back therefrom over the plain through which it runs may have been entirely different when the Township of Hull was surveyed, from what it seems now, or may have seemed sixty years ago, when steps were taken to improve and render it navigable, for even the limited navigable uses it has been put to.

We must, so far as we can, with the very limited information given us, try to realize what those engaged in the survey found confronting them; and I think we must attribute to them at least an honest purpose to discharge their duty.

That discharge of duty we find portrayed in the plans before us which assuredly indicate an intention to measure out in rectangular lots of the dimensions indicated in the instructions that space in the wilderness occupied by either land or water or both, regardless of the possibilities of the developments of the waters for purposes of navigation.

To quote the language of the Judicial Committee in the recent case of *Maclaren* v. *The Attorney-General of Quebec*(1), at page 275, when dealing with this river and having to consider the title as to the bed thereof at a point where the townships and land on either side of the river had been bounded by iron posts placed in the bank thereof; the judgment stated:—

The plots in those townships (meaning the Townships of Hull and Wakefield) are rectangular, so that in the case of river lots the bed of

(1) (1914) A.C. 258.

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the river is included within the metes and bounds of the lots in question without any appeal to the doctrine of *ad medium filum aquæ.*

That is not a decision of the court on the point involved herein but it is of great value as indicating how this survey and these plans thereof as presented to the minds of their Lordships led them to view the matter and conclude what was the nature thereof.

It is, I submit, reasonable to presume that the Governor-General of the time, or his Lieutenant-Governor did not discard their instructions and that the Surveyor-General for the province properly instructed his deputy surveyors and duly received reports from them of their work duly accompanied by their field notes, and duly considered same; and acted properly in adopting the survey and directing the patents to issue upon which appellants now rely.

It requires more assurance than I possess to overrule their judgment reached upon a knowledge of the facts no one can now ever possess, and condemn their conduct of the business they had in hand.

With great respect I submit the language of the patent read in light of the plans and instructions can convey no other meaning than the plain reading thereof.

There is nothing that can be found in the history of the prerogative of the Crown which would render it either necessary or proper to read into such a language a condition relative to future possible uses of the waters in question for purposes of navigation.

We might almost as well try to read into the patents of those holding grants of land from the Crown a reservation in favour of railways to be constructed by the Crown because we now find such might have been a prudent exercise of the power of the Crown in making such a grant.

Although we are far from having presented to us all that might have been so, relative to the condition of the Gatineau River before it was touched by the improving hands of those acting for the respondent, there is enough presented in the evidence to suggest that it may have shifted more than once its banks at the places in question long before any such improvements were made.

The accumulation of banks of sand and gravel which are in question and all that is implied therein ought to make one pause before positively reaching any conclusion in favour of navigability of the parts in question a hundred and ten years ago.

We have in truth nothing to guide us accurately unless we adopt the conclusion reached by those concerned in the survey and the outcome of the labour as exemplified in the patent and plans descriptive of the lots.

We do find those called to testify as to the navigability of the river telling us as follows: Noonan says:—

Q.—Down to 18 years ago, or say in later days, we will call it, where was the channel? A.—The place commenced to fill up.

Q.—On the west shore? A.—On the west shore, and then we had to let them through on the other side. We let them through on the east side when the water was high; and when the water went down we let them through in the middle of the boom.

Q.—At high water, the place for passing boats through is where you describe between piers 9 and 10? A.—Yes.

Q.—If the water was low you used to let them through in the middle of the boom? A.—Yes, at the third pier.

Q.—How long ago was it you let steamers through at the third pier? A.—A long time.

Q.—In more recent years all have gone through at the trip? A.—They got the dredge at the trip to make the channel deeper.

Q.—When was that dredging done? A.—In 1874. They dredged twice.

Q. Was the last time in 1874? A.—I can't say.

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Fenton says:—

Q.—The three inch planks would be rafted, and where would you raft to? A.—We rafted it.

Q.—At the yard at Ironsides—what sort of raft? A.—The cribs were 24 feet wide, and 72 feet long, and 12 tiers when the water was at its proper pitch. There were 12 tiers in each crib. The crib was 72 by 24 of 12 tiers of three inch planks.

HIS LORDSHIP:—What would that draw? A.—I should say it would draw about 24 inches or a little more perhaps.

And again:—

Q.—Do you remember if the river was dredged at any time? A.—Yes.

Q.—When was it first dredged? A.—I can't say. It was dredged while I still was at Ironsides.

He was employed at Gilmour's Mills from 1869 to 1890; and again:—

Q.—What about the sandbars, were they there in your time? A.—There were sandbars there.

Q.—But you can't say how they compared with those to-day? A.—No.

Q.—You don't know the size of them? A.—No.

Scott, an engineer of respondent, in 1889, says:—

Q.—It shews Leamy's Lake? A.—Yes.

Q.—It shews the outlet of the Leamy Lake and the old canal and the new canal? A.—Yes.

Q.—Are the numbers on this plan for the piers? A.—Yes.

And again says:—

Q.—And the boom is attached to the east bank of the Gatineau River, about three-quarters of a mile north of the C.P.R. Bridge? A.—About that. The boom extends from the north of the new canal on the west side to about a quarter of a mile above the C.P.R. bridge on the east side.

The respondent, interested only in seeing justice done, should have been able to follow these hints, so as to enlighten us why and when such conditions existed and especially how the two feet of navigable water was obtained and whether or not it was the result of improvements to navigation? Or was the entrance only a few inches in depth before these changes?

It should be held to be impossible by such evidence, unless clearly demonstrating that the improvements had nothing to do with producing even that degree of navigability, to establish that the Crown had originally been improvident in its grant and thereby escape the consequences thereof.

The reservations of the minerals and of the right to use the waters on the lands in question for operating mines is indicative of what was thought of the waters at the time of the grant. No doubt that was a usual provision in every like grant. Yet it brought always home, to the minds of those acting, the nature of the waters referred to in each grant.

I conclude from all the foregoing considerations not only that the grant of the lands in question was intended and properly intended to convey all that the Crown could grant by a conveyance of lots 2 and 3 in range 5 as it purports to, and that is all proprietory interests possible therein. Hence the respondent had no right without expropriation to interfere with the enjoyment of anything thereby presumably granted, any more than with the rights of grantees of low and marshy spots of land through which in the interests of navigation a canal might be projected and constructed.

In any event I am unable to understand in light of the authorities I have referred to, how it can be contended that the Crown had not by so plain a description comprehending the lands covered by the waters of the Gatineau as well as everything else within the assigned limits conveyed the soil over which the river runs even if subject to the right of the public for purposes of navigation.

The legislation of the last session of the Quebec Legislature would seem, if applicable to a pending suit, to have put an end to controversy on this head,

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but, holding the views I have expressed, I prefer resting thereon to seeking refuge in this legislation which may not have been intended to affect the present litigants.

Then the assertion of such public right does not require or justify the uses of the river for purposes of storage of lumber or encumbering the soil with such timber as stranded there when the waters have subsided.

Whether the soil under the piers erected by the respondent has by reason of such possession of the soil whereon they rest become by prescription that of respondent and that respondent is entitled to maintain that title thereto is by no means easy of a satisfactory solution.

The uses to which the piers were put from time to time could not establish at law any prescriptive title to maintain such an easement or servitude as needed to maintain the right to so use and enjoy them.

And with the failure to assert such a right of user I think must fall the possible claims to the soil on which the piers rest.

I see no good ground for questioning the title of appellants found as fact by the learned trial judge.

The appellants are entitled to the declarations prayed for and the other relief prayed for save in so far as the measure of the damages to determine which there must, if the parties cannot agree as to same, be a reference to find what may be due within the times not answered by the plea of prescription relative thereto so far as same be found on the facts applicable.

The appeal should therefore be allowed with costs throughout.

ANGLIN J.—Whatever may be their position in other provinces of Canada (see *Keewatin Power Co.*

v. *Town of Kenora*(1),) in the Province of Quebec the beds of non-tidal rivers navigable or floatable in fact form part of the public domain (Art. 400 C.C.; *Attorney-General of Quebec* v. *Fraser*(2), at pages 593, 599), and do not pass to the grantee of lands bordering upon them, at all events unless expressly included in the grant in terms specific and unmistakable (Seigniorial Questions, Vol. A., pp. 68a, 130a, 374a; Vol. B., 50 (*c*); *Maclaren* v. *Attorney-General for Quebec*(3), at pages 273-8. As to the effect of decisions of the Seigniorial Court and their applicability to other than seigniorial lands, see the "Seigniorial Act," 18 Vict. ch. 3, sec. 16, and *Tanguay* v. *Canadian Electric Light Co.*(4), at pages 12-13, 19; *Maclaren* v. *Attorney-General of Quebec*(3), at pages 280-1.) Although non-floatable in some of its upper reaches and indeed throughout the greater part of its length (*Maclaren* v. *Attorney-General for Quebec*(3), at pages 278-283), the Gatineau is admittedly navigable for several miles from the point at which it debouches into the River Ottawa. Notwithstanding that its general character is that of non-navigability, and however its navigable reaches above the first obstruction to navigation should be regarded (see *Hurdman* v. *Thompson* (5), at pages 437, 450, the converse case), the incidents of a navigable river attach to it up to that obstruction. *The Queen* v. *Robertson*(6). The lands in question are within this navigable stretch of the river.

Having regard to the royal instructions referred to by Mr. Justice Audette (15 Ex. C.R. 189), to which it was expressly made subject and to the rule of construc-

(1) 13 Ont. L.R. 237; 16 Ont. L.R. 184.
(2) 37 Can. S.C.R. 577.
(3) [1914] A.C. 258.
(4) 40 Can. S.C.R. 1.
(5) Q.R. 4 Q.B. 409.
(6) 6 Can. S.C.R. 52.

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tion "in favour of the Crown *pro bono publico* and against grantees" (Coulson and Forbes on Waters (3 ed.), p. 28), the grant to the appellants' predecessor in title of lots by number, although, as surveyed for the purpose of the erection of the Township of Hull, they extend across the river, was not, in my opinion, such an express grant of the river bed as would be necessary to carry title to it, assuming that it was alienable.

I also incline to the view that, if it were necessary to invoke it, the Crown could maintain the title by prescription alternatively asserted on its behalf.

BRODEUR J.—Avant la Confédération, le gouvernement canadien avait érigé près de l'embouchure de la Rivière Gatineau des estacades (booms) pour y recueillir les billots qu'on descendait dans cette rivière. Depuis 1867, le gouvernement fédéral a continué a maintenir ces estacades et une poursuite est maintenant dirigée contre lui par les appelants, qui déclarent que le lit de la Rivière Gatineau, à cet endroit-là, était leur propriété.

Ils se prétendent subrogés aux droits de Philemon Wright et ils alleguent qu'en vertu d'une concession faite par la Couronne à ce dernier, le 14 janvier, 1806, il est devenu propriétaire de certains lots de terre que couvrait la rivière.

Dans une cause de *Maclaren* v. *Attorney-General of Quebec*(1), la Rivière Gatineau a été l'objet d'un litige qui a été porté jusqu'au Conseil Privé.

Dans cette cause de *Maclaren*(1), il s'agissait de savoir si le lit de la rivière à un endroit où elle n'était pas navigable était la propriété des riverains ou la

(1) [1914] A.C. 258.

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propriété du gouvernement provincial. Le Conseil Privé a décidé qu'à cet endroit particulier il était évident que la rivière n'était pas navigable et qu'en conséquence les riverains, par leur contrat de concession, étaient devenus propriétaires du lit de la rivière.

A l'endroit qui nous occupe dans la présente cause, il est incontestable que la rivières est navigable.

Alors la première question qui se présente est de savoir si une rivière peut être navigable pour partie et être considérée comme une dépendance du domaine public pour cette partie-là lorsque dans d'autres parties elle n'est pas navigable et est par conséquent du domaine privé.

Je n'hésite pas à dire avec les auteurs suivants que des rivières peuvent être du domaine public pour partie.

Daviel, Cours-d'eau, p. 40, dit:

Lorsqu'une rivière n'est navigable ou flottable en trains qu'en certaines parties, toutes ces parties exclusivement doivent être considérées comme dépendances du domaine public.

Duranton, No. 203, dit:—

Les rivières navigables ou flottables ne sont telles que dans les parties où la navigation ou la flottaison peut avoir lieu; dès lors elles ne font partie du domaine public que dans ces endroits et dans les autres les riverains peuvent les faire servir à l'irrigation de leurs propriétés.

Garnier, Régime des Eaux, Vol. 1er, p. 56:—

Les lieux navigables et flottables font partie du domaine public et ceux qui ne le sont pas appartiennent aux particuliers sans égard à leur situation sur l'étendue du cours d'eau.

Cette cour a d'ailleurs consacré le même principe dans la cause de *Attorney-General of Quebec* v. *Fraser*(1). Le jugement a été plus tard confirmé par le Conseil Privé(2).

(1) 37 Can. S.C.R. 577. (2) [1911] A.C. 489.

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La Couronne avait-elle le droit, en 1806, de faire des concessions de terrain de manière à y inclure des parties de rivières navigables?

Cette question aurait donné lieu a beaucoup d'étude et de travail pour être solutionnée; mais depuis que la cause est pendante devant nous un statut provincial a été adopté (6 Geo. V., ch. 17) qui déclare positivement que la Couronne avait le droit de concéder et d'aliéner les lits des rivières navigables et flottables.

Peut-on interpréter la concession du terrain qui a été faite comme incluant la rivière elle-meme?

Le Township de Hull avait été divisé en lots par un arpenteur; mais cette division paraît avoir été faite sur le papier plutôt que sur le terrain lui-même. On semble avoir pris l'étendue du township et avoir tracé sur papier divers lopins de terre sans y indiquer les cours d'eau, ni même les rivières. Est-il à présumer que lorsque la concession a été faite à Philemon Wright, en 1806, la Couronne lui concédait en même temps la Rivière Gatineau qui couvrait quelques-uns de ces lots, et notamment les lots en litige dans la présente cause?

Chitty, On Prerogatives of the Crown, p. 391, dit:—

> In ordinary cases between subject and subject the principle is that the grant shall be construed, if the meaning be doubtful, most strongly against the grantor, who is presumed to use the most cautious words for his own advantage and security. But in the case of the King, whose grants chiefly flow from his royal bounty and grace, the rule is otherwise; and the Crown grants have at all times been construed most favourably to the King, where a fair doubt exists as to the real meaning of the instrument.

Il me semble que dans une concession comme celle-ci si on avait voulu inclure les rivières navigables on l'aurait certainement mentionné.

La Cour Seigneuriale, appelée à examiner des con-

cessions de la même nature, a déclaré que ces contrats de concession ne pouvaient pas être interprétés comme comprenant les rivières navigables. (Décisions de la Cour Seigneuriale, Vol. A, page 68 à la 26ème Question.) Sir Louis-Hypolite La Fontaine, le Président de cette Cour disait, p. 358:—

De tout ce qui précède nous concluons que les seigneurs comme tous autres particuliers ont pu acquérir des droits dans des rivières navigables mais non pas de plein droit comme seigneurs de fiefs adjacents à ces rivières, à la différence des rivières non navigables ni flottables dont la propriété leur était dévolue à ce seul titre.

Pour acquérir ces droits dans une rivière navigable, *il leur fallait une concession expresse du Souverain.*

Je considère que dans les circonstances le contrat de concession sur lequel les appelants basent leur demande ne les autorise pas à réclamer la propriété dans le lit de la rivière où le gouvernement fédéral maintient ses estacades.

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

Appeal dismissed with costs.

Solicitors for the appellant: *Aylen & Duclos.*
Solicitor for the respondent: *F. H. Chrysler.*

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*Nov. 17.
*Dec. 30.

THE COUNTY OF WENTWORTH (PLAINTIFF) .... APPELLANT;

AND

THE HAMILTON RADIAL ELECTRIC RAILWAY COMPANY AND THE CITY OF HAMILTON (DEFENDANTS) .... RESPONDENTS.

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

Municipal Corporation—Annexation of territory—Portion of county road—Railway franchise—Annual payments—Divisibility after annexation—Ontario Railway and Municipal Board—Order for annexation.

In 1902, the County of Wentworth passed a by-law by which an electric railway company was given the privilege of running cars over a county road on paying annually to the county a certain sum for each mile of the operated road. In 1909, territory of the county, including part of said road, was annexed to the City of Hamilton.

Held, Brodeur J. dissenting, that the agreement with the railway company remained in force in respect to the portion of road so annexed and the county was entitled to the whole annual payment as if the annexation had not taken place.

The railway company, by agreement in writing, accepted the said by-law of the county and covenanted with the latter "their successors and assigns" to perform all the conditions thereof.

Held, Brodeur J. dissenting, that the City of Hamilton did not, as a consequence of the annexation of county territory, become the "successor" of the county under said agreement and by-law so as to be entitled to a proportion of the payments to be made by the railway company thereunder.

Per Fitzpatrick C.J. and Idington and Duff JJ.—The Ontario Railway and Municipal Board was not invested with authority to provide, in its order extending the boundaries of the city, that such rights as those reserved by section 24 of the county by-law should, on such extension of the boundaries, pass to the city in whole or in part.

Judgment of the Appellate Division (35 Ont. L.R. 434) reversed and that of the trial judge (31 Ont. L.R. 659) restored.

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

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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 plaintiff.

The appellants in this action, the County of Wentworth, on the 6th of November, 1902, purchased from the Barton and Stoney Creek Consolidated Road Company for the sum of $24,000 certain toll roads which ran from a point in the County of Wentworth through the Township of Barton to the easterly boundary of the City of Hamilton. The respondents, the Hamilton Radial Electric Railway Company, by an agreement dated the 19th of June, 1905, acquired running rights over part of the said road from the County of Wentworth for the consideration therein named. On the 27th of September, 1909, upon the application of the City of Hamilton and Township of Barton (the County of Wentworth not being notified nor represented), the Ontario Railway and Municipal Board made an order annexing to the City of Hamilton, certain lands in the Township of Barton immediately adjoining the city through which lands certain portions of the said toll roads ran, and the order provided that all former toll roads purchased by the said county in the annexed territory, should vest in the City of Hamilton. After the aforesaid order was passed, and up to the year 1912, the appellants, the County of Wentworth, recognized it and permitted the City of Hamilton to exercise jurisdiction over the portions of the road included in the order of the Railway Board and to collect a proportionate part of the rental for the running rights thereon from the Hamilton Radial Electric Railway Company.

In the year 1913, the question of the validity of

(1) 35 Ont. L.R. 434. (2) 31 Ont. L.R. 659.

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the said order of the Railway Board was raised and the County of Wentworth refused to further recognize the same, and upon the refusal by the Railway Company to pay the full amount of the rental due under and by virtue of the mileage agreement of the 19th of June, 1905, the County of Wentworth thereupon issued a writ against the Hamilton Radial Electric Railway Company for the payment of the rental due under the agreement of the 19th day of June, 1905, and arrears. The Railway Company thereupon made application and as a result of same the Municipal Corporation of the City of Hamilton were joined as party defendants in this action.

The action by the county was to recover the whole payment for the year 1914 and arrears for the three preceding years representing the sums paid to the city during those years as its proportion for the mileage annexed. As to these amounts both courts below held that the county could not recover after acquiescing in the payments to the city and from that decision there was no appeal.

Lynch-Staunton K.C. and *Counsell* for the appellant.

Rose K.C. and *Waddell K.C.* for the respondent the City of Hamilton.

Leighton McCarthy K.C. and *Gibson* for the respondents The Hamilton Radial Electric Railway Co.

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

IDINGTON J.—What had been a toll road constructed by a private company was by it surrendered to appellant. Thereafter, pursuant to such juris-

diction as appellant had, it bargained with the railway company respondent to confer upon it the franchise of using part of said road, for constructing and running thereon a railway, of the kind its name implies.

The franchise was given by section 1 of the by-law which reads as follows:—

1. The consent, permission and authority of the Corporation of the County of Wentworth is hereby granted to the Hamilton Radial Electric Railway Company (subject to and upon the terms, conditions and provisions hereinafter contained) to construct, maintain, complete and operate an electric railway along the Main Street Road, from Sherman Avenue to Delta, and on the King Street Road from the Delta easterly through the unincorporated Village of Bartonville to the Saltfleet Town Line.

For this franchise the said company agreed to comply with some twenty-four several terms and conditions specified in the appellant's by-law.

To hold many of these abrogated by reason of the events the city now herein relies upon in its present attitude relative to the 24th, would be rather embarrassing for it. Yet such would in many instances be the logical result of maintaining what it contends for.

The 24th is in these words:—

24. For the privileges hereby granted the Company shall pay to the Corporation of the County of Wentworth yearly at the commencement of each year, at the rate of FIFTY DOLLARS per mile or *pro ratâ* for portion of a mile per year for the first three years, and after the expiration of the first three years at the rate of ONE HUNDRED DOLLARS per mile, or *pro ratâ* for portion of a mile per year for the next five years, and at the rate of TWO HUNDRED DOLLARS per mile, per year thereafter for every mile or *pro ratâ* for portion of a mile of railway operated on the said county roads under this by-law. First payment to be made on the first day of January, 1907.

Whatever else appears in the agreement made by the parties these two clauses (the first and twenty-fourth) furnish the keynote for the construction of the document.

And surely there could not be clearer or more

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explicit terms used as to the basis upon or by which the compensation was to be measured.

It is

for every mile or *pro ratâ* for portion of a mile of railway operated on the said county roads under this by-law.

It mattered not whether the roads lost their character of county roads or not, or passed under some other jurisdiction the legislature chose to put them under, so long as the company continued to enjoy the franchise thus acquired and conferred.

However questionable from an economic point of view I might feel inclined to think the bargaining between municipalities and railway companies whereby profits are to be reaped, I have no reason to doubt the now generally accepted legislative authority to make such bargains as falling within the power given municipalities in control of a highway, to consent to the use of highways by a railway.

Indeed no argument was presented contesting this exercise of the power and there remains nothing in this case but the construction of a tolerably clear contract.

It seems to me a novelty to import into the consideration of the construction of the contract that which transpired later between third parties by reason of which some one else might have a right to pass by-laws or direct operations or means for the public safety relative to the maintenance of a part of the road.

It was quite competent for the parties to the contract to have included as their basis of the computation of the compensation to be given for the franchise the entire mileage over the part they were bargaining about or over the entire road if they saw fit.

They might have made the number of passengers

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carried from any place outside the city to the market place of the city or any other agreed point or in short any other mode of computation they saw fit.

As Mr. Justice Hodgins has well pointed out it is as a whole the subject-matter of the bargain was dealt with by those immediately concerned.

Then what right has the respondent city to interfere? It knew, or ought to have known before bargaining for the annexation of part of a township all about the franchise in question, the terms upon which it was granted and the history leading up to the acquisition of those rights the county had acquired entitling it to so bargain.

And I venture to submit that the city was quite as much interested as the county in the abolition of tolls and knew what it cost and that it had no more right to try to take away from another corporation without its consent part of the incidental advantages which had flowed to it from the promotion of free travel and good roads designed for their common benefit.

Of course these considerations cannot answer the law if it has given respondent what appellant had acquired, but I submit they do answer much we have heard and read of the city's alleged burdensome duties relative to this part of its acquisition.

There is no pretence made that the appellants' by-law has been either expressly or impliedly repealed.

There is, by a curious confusion of thought, claimed to enure to the city a share in the compensation because it is based on mileage and the city has acquired jurisdiction over some of that mileage.

The argument confounds the rights flowing from a contract in relation to property and perhaps property itself, with those rights flowing from mere acquisi-

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tion of jurisdiction over it for certain limited purposes and within certani relations only.

Let us see what the city did acquire. It obtained from the Ontario Railway and Municipal Board only that which the Lieutenant-Governor in Council was vested with relative to municipal annexations up to 1906, when 6 Edw. VII., ch. 31, by sec. 53 transferred same to the Board, and amending Acts.

The Municipal Amendment Act (1908) 7 Edw. VII., ch. 48, sec. 1, is, I assume, correctly presented in the city's factum as containing the said powers as existent at the time in question.

That section reads as follows:—

> In case the council of any city or town by resolution declare that it is expedient that any portion of an adjacent township should be annexed to the city or town, and in case the majority of the ratepayers in any such portion of such township petition the Lieutenant-Governor in Council to add such portion to such city or town, and after due notice of such resolution and petition has been given by such city or town to such adjacent township, the Lieutenant-Governor may, by proclamation to take effect upon some day to be named therein, annex to the city or town such portion of the adjacent township upon such terms and conditions as to taxation, assessment, improvements or otherwise as may have been agreed upon, or shall be determined by the Lieutenant-Governor in Council.

It is to be observed that the only terms or conditions of such changes of boundaries as agreed on with which the Lieutenant-Governor in Council or Board ever became entitled to meddle, were

> as to taxation, assessment, improvements or otherwise.

I fail to see how anything in question herein falls within such terms.

The Board clearly exceeded its authority unless we ignore the *ejusdem generis* rule of construction and attribute to the word "otherwise" a meaning that might enable it to transfer the ownership of the court-house, jail, and registry office (though presumably

county property) to the city, because they happen to be within the city.

The suggestion that the city is the "successor or assign" of the county within the meaning of these usual words of contract between contracting corporations in the operative part of the contract between the railway company and the county, seems to me rather far fetched.

We are not referred to any express legislative enactment which would be effectively applicable to such a contract and constitute the city the successor of the county.

The Board had no power to confer any such right or meddle with anything relative to that or anything but that expressly given it by the language I have quoted.

I have heard no answer made, or that can be made, by the railway company to its contract; or that either bound or entitled it to deal with any one else than the party it in fact contracted with.

Whether or not there is anything in the usual arbitration claim relative to the consequences of annexation now standing we are told as in the Consolidated Municipal Act, 1903, sec. 58, need not concern us.

The railway company as I understand its attitude is only a proper party to this appeal by virtue of the unfounded contention of the city and should get its costs of this appeal from the latter.

The appeal should be allowed with costs of the appellant and the railway company of this appeal and the appeal to the Appellate Division and the judgment of the learned trial judge be restored.

DUFF J.—By a by-law passed on the 10th of June, 1905, the municipal council of the County of Wentworth professed to enact that:—

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The consent, permission and authority of the Corporation of the County of Wentworth is hereby granted to the Hamilton Radial Electric Railway Company (subject to and upon the terms, conditions and provisions hereinafter contained) to construct, maintain, complete and operate an electric railway along the Main Street Road, from Sherman Avenue to Delta, and on the King Street Road from Delta easterly through the unincorporated village of Bartonville to the Saltfleet Town Line;

and among a great variety of other provisions:—

24.—For the privileges hereby granted the Company shall pay to the Corporation of the County of Wentworth, yearly, at the commencement of each year, at the rate of fifty dollars per mile or *pro ratâ* for portion of a mile, per year for the first three years, and after the expiration of the first three years at the rate of one hundred dollars per mile or *pro ratâ* for portion of a mile, per year, for the next five years, and at the rate of two hundred dollars per mile thereafter for every mile or *pro ratâ* for portion of a mile of railway operated on the said County Roads under this By-law. First payment to be made on the first day of January, 1907.

The by-law provided that it should not take effect unless formally accepted by the company within ten days after the passing of it by an agreement binding the company to "perform, observe and comply with all the agreements, obligations, terms and conditions" therein contained. Accordingly on the 19th of June, 1905, an agreement was entered into between the respondent company and the appellant county corporation by which the company contracted to observe all the obligations imposed upon it by the terms of the by-law.

Subsequently, *i.e.*, in 1909, an order was made by the Ontario Railway and Municipal Board extending the boundaries of the City of Hamilton in such a way as to embrace within the territorial limits of the city certain parts of the county roads named in the first section of the by-law, in which the respondent company was given the right to construct and operate its railway. After the passing of this order and down to and including the year 1912, it appears to

have been assumed by the parties that the effect of the order of the board was to vest in the respondent city corporation the right to take and to impose upon the respondent company the obligation to pay to the city for the use of that part of the roads so named within the annexed territory occupied by the company's railway, a sum equivalent to $50 for each mile of railway within that territory. It was assumed, in other words, that the order extending the boundaries of the city did by its provisions transfer to that municipality and divest the county of the benefit of the moneys payable under section 24 to a degree proportionate to the number of miles of the railway which, by virtue of the order, came within the territory of the city. In the year 1913 the county for the first time disputed the validity of this assumption and called upon the company for the payment of the whole of the moneys payable under section 24, as if no change in boundaries had taken place.

The whole question in the action out of which the appeal arises is whether the county is or is not right in that contention. I am unable myself to entertain any doubt that the phrase "the said county roads" in section 24 is descriptive of the roads in which by the by-law the county gave its consent to the company constructing and operating its railway; neither have I any doubt that the railway is now "operated on the said county roads under this by-law." The county is therefore entitled to require payment of the whole of the sums made payable *ex facie* by section 24 of the by-law unless in some way their right to do so has been transferred to the city.

There are three ways, and three ways only, by which such a transfer could be legally effected; by agreement, by statute, or by the operation of some rule of law not

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resting on statute. Admittedly there is no agreement. For the reasons given by my brother Idington I think the powers of the board (where such an extension of the boundaries takes place) in respect of terms and conditions—limited as those powers were to imposing terms and conditions relating to

taxation, assessment, improvements or otherwise—

are not sufficient to authorize a provision transferring to the city any of the rights created by section 24; and needless to say what the board could not do expressly it could not do by implication.

Then is there any rule of law having the effect of vesting in the city corporation the right to which it now lays claim? The first contention is that the city corporation is the "successor" of the county corporation within the meaning of the words of the contract; but although it may be there is a sense in which the city corporation can be said to be the successor of the county corporation with respect to the county roads affected by the extension of boundaries, still it is sufficiently evident that the word "successor" (if it is not to be treated, as it probably should be, as mere surplusage) is used *alio intuitu* pointing to something in the nature of universal successor; and that the presence of it cannot help, as the absence of it would not in anywise impair, the city corporation's claim.

It is suggested that the rule governing the case is one derived by analogy to that which determines the apportionment of rent when title to the reversion in part of land held by a tenant is severed from that to the reversion in the residue. I do not think Mr. Rose meant us to understand him as arguing that the sums payable under the by-law could be treated as being rent service in contemplation of law. Self-evidently there is here no tenure of land and no reversion.

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To attempt to describe the railway company's rights *simpliciter* by reference to any of the well-known categories of common law rights *in alieno solo* would probably be misleading. The company's rights are statutory and it is perhaps better, if one desires to avoid deceptive analogies, to treat them frankly as *sui generis*. If one must search for some general analogy, the analogy of easement or license is nearer the mark than that of tenancy; "railway easement," though not in any sense, of course, a phrase of art, could mislead few lawyers in this country.

But with reference to the argument under consideration the characteristic of the railway company's rights to be noted and emphasized is that they are not rights created or capable of being created by the municipality as the owner of some sort of property in the soil of a highway. The highway as highway is a strip of soil in which His Majesty's subjects, as such, have rights of going and coming. The municipality is the public authority, speaking broadly, invested with the management of the highway and with certain powers in regulation of the exercise of the public right. The municipality does not derive its authority over the highway as such from any property in the soil; on the contrary, such property was vested in or could be acquired by the municipality precisely because the municipality is the public authority endowed with jurisdiction over the highway and charged with certain duties in relation to it; and it must be assumed that it was as public authority and not as proprietor that such power as it possessed to pass the by-law consenting to the construction and operation of the railway was entrusted to the municipality; and that it had such rights as it had to exact the consideration

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provided for in section 24 of the by-law. The parallel seems to fail.

It might, no doubt, be argued that as incidental to the transfer of jurisdiction the right to a proportionate part of the mileage toll should justly and reasonably pass to the city; but that argument should be addressed to the legislature.

Finding, therefore, neither contract, nor statute nor principle of common law upon which the city's claim can rest, it follows that effect must be given to the contract in accordance with the view already expressed. The appeal ought to be allowed and the judgment of the Chief Justice of the Common Pleas restored. I think the city corporation should pay all the costs incurred in consequence of the appeals since the date of that judgment.

ANGLIN J.—With deference, it seems to me that immaterial features of this case have unduly absorbed the attention of the courts below. For instance, we are not concerned with the past history of the roads in question as toll roads. The only relevant facts in that connection — that upon the removal of the tolls from these roads by the County of Wentworth they became county roads under section 15 of the Toll Roads Expropriation Act, 1901, as enacted by section 6 of ch. 35 of the Ontario Statutes of 1902, and that when the contract sued upon was made they were under the jurisdiction of the county, so that it could validly and effectively grant the privileges or franchise over them which that contract purported to confer upon the Hamilton Radial Electric Railway Company—are not contested. Neither does it seem to be of the least importance that the annexation order of the Municipal Board contained a provision—probably

as held in the Ontario courts, in excess of its authority —which purported to vest in the City of Hamilton the portions of those roads lying within the annexed territory. It is unnecessary either to pass upon the question of the Board's jurisdiction to make this provision or to determine whether the title to the portions of the road in question became vested in the City of Hamilton immediately upon the annexation or remained vested in the County of Wentworth until the enactment of section 433 of the Municipal Act of 1913. The only material matter in connection with the action of the Board is its jurisdiction to order the annexation itself, which is uncontroverted and incontrovertible. Whether the order for annexation does full justice to the county in the matter of burdens which it had assumed in connection with the roads in question, or to the city in regard to the responsibilities imposed upon it for their future maintenance, is likewise beside the question with which we have to deal. There may, as Mr. Justice Garrow has suggested, be claims on the part either of the city or of the county, which would be proper subjects for arbitration under section 58 of the Consolidated Municipal Act of 1903 —now section 38 of ch. 192, R.S.O., 1914— but these claims do not form part of the subject of this action. The introduction of all these matters merely tends to be-cloud and obscure the real issue presented, which is whether anything has transpired which has the legal effect of depriving the County of Wentworth of the contractual right that it formerly had, and would otherwise continue to possess, to collect from the Hamilton Radial Electric Railway Company the entire annual payments which that company bound itself to make to the county when it acquired the rights or franchise under which it maintains and operates its railway.

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By a by-law passed in June, 1905, to fulfilment of the terms and conditions of which the railway company duly bound itself by contract, the county authorized the construction, maintenance and operation by the railway company of an electric tramway on certain streets or roads then under the jurisdiction of the county. For the privilege thus granted to it the company undertook and agreed to pay to the county a money consideration or compensation, in some of the American cases called a bonus. Booth on Street Railways, 2 ed., secs. 284 and 287. Instead of a gross sum payable on the execution of the contract, as of course it might have been, this compensation took the form of annual instalments of fixed sums payable for each mile of the railway to be constructed, and *pro ratâ* for any portion of a mile. The question now presented is whether the annexation, in November, 1909, to the City of Hamilton of territory which includes portions of the roads or streets covered by the agreement between the county and the company, has affected the obligation of the latter to pay the stipulated compensation, in respect of such portions of the roads or streets, or has deprived the county of its right to recover the same or vested that right in the city.

The obligation of the company to pay is not contested. Rightly insisting upon the continuation of its franchise to maintain and operate its railway on the portions of the highways in question, the railway company could not consistently contest its correlative obligation to fulfil the condition as to payment of the compensation upon which the existence of that right depends. The substantial dispute is as to the body entitled to receive the moneys—whether they belong to the county or to the city—and for the present that

dispute is confined to the instalment for the year 1914, the provincial courts having held that the county had acquiesced in the payments for 1911, 1912 and 1913 being made to the city and was thereby estopped from claiming them—and from that part of the judgment there has been no appeal.

Under the terms of the contract the annual instalments are payable for the privilege granted to use the highways for the purpose, in the manner and on the terms stipulated in the county by-law. That right is conferred by the by-law. Its existence depends upon it and is in nowise affected by the annexation to the city, which took the highways subject to it. The jurisdiction acquired by the city upon the annexation over certain portions of the roads on which the railway is constructed does not enable it to interfere with the franchise of the company, which is its property. *Woodhaven Gas Co.* v. *Deehan*(1); *Chicago General Railway Co.* v. *City of Chicago*(2); *City of Grand Rapids* v. *Grand Rapids Hydraulic Co.*(3). The description in the agreement of the roads dealt with as "county roads," if not geographical, as Mr. Justice Hodgins thinks it was meant to be, at all events has not the effect of confining the operation of the agreement to such portions of those roads as remain county roads in the legal sense throughout the term of the franchise. They were county roads in the legal sense when the agreement was made. That the portions of them in the annexed territory have ceased to be county roads within the meaning of that term in the Municipal Act is quite as immaterial as is the question whether the title to the freehold or soil

(1) 153 N.Y. 528, at p. 532.
(2) 176 Ill. 253, at p. 259.
(3) 66 Mich. 606, at p. 613.

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of them passed to the city immediately upon the annexation. What is material is that the franchise or right to maintain and operate the tramway of the respondent company upon these portions of the highways was conferred by the county when they were, as portions of "county roads," under its jurisdiction and when it had unquestioned power and authority to subject them to that right or franchise for whatever term it deemed proper and whatever the legal character of the roads might become, or however the ownership of the freehold or soil thereof might change during the term for which such right or franchise should be conferred. Those rights still subsist and they are now enjoyed and exercised by the company solely by virtue of their contract with the county and the county by-law. That by-law, because it affected roads, unlike other by-laws of the county, remained in force within the annexed territory (3 Edw. VII., ch. 19, section 56) and, so far as it authorized the conferring of property rights on the Hamilton Radial Electric Railway Company, cannot, notwithstanding the annexation, be repealed, altered or affected by the city to the prejudice of that company. If the consideration for the privilege granted to the company by the county had been a sum in gross paid on the execution of the contract, it is difficult to conceive on what basis the city could formulate a claim against the county for any part of the money so paid. It is from the county that the company has received its entire right or franchise over the roads in question. It takes nothing in that connection from the city. The annual instalments which it has bound itself to pay are just as much and just as truly the consideration for what it has obtained from the county, and from the county alone, as their total amount would have been if paid when the contract was made.

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On behalf of the respondent, the City of Hamilton, it was sought to treat these payments as rental, incident to and intended to follow a supposed reversion, and, as such, apportionable upon the severance or division of that reversion; and reliance was placed in this connection on section 433 of the Municipal Act of 1913, which declares the freehold and soil of every highway to be vested in the corporation of the municipality, the council of which exercises jurisdiction over it. This idea, though not in terms expressed, would appear to underlie thej udgment of the late Mr. Justice Garrow, concurred in by Maclaren and Magee JJ.A., which proceeds on the assumption that because the annexation shortened the mileage in the county and transferred portions of the roads from the county to the city the right to collect the mileage payable in respect of the portions so transferred passed with the transfer. The order of the court is not confined to disaffirming the right of the county to the money in question: it directs the payment of it to the city. But the County of Wentworth was not a lessor and the railway company in no sense became its tenant. It acquired no right to exclusive possession of any part of the highway: *City of St. Louis* v. *Western Telegraph Co.*(1). The annual instalments are not charged upon and do not issue out of any land. Neither is there any reversion to which the right to receive them is incident or which it can follow. The transfer from the county to the city of jurisdiction over the parts of the highways in question, even though it carried with it the property in the soil or freehold, did not transfer to the city any interest in the moneys payable under the contract in question, for which the railway company had already

(1) 148 U.S.R. 92, at pp. 97-9.

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received from the county the full and entire consideration.

There is no statute which takesf rom the county its contractual right to these moneys. There is no rule of law applicable to thé circumstances which deprives it of that right or vests it in another. It has neither relinquished nor transferred it by contract. I know of no other means by which its title to the moneys can have been divested.

While I express no opinion on the merits in this respect of the case at bar, I can conceive that it may be desirable that some body, such as the Ontario Railway and Municipal Board, should be endowed with authority to control contracts such as that now before us, which confer franchises exercisable in territoryi nwhich changes of municipal boundaries may occur, and thereupon to revise and readjust their terms. Such authority does not exist, however, and it can be created only by legislation.

I would, for these reasons, with respect, allow this appeal with costs of the appellant and of the Hamilton Radial Electric Railway Company in this court and in the Appellate Division to be paid by the respondents, the Municipal Corporation of the City of Hamilton, and would restore the judgment of the learned trial judge.

BRODEUR J. (dissenting)—This is an action instituted by the County of Wentworth to claim from the railway company, respondent, a sum of money due for the year 1914 by virtue of an agreement made on the 19th June, 1905.

By that agreement the respondent railway company was authorized to run its street cars on some county roads which were under the jurisdiction of the appel-

lant corporation and one of the clauses of that agreement was to the effect that the company should pay a yearly sum

for every mile or *pro ratâ* for portion of a mile of railway operated on the said county roads.

In 1909 a certain portion of the township of Barton in the County of Wentworth was annexed to the City of Hamilton by order of the Ontario Railway and Municipal Board and a portion of those county roads came, as a result of that annexation, under the jurisdiction of the City of Hamilton. The street railway respondent then apportioned its rental and paid to the County of Wentworth the portion of rent for the road which was under the jurisdiction of the County of Wentworth and paid the other portion to the City of Hamilton.

By its action the County of Wentworth claims that the whole amount should be paid to the county. The money was deposited in court by the railway company and the City of Hamilton claims that the portion of rent which they received from the railway company had been properly paid.

There may be some question as to the extent of the rights of the county corporation over the roads in question; but this question has been solved by an Act passed in 1913 (3 & 4 Geo. V., ch. 43) which declared that the soil of every highway shall be vested in the corporation of the municipality the council for which for the time being have jurisdiction over it.

It is not disputed that the Municipal Board had the right to annex a portion of the Township of Barton to the City of Hamilton. It is common ground also that as a result of that annexation the Council of Hamilton had jurisdiction over all the highways which were in the

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portion so annexed. As a result of that legislation of 1913 the City of Hamilton became also the owner of the soil over which those highways were built.

Then what is the result of that jurisdiction and that ownership with regard to the payment of money which was stipulated for in the deed of the 19th of June, 1905, between the street raiwaly company and the County of Wentworth?

If the sum which had been stipulated for the rent or for the easement in question were a lump sum, the question might be differently solved; but, in the case where it has been stipulated, as in this one, that the amount to be paid is so much per mile, it seems to me that the only conclusion which might be reached is that if a portion of the highway on which the street railway runs is transferred to the jurisdiction of another body and ceases to be a county road then the rights and obligations in connection with that portion of highway become vested in the new body.

Nobody will dispute that the City of Hamilton is now bound to look after the maintenance of that highway. But it is also entitled to receive all the rents which might be due in connection with the use of that highway. The rent, according to the law, is apportionable where the lessee ceases to have possession of the demised premises, provided this is not due to unlawful eviction by the elssor; thus it isapportionable where the lessee is evicted from part by a person lawfully claiming under title paramount. Halsbury, Laws of England, vol. 18, page 484.

It seems to me that the action by the County of Wentworth for the recovery of the rent and for the use of the road in question is not well founded and the judgment of the Court of Appeal which dismissed that action should be confirmed with costs.

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The appellant has contended and argued that the Municipal Board had illegally and unjustly, in their order, dealt with regard to the payment of a portion of the good roads debentures issued by the County of Wentworth. I did not deal with that question because I consider that it had no bearing on the issues raised by the plaintiffs.

Appeal allowed with costs.

Solicitors for the appellant: *Bruce, Bruce & Counsell.*

Solicitors for the respondents The Hamilton Radial Railway Co.: *Gibson, Levy & Gibson.*

Solicitor for the respondent the City of Hamilton: *.T. R Waddell.*

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*Nov. 21.
*Dec. 30.

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT)...... APPELLANT;

AND

ADA LAMBERT (PLAINTIFF) AND THE INTERURBAN ELECTRIC COMPANY (DEFENDANTS)....... RESPONDENTS.

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

Negligence—Electric shock—Action against two defendants—Findings of jury—Joint liability—Agreement between defendants—Right to indemnity.

In an action against two parties claiming from them jointly and severally compensation for the death of plaintiff's son from electric shock caused by negligence, where there is no contributory negligence both defendants may be held liable if the negligence of each was a real cause of the accident. *Cf. Algoma Steel Corporation* v. *Dubé* (53 Can. S.C.R. 48).

By an agreement between the Interurban Electric Co. and the City of Toronto, operating the Hydro-Electric System, the former undertook to "save harmless and indemnify the said corporation * * * against all loss, damages * * * which the corporation may * * * have to pay * * * by reason of any act, default or omission of the company or otherwise howsoever." An employee of the company was killed in course of his employment and in an action by his personal representative the jury found that the city and the company were each guilty of negligence which caused the accident.

Held, that the agreement did not apply to the case of damages which the city would have to pay as a consequence of its own negligence and neither relieved it from liability nor entitled it to indemnity.

Judgment of the Appellate Division (36 Ont. L.R. 269) affirmed.

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

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming the judgment at the trial against both defendants.

The action was brought by the respondent, Ada Lambert, against the appellants and the respondents, the Interurban Electric Company, Limited, to recover damages for the death of her son, Kenneth Lambert, a lineman in the employ of the respondents, the Interurban Electric Company, Limited, who was electrocuted while working for that company on one of their poles at the north-west corner of St. Clair Avenue and Bathurst Street, in the City of Toronto, on 13th March, 1914.

On the 13th March, 1914, the date of the accident to Kenneth Lambert, the Interurban pole and the Hydro-Electric pole were located on the north side of St. Clair Avenue, the Interurban pole being near the corner of Bathurst Street and the Hydro-Electric pole about six feet further west, and practically in line east and west.

The pole of the respondents, the Interurban Electric Company, was thirty-five feet in height and had attached to it two horizontal cross-arms, the upper of which was about nine inches below the top of the pole, and ran north and south, while the lower cross-arm was some two feet three inches below the top of the pole and ran east and west. This pole carried four high voltage wires carrying 2,200 volts each, which came north along Bathurst Street to the lower cross-arm, two of the wires being brought to the east and two to the west of the pole in the cross-arm. From this pole the easterly two wires continued northerly along Bathurst Street, but the westerly two wires were

(1) 36 Ont. L.R. 269.

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turned east along St. Clair Avenue. The turning was accomplished by taking the wires up from the west end of the lower cross-arm to the north end of the upper cross-arm by means of wire connections which are termed in the evidence "jumpers" or "risers."

The appellants' pole (the Hydro-Electric pole) was about six feet west of the Interurban pole, and was a higher pole, forty feet in height; on top of it was a lightning arrester, connected with the ground by a wire which ran down along the north side of the pole, and was fastened to it with staples. The two guy wires which supported this pole were tied to it at distances o fabout one foot three inches and three feet three inches, respectively, from the top and ran from this pole easterly to the far side of Bathurst Street, passing almost directly over the Interurban pole. The lower of these guy wires was either touching the top of the Interurban pole or a few inches above it, and the higher guy wire was about two feet above that. Both guy wires were protected by "strain insulators," porcelain articles of globular shape, placed on the guy wires about six feet east of the appellants' pole, and which were accordingly about opposite the Interurban pole. The lower guy wire where it was tied around the appellants' pole was in contact with the ground wire which ran down from the lightning arrester to the ground.

On 16th March, 1914, a gang of men in the employ of the respondent, the Interurban Electric Company, and in charge of their foreman, Angus Cameron, were engaged in removing the westerly two wires which turned from this pole to run east along St. Clair Avenue. The foreman sent the deceased, Lambert, up the Interurban pole to cut away these two wires.

Lambert went up the pole and cut the two "jumpers" or "risers" near the lower cross-arm, leaving exposed their live ends, called in the evidence "pig-tails." He was standing with his right foot on the lower east and west cross-arm between the pole and the first pin, toe to the north, and his left leg thrown over the upper north and south cross-arm between the pole and the first pin. He was facing west with his body on the east side of the pole and as he leaned over the top of the pole to reach for a rope the heel of his left foot dangling over the upper cross-arm came in contact with one of the live pig-tails that he had made, while his left side was touching the appellants' lower guy wire, completing a circuit from the Interurban high voltage wire, through his body, the guy wire, the ground wire, to the ground, and he was killed instantly.

The action was tried at Toronto by Sir William Mulock, C.J., with a jury. The jury in answer to questions submitted to them found as follows:—

1. What was the cause of the accident? A.—The accident was caused by Lambert's left heel coming in contact with the Interurban wire, and his left side touching the guy wire, which was in contact with the ground wire on the Hydro-Electric pole.

2. Was the Corporation of the City of Toronto guilty of any negligence which caused the accident? A.—Yes.

3. If yes, in what did such negligence consist? A.—By not having the strain insulators nearer the Hydro-Electric pole, and by not insulating the point of contact between the guy wire and the ground wire or lightning arrester on the Hydro pole.

4. Was the Interurban Electric Company guilty of any negligence which caused the accident? A.—Yes.

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5. If yes, in what did such negligence consist? A.—Before sending Lambert up the pole, the Interurban foreman should have noted that the strain insulators near his company's pole were in wrong position, and, that being so, should have directed his attention to the possibility of the guy wire being in contact with the ground wire on the Hydro pole.

6. Was the deceased guilty of any negligence which caused or contributed to the accident? A.—No.

8. What damages, if any, do you award the plain- A.—$2,700, $1,800 to be borne by the Hydro-Electric Company Company and $900 by the Interurban Electric Company.

Upon the findings of the jury the learned trial judge gave judgment against both defendants for $2,700, and subsequently gave reasons for judgment dismissing the claim of each defendant against the other.

Both defendants appealed to the Appellate Division of the Supreme Court of Ontario as against the plaintiff and as against their co-defendant, and that court composed of Meredith C.J.C.P., and Riddell, Lennox and Masten JJ., dismissed the appeals of both, the Chief Justice dissenting.

C. M. Colquhoun for the appellant. Under their agreement with the City the Interurban Co. could have no right of action against us and their employee would be in no better position. See *Grand Trunk Railway Co.* v. *Robinson*(1); *Jones* v. *Morton Co.*(2), at page 414; *Dominion Natural Gas Co.* v. *Collins*(3).

The negligence of the appellant was not of a nature to render probable the subsequent negligence of the

(1) [1915] A.C. 740.
(2) 14 Ont. L.R. 402.
(3) [1909] A.C. 640.

Interurban Co and cannot have caused the accident. Beven on Negligence, 3 ed., p. 77; *McDowall* v *Great Western Railway Co.*(1); *Ruoff* v. *Long & Co.*(2).

As to our right to indemnity, see *Pyman S.S Co.* v. *Hull and Barnsley Railway Co.* (3); *Travers & Sons* v. *Cooper*(4).

B. N. Davis for the respondent Ada Lambert referred to *Till* v. *Town of Oakville*(5), at page 417; *Sault S'e. Marie Pulp and Paper Co.* v. *Myers*(6).

D. Inglis Grant for the respondent The Interurban Electric Co. cited *Price & Co.* v. *Union Lighterage Co.*(7); *Stott (Baltic) Steamers* v. *Marten*(8).

THE CHIEF JUSTICE.—I agree with Anglin J.

DAVIES J.—I think the agreement between the two defendant companies cannot be invoked by the defendant appellant, the City of Toronto, against its co-defendant, the Interurban Electric Co., to relieve the city from its liability for the death of the deceased. That agreement does not extend, as I construe it, to cases where the accident causing the injury sued for was caused "partly directly," to use Lord Esher's own phrase many times repeated in the case of *The Bernina*(9), by the defendant corporation's own negligence as is found to be the case here.

In this case the jury have found on evidence which I think sufficient, that the deceased was not guilty

(1) [1903] 2 K.B. 331.
(2) [1916] 1 K.B. 148.
(3) [1915] 2 K.B. 729.
(4) [1915] 1 K.B. 73.
(5) 31 Ont. L.R. 405, at p. 412.
(6) 33 Can. S.C.R. 23.
(7) [1904] 1 K.B. 412.
(8) [1916] 1 A.C. 304.
(9) 12 P.D. 58.

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of contributory negligence and I think that finding applies as well to the corporation defendant, the present appellant, as to its co-defendant the Interurban Company which employed the deceased.

The jury have also found the appellant-defendant, the Corporation of the City of Toronto, guilty of negligence which caused the accident

by not having the strain insulators nearer the Hydro-Electric pole and by not insulating the point of contact between the guy wire and the ground wire or lightning arrester on the Hydro pole.

It is true they also found the other defendant, the Interurban Electric Company, guilty of negligence which caused the accident as follows:—

Before sending Lambert up the pole, the Interurban foreman should have noted that the strain insulators near his company's pole were in wrong position and that being so should have directed his attention to the possibility of the guy wire being in contact with the ground wire on Hydro pole.

But that finding of negligence on the part of the Interurban Company does not discharge the City of Toronto from the consequences following the finding of negligence against it.

Both companies have been found guilty of negligence which "partly directly" caused the accident and they are both and each liable for the consequences. To entitle the defendant, the City of Toronto, to shelter itself behind the negligence found against its co-defendant, the Interurban Electric Company, it must shew that this latter's negligence was

the conscious act of another volition

and was the real cause which brought the injury about and without which the accident could not have happened.

The negligence of the electric company was that of one of its foremen, a mere case of negligence in over-

looking the conditions existing when he ordered the deceased to climb the electric pole and do certain work. Such negligence does not come within the meaning of the words—

conscious act of another volition

which under certain circumstances will remove liability from one whose previous negligence has "partly directly" caused the injury complained of.

Construing the indemnity clauses of the agreement between the two defendants as I do, not to embrace or include a case of negligence on the part of both companies the negligence of each "partly directly" causing the accident, and holding the finding of the jury as to the absence of contributory negligence applicable to both corporation and company alike and that there was no

conscious act of another volition

intervening between the negligence found against the corporation and the happening of the accident, but merely an additional act of negligence on the part of its co-defendants, the electric company, I would dismiss the appeal with costs to both respondents.

DUFF J.—The appellant municipality's (The Hydro El.) pole, near the N.W. corner of Bathurst Street and St. Clair Ave., was about 6 ft. west of the Interurban Company's pole, and was about five feet higher. On the top of the appellant's pole was a lightning arrester connected with the ground by a wire running down the pole. One of the two guy-wires supporting this pole ran past the top of the Interurban pole touching, or almost touching, it. This guy-wire where it was tied around the appellant's pole was in contact with the ground-wire of the lightning arrester. It had

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on it a porcelain insulator which was situated about six feet east of the Interurban pole. The deceased Kenneth Lambert, a lineman in the employ of the Interurban, was killed by an electric shock received while working on the Interurban pole on the 13th March, 1914. The Interurban pole had two horizontal cross-bars, one about nine inches and another about two feet three inches below the top. The lower arm ran east and west parallel with St. Clair Avenue and the other north and south parallel with Bathurst Street. The lower cross-arm supported four high voltage wires coming up Bathurst Street from the south, two of which passed on along that street to the north, the remaining two turning here and running east along St. Clair Avenue. To accomplish this turning these two wires were connected by wire connections, called "risers" or "jumpers," with the two wires fastened to the northern arm of the upper wire and carried thence to the company's pole to the east. This was the situation on the 13th of March, 1914, when the deceased Lambert was sent by his foreman to the top of the pole to do some work; and this condition of affairs, it may be added, had existed since the 25th of November, 1912, a year and a half before. On the occasion in question the foreman with a gang of men was engaged in removing the two westerly wires just referred to, and Lambert was sent up to cut them away. To do this it was necessary to cut the "jumpers" or "risers," which he did, leaving the live ends exposed, referred to in the evidence as "pig tails." Unhappily Lambert, standing with his right foot on the lower, east and west, cross-arm, his left leg thrown over the upper, north and south, cross-arm, his left foot which was dangling from the cross-arm was brought into contact with one of these live ends as he

was reaching for a rope, while his right hand at the same time encountered the guy-wire of the appellant's pole, and a circuit being established through his body by way of the guy-wire and the ground-wire of the lightning arrester, he was instantly killed.

Two additional facts should be mentioned as introductory to the discussion of points in controversy. The first is that it was the practice in the Hydro-Electric system to attach guy-wires in contact with ground-wires to the Hydro Electric poles, the only protection being an insulation similar to that above described. The other point is that the Interurban poles and wires were erected under the provisions of an agreement with the appellant municipality one term of which is set out in the 7th paragraph of it, and is in the following words:—

> The company shall save harmless and indemnify said corporation against any action, claim, suit or demand brought or made by the granting of any of the privileges hereinbefore mentioned to the company, and all costs and expenses incurred thereby, and also against all loss, damages, costs, charges and expenses of every nature and kind whatsoever, which the corporation may incur, be put to or have to pay, by reason of the improper or imperfect execution of their works or any of them, or by reason of the said works becoming unsafe or out of repair, or by reason of the neglect, failure or omission of the company to do or permit anything therein agreed to be done or permitted, or by reason of any act, default or omission of the company or otherwise howsoever.

The jury found that the accident was attributable to the negligence of the appellant as well as the negligence of the Interurban Company, the deceased Lambert being acquitted of contributory negligence. The appellant corporation denies its responsibility on the ground that there is no evidence of actionable negligence, on the ground that the deceased Lambert is chargeable with contributory negligence and that their responsibility to him is precluded by the terms of the contract with the Interurban company

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above set out, and they further claim to be entitled to indemnity as against the Interurban under the same agreement.

First, as to contributory negligence It was a question for the jury, I think, whether Lambert, going about the execution of the manual work in which he was engaged, bent upon getting it done without waste of time, was acting reasonably in assuming that such sources of danger as might be created by the condition and situation of the poles and wires had been the object of attention on the part of his employers; I think it is impossible to say that the jury could not reasonably find affirmatively on that question and acquit Lambert, as they did, of contributory negligence.

As to the agreement. The point made against the respondent Ada Lambert, on the agreement is, as I understand it, that the Interurban pole was where it was and that Lambert, a servant of the Interurban company, was only entitled to be where he was by virtue of the agreement between the appellant and the Interurban company, and that consequently his rights, when there, must be such rights only as he could avail himself of against the appellant if he himself instead of the company were the contracting party This argument seems to be largely based upon the construction of the judgment of the Privy Council in *Grand Trunk Railway Co.* v. *Robinson*(1). I think the contention requires for its support a much broader principle than anything established by *Robinson's Case*(1) because their Lordships there, as I read the judgment, put their decision upon the specific conclusion at which they arrived that the person who contracted with the

(1) [1915] A.C. 740.

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railway company was Robinson's agent empowered to bind himself by any terms he might make with reference to the company's responsibility for the carriage of Robinson. Here there is of course no suggestion of agency, express or implied, and I think that on this ground the agreement must be rejected.

It is convenient at this point to dispose of the question of indemnity also. The stipulation relied upon has not, in my judgment, the effect of casting upon the appellant municipality responsibility for a condition of things primarily due to the negligence of the appellant itself. Where harm is caused and the appellant municipality is answerable by reason of the fact that its own negligence is a proximate cause of that harm, I do not think such responsibility is fairly within the contemplation of clause 7.

It is true that the phrase "otherwise however" is a very broad one; but the language of the clause shews that it was framed *alio intuitu* and we should violate a fundamental rule of construction if sweeping words placed at the end of a more specific enumeration were to be read as embracing cases which it is abundantly evident from the clause (when read as a whole) the parties never had in contemplation. It is not the "act, default or omission" of the Interurban Company for which the appellant municipality is held responsible, it is the municipality's own wrongful act.

But is there evidence of wrongful act, or in other words, is there evidence of actionable negligence for which the appellant municipality is responsible and to which as a proximate cause Lambert's death may be attributable?

Now it is quite true that to affirm this is to affirm,

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first, that the appellant company was guilty of a breach of duty to Lambert, and, secondly, that Lambert's death was a consequence of that breach. It is quite true also that but for the placing of the Interurban pole in the situation in which it was, and but for the negligent omission of the servants of the Interurban Company to observe and warn their employees against the dangerous situation created by the proximity of the uninsulated guy-wire to the Interurban pole, this accident would not have happened

The fact that the Interurban pole was brought into this position after the appellant municipality's pole had been placed where it was at the time of the accident, does not appear to me to be a circumstance of much importance. As I have already said, the situation created by the proximity of these poles and wires, the wires being in the condition in which they were, had been in existence unchanged for some eighteen months preceding the accident.

In these circumstances the jury were entitled to find as a fact that the appellant municipality was concurrently responsible with the Interurban company for the existence of this dangerous state of things; and as to the neglect of the servants of the Interurban company and particularly the neglect of the foreman to observe and give warning of this dangerous situation, the rule applies which is stated by Lord Sumner (then Hamilton L.J.) in *Latham* v. *Johnson & Nephew*(1), at page 413:—

A person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of the plaintiff himself (*Bird* v. *Holbrook*(2); *Lynch* v. *Nurdin*(3), that injury would not have occurred.

(1) [1913] 1 K.B. 398. (2) 4 Bing. 628.
(3) 1 Q.B. 29.

In such circumstances the duty not to neglect ordinary care incumbent upon both the appellant municipality and the Interurban Company was a duty owing by the appellant company to the servants of the Interurban Company. It follows that the appeal in both branches of it should be dismissed.

ANGLIN J.—In the appellants' factum four distinct objections taken to the judgment holding them liable to the plaintiff for the death of her son and not entitled to indemnity from their co-defendants are stated as follows:—

(1) The deceased as an employee of the Interurban Electric Company could claim no greater right than his employers who were on the street at their own risk and on condition that their presence should not result in loss or expense to the appellants.

(2) The deceased was, as against the appellants, guilty of contributory negligence which caused the accident.

(3) The negligence of the appellants as found by the jury was not the real or proximate cause of the accident.

(4) By the provisions of the agreement between the appellants and the respondent, the Interurban Electric Company, the said respondent agreed to indemnify and save harmless the appellants against liability in this action.

For convenience I shall refer to the Municipal Corporation as the corporation, and to the Interurban Electric Company as the company.

Apart from the question involved in the first ground of appeal—whether the deceased as a servant of the company was so identified with his employers that his right of recovery must depend upon the existence of facts which would give them a right of action against their co-defendants, the corporation, for any damage they might sustain through fault of the latter (which I must not by any means be taken to regard as concluded in favour of the appellants)—

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see *Algoma Steel Corporation* v. *Dubé*(1)—the first and fourth grounds of appeal rest upon the following clause of an agreement made between the two defendants:—

The Company shall save harmless and indemnify said Corporation against any action, claim, suit or demand brought or made by the granting (*sic.*) of any of the privileges hereinbefore mentioned to the Company and all costs and expenses incurred thereby, and also against all loss, damages, costs, charges and expenses of every nature and kind whatsoever, which the Corporation may incur, be put to or have to pay by reason of the improper or imperfect execution of their works or any of them or by reason of the said works becoming unsafe or out of repair or by reason of the neglect, failure or omission of the Company to do or permit anything herein agreed to be done or permitted, or by reason of any act, default or omission of the Company *or otherwise howsoever*, and should the Corporation incur, pay or be put to any such loss, damages, costs, charges or expenses, the Company shall forthwith upon demand repay the same to the Corporation.

The Company shall repair broken wires forthwith and make all other repairs on reasonable notice and shall keep same in good repair.

While it would, no doubt, have been quite possible for the corporation to have guarded against any liability to the company and to have provided for indemnification by it for any damages arising however indirectly out of the presence on its streets of the poles and lines of the company, even where such damages should be directly occasioned by the negligence of corporation employees, it would undoubtedly be necessary that such a provision should be expressed in clear and explicit language. Here there is nothing of the kind. There is nothing from which any implication of an intention to provide for such a right of indemnification can be inferred. The application of the words "or otherwise howsoever," invoked by counsel for the appellants, having regard to one of the most familiar rules of construction cannot extend to some-

(1) 53 Can. S.C.R. 481.

thing so entirely foreign to the context as damages caused by negligence of the other party to the agreement.

Neither should the clause be read as relieving the corporation from liability for, or entitling it to indemnity against claims for injuries partly occasioned by its own negligence, though operating in conjunction with negligence of the company or its servants. Only an explicit provision couched in unmistakable terms could be given that effect. Here damages due to negligence of the corporation, either as a sole cause or as a contributing causative factor, are not even hinted at. To import such a case by implication as one of the things for which the company assumed entire responsibility would be quite unjustifiable. If under the agreement the company would itself be entitled to recover damages from the corporation for injuries to its property placed upon the streets in the exercise of the franchise thereby conferred, caused by negligence imputable to the corporation, as I think it would, an employee of the company, who has sustained such an injury, must *a fortiori* have a right of action against the corporation. Fault imputable to the company (such as the negligence of its foreman found by the jury in this case), which might under a plea of contributory negligence afford the corporation a defence in an action brought by the company for damages to its property caused by negligence of the corporation's servants, may not be ascribed to the plaintiff's son as an employee of the company so as to debar recovery for personal injury to him under such a plea. It follows that the first and fourth objections fail.

The second objection is conclusively disposed of by the adverse finding of the jury upon it, which is clearly

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made against both defendants. It is impossible to say that this finding, negativing personal contributory negligence on the part of the plaintiff's deceased son, affirmed in the Appellate Division, is so preposterous that no honest or reasonable jury could have made it.

The third ground of appeal involves the familiar question as to liability where negligence of two independent persons or bodies is found to have been the cause of the plaintiff's injuries. The first of Lord Esher's well-known propositions upon the law of negligence, stated in *The Bernina*(1), at page 61, and the decisions in such cases as *Burrows* v. *March Gas and Coke Co.*(2), are conclusive against the appellant. The authorities upon this branch of the case are conveniently collected in Halsbury's Laws of England, *vo.* "Negligence," par. 649. That a lineman of the company might be injured just as the plaintiff's son was, was a natural consequence of the appellants' negligence. That the injuries sustained by the plaintiff's son were a direct consequence of that negligence is incontestible. There was no intervention of a conscious act of another volition operating as a real cause to interrupt the chain of causation between the appellants' negligence and the consequences complained of. They cannot invoke as an excuse the failure of their co-defendants' foreman to prevent that negligence becoming operative. Both it and the negligence of the company's foreman (assuming the correctness of the jury's finding as to the latter, which is now not open to question) were in fact operative at the moment when Lambert was killed. Both were truly active causes. Neither can be said to have been merely a condition

(1) 12 P.D. 58.

(2) L.R. 5 Ex. 67; 7 Ex. 96.

sine qua non of that which occurred. *Algoma Steel Corporation* v. *Dubé*(1).

The appeal, in my opinion, fails and should be dismissed with costs to be paid by the appellants to both respondents

BRODEUR J.—This is an action instituted under Lord Campbell's Act.

The plaintiff's son was an employee of the defendant, the Interurban Electric Company, as lineman, and while working on the cross-arms of the electric poles of that company he met his death from an electric current.

The appellant, the City of Toronto had a pole carrying light and power wires situated near the one on which the victim, Lambert, was working. The guy wire which assisted in the support of this city pole was fastened tightly around that pole and was coming in direct contact with a ground wire running down the city pole to the ground That guy wire extended over the pole of the Interurban Electric Company and the guy wire then in its direct contact with the ground wire on the city pole was loaded with electric current at high voltage and the victim, in working near by that guy wire, came in contact with it and was killed.

The action was instituted against the City of Toronto and against the company for which Lambert was working and by the verdict of the jury the City of Toronto was declared guilty of negligence for not having the strain insulators nearer their pole, and by not insulating the point of contact between the guy wire and the ground wire.

(1) 53 Can. S.C.R. 481.

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CITY OF TORONTO v. LAMBERT.
Brodeur J.

Nobody can find fault with that verdict This guy wire was for the purpose of sustaining the pole belonging to the city. It was their duty to see that this guy wire should not come in contact with the loaded wires, and if it was exposed to come in contact they should also have put insulators at such a place where accidents could be avoided.

There is, in this case, an insulator; but the insulator, instead of being placed between the poles and so avoiding any accident to those who would have to work on the company's pole, was placed further away.

The verdict of the jury also stated that the company was liable because its foreman, before sending Lambert up the pole, should have noted that the insulator was in a wrong position. There is no appeal before us with regard to the verdict rendered against the company.

The aggregate amount which was given by the verdict to the plaintiff was $2,700: 2-3 to be paid by the City of Toronto and $900 by the respondent company.

This verdict should be sustained because there was, no doubt, negligence by the City of Toronto.

But the latter claims that under a contract existing between the company and itself it should be indemnified for that judgment.

When the company desired to erect poles in the place in question they applied to the municipal authorities then having jurisdiction and the council consented to grant such permission, subject to certain conditions. One of those conditions was that the company should indemnify the municipal corporation against any action in consequence of the granting of the

privilege mentioned in the contract, and also against all damages which the corporation might incur by reason of the imperfect execution of their work

or by reason of any act, default or omission of the company or otherwise howsoever.

The jury have found, it is true, that the foreman of the respondent company gave improper orders to the victim. But at the same time the jury stated that the City of Toronto was mostly responsible for the accident because it was due to defective connections or stringing of their wires.

It is not a case, in my opinion, covered by the indemnification clause above mentioned. It is clear that no injury would have been suffered by the deceased if the defendants had not fastened their guy wire in direct and immediate contact with their ground wire and if they had placed their insulator in the proper position The liability of the City of Toronto results because of its own negligence and the condition on which the City of Toronto relies does not go so far as to state that the company will be bound to indemnify it for the appellant's own negligence.

I come to the conclusion that the judgment rendered by the Appellate Division should be confirmed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *William Johnston.*

Solicitor for respondent Ada Lambert: *Henry C. Forster.*

Solicitors for the respondents Interurban Electric Co.: *Johnston, McKay, Dods & Grant.*

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*Oct. 10-13.
*Nov. 7.

THOMAS KELLY .... APPELLANT;

AND

HIS MAJESTY THE KING...... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Criminal law—Indictment—Separate counts—Verdict—Conspiracy—Extraditable offence—Inadmissible evidence—Conviction—Inconsistency—Irregularity of procedure—Charge to jury—Address of counsel—Substantial wrong or miscarriage—New trial—"Criminal Code," s. 1019—*Penalty.*

On an indictment containing several counts, including charges for theft, receiving stolen property and obtaining money under false pretences, in respect of which the person accused had been extradited from the United States of America, evidence was admitted on behalf of the Crown, for the purpose of shewing *mens rea,* which involved participation of the accused in an alleged conspiracy. The principal objections urged against a conviction upon the charges mentioned were (*a*) that by the manner in which the trial had been conducted the jury may have been given the impression that the accused was on trial for conspiracy, a non-extraditable offence; (*b*) that misstatements and inflammatory observations had been made by counsel for the Crown in addressing the jury; and (*c*) that, in his charge, the trial judge had failed to correct impressions which may have been thus made on the minds of the jury or to instruct them that portions of the evidence admitted in regard to other counts ought not to be considered by them in disposing of the charge of obtaining money under false pretences.

Held, that, as there was sufficient evidence to support the verdict of the jury on the charge of obtaining money under false pretences, quite apart from the irregularities alleged to have taken place at the trial, no substantial wrong or miscarriage had been occasioned and there could be no ground for setting aside the conviction or directing a new trial under the provisions of section 1019 of the Criminal Code.

Judgment appealed from (11 West. W.R. 46), affirmed.

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

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APPEAL from the judgment of the Court of Appeal for Manitoba(1), upon a reserved case submitted by Mr. Justice Prendergast, the presiding judge at the trial of the appellant who was convicted upon four of the counts of the indictment preferred against him.

The accused was tried on five counts of an indictment, in substance as follows: (1) Theft of money, valuable securities and other property, belonging to the King, in the right of the Province of Manitoba; (2) unlawfully receiving money, valuable securities or other property belonging to the King which had been embezzled, stolen or fraudulently obtained by means of a conspiracy between the accused and others to defraud the King, the accused then knowing the same to have been so embezzled, etc., by means of said conspiracy; (3) a count similar to the second count, but naming two additional co-conspirators; (4) obtaining moneys by false pretences from His Majesty for the accused and others; (5) unlawfully receiving moneys of His Majesty which had to the knowledge of the accused been obtained by false pretences with intent to defraud.

The jury acquitted the accused on the third count, but brought in a verdict of guilty on all the others.

The issues raised on the present appeal are stated in the judgments now reported.

The questions reserved for consideration by the Court of Appeal for Manitoba, with the answers ordered to be returned thereto by that court were as follows:—

"1. Was I right in refusing to quash the whole indictment on the motion of counsel for the accused upon the grounds urged by them in their argument before me? A. Yes.

(1) 11 West. W.R. 46.

"2. Was I right in refusing to quash the first count in the indictment upon the motion of counsel for the accused upon the grounds urged by them in their argument before me? A. Yes.

"3. Was I right in refusing to quash the second count in the indictment upon the motion of counsel for accused upon the grounds urged by them in their argument before me? A. Yes.

"4. Was I right in refusing to quash the fourth count in the indictment upon the motion of counsel for the accused upon the grounds urged by them in their argument before me? A. Yes.

"5. Was I right in refusing to quash the fifth count in the indictment upon the motion of counsel for the accused upon the grounds urged by them in their argument before me? A. No.

"6. If any of the said counts should have been quashed or otherwise dealt with by me, either before or during the trial, has there been a mis-trial of the accused on any other count or counts by reason of the admission of evidence upon such count or counts as should have been quashed or otherwise dealt with by me? A. No.

"7. Was I right in my charge to the jury on the first count of the indictment as to theft or was my charge insufficient in law so as to be prejudicial to a fair trial of the accused? A. To the first part of question preceding the word 'or'—Yes; to remainder of question—No.

"8. Was I right in my charge to the jury on the fourth count of the indictment as to what constituted the offence of obtaining money by false pretences or was my charge insufficient in law so as to be prejudicial to a fair trial of the accused? A. To first part of question preceding the word 'or'—Yes; to remainder of question—No.

"9. Was I right in admitting evidence as to acts, conduct, admissions, conversations and facts relating to some one or more of those named in the second count, namely: Rodmond P. Roblin, Walter H. Montague (since deceased), James H. Howden, George R. Coldwell, R. M. Simpson and Victor W. Horwood, to which the accused was not a party, and, if I have erred, was the same prejudicial to a fair trial of the accused? A. To first part of question down to and including the word 'party'—Yes; to remainder of question—No.

"10. Was there evidence upon which a jury could properly convict the accused—(*a*) On count Number 1; (*b*) On count Number 2; (*c*) On count Number 4; (*d*) On count Number 5. A. Yes.

"11. The jury having found the accused Thomas Kelly not guilty on the third count in the indictment, and evidence having been admitted on said count upon the trial, was the admission of such evidence prejudicial to a fair trial of the accused on the remaining four counts in the indictment upon which he was found guilty? A. No.

"12. Was I right in permitting the affidavits on production of Thomas Kelly, Lawrence Kelly and Charles Kelly, Exhibits 62 and 63, in a civil action of he Attorney-General of Manitoba against Thomas Kelly & Sons to be put in evidence in the manner disclosed by the record against the accused Thomas Kelly, and, if not, was the same prejudicial to a fair trial of the accused? A. To first part of question down to words 'and, if not'—Yes; to remainder of question —No.

"13. Was I right in the admission of certain documents (as so called secondary evidence) at the instance of the Crown, and, if so, was the admission of such documents or of any other exhibits filed prejudicial

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to a fair trial of the said Thomas Kelly as set out in Schedule 'D'? A. To first part of question down to and including the word 'Crown'—Yes; to remainder of question—No.

"14. Was any evidence admitted or allowed to be given which should not have been admitted or allowed to be given and which was prejudicial to a fair trial of the said Thomas Kelly, in regard to the matters set out in Schedule 'E'? A. No.

"15. Was I right in my comments upon the statement of the accused to the jury, with respect to it not being made under oath, and, if so, was this prejudicial to a fair trial of the accused or a violation of the "Canada Evidence Act?" A. To first part of question down to and including the word 'oath'—Yes; to remainder of question—No.

"16. Similarly were any of the observations of counsel for the Crown so inflammatory or improper as to prejudice the fair trial of the accused or to be a violation of the "Canada Evidence Act?" A. The first part of this question 'Were any of the observations of counsel for the Crown so inflammatory or improper as to prejudice the fair trial of the accused?' is not a question of law that may be reserved for the Court of Appeal under the Criminal Code. To the second part of the question—No.

"17. Was there in any respect, on my part, either a failure to direct the jury or an inaccurate direction to the jury with regard to the difference between a statement made by the accused to the jury and an address made on his behalf to a jury; or as to the weight that a jury is entitled to attach to the statements of the accused which are not made under oath or as to pointing out evidence favourable to the accused or in regard to correcting any mis-statements as to law or fact made

by the Crown counsel during the trial or any addresses to the jury? A. No."

The majority of the Court of Appeal for Manitoba, upon the rendering of the judgment appealed from, by which the above answers were returned, consisted of His Lordship Chief Justice Howell and their Lordships Justices Perdue and Cameron. Their Lordships Justices Richards and Haggart dissented and were of opinion that there should be a new trial and that such new trial should be upon the fourth count of the ndictment only.

Dewart K.C. and *Harding* for the appellant (*Sweatman* with them. The inflammatory and improper observations of counsel for the Crown to the jury afford ground for a new trial. In Pritchard's Practice of the Quarter Sessions, p. 22, it is laid down that prosecuting counsel addressing the jury ought to confine themselves to the simple statement of the facts expected to be proven; where prisoner has no counsel they should particularly refrain from stating any facts, proof of which may appear doubtful. Even where the prisoner has counsel, they should refrain from invective or appealing to the prejudices or passions of the jury, it being neither in good taste or right feeling to struggle for a conviction as is done in a civil court: *Reg.* v. *Thursfield*(1), *per* Gurney B. See also Archbold's Criminal Pleading, (24 ed.,) pp. 219-220; *Reg.* v. *Holchester*(2); *per* Blackburn, J.; *Reg.* v. *Berens*(3); *Reg.* v. *Webb*(4); *Rex* v. *Webb*(5); *Ibrahim* v. *The King*(6), at p. 616.

(1) 8 C. & P. 269.
(2) 10 Cox C.C. 226.
(3) 4 F. & F. 842, 843n.
(4) 4 F. & F. 862.
(5) 22 Can, Cr. Cas. 424.
(6) [1914] A.C. 599.

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We take objection to the comments and directions, or lack of directions, by the learned trial judge, particularly regarding theft and false pretences and the failure of the accused to testify. See *Rex* v. *Hill*(1) and *Reg.* v. *Coleman*(2), *per* McMahon J., at page 108. The trial judge failed to point out facts favourable to the accused: *Rex* v. *Dinnick*(3); *Rex* v. *Richards*(4); *Rex* v. *Totty*(5); *Reg.* v. *Parkins*(6); *Rex* v. *Beauchamp* (7); *Reg.* v. *Mills*(8).

The learned trial judge failed to clearly point out to the jury the difference between the offences of theft and receiving and conspiracy and obtaining by false pretences, and what evidence was admissible under each offence charged, what evidence affected each count, and that evidence involving conspiracy could not affect the counts for theft or false pretences. He should have pointed out the inconsistency of a verdict on all four counts: *Rex* v. *Wong On*(9); *Reg.* v. *Paul*(10), *per* Hawkins J., at p. 211.

There was wrongful admission of evidence in several respects, more especially relating to earlier events and to later conspiracies: *Reg.* v. *Blake*(11); *Reg.* v. *Barry* (12). The admission of evidence, under the second count, upon a general charge of conspiracy relating to persons other than the accused, and of evidence under count three, relating to a conspiracy in which the sons of the accused were joined as parties, altogether apart from the question as to the admissibility of evidence of subsequent conspiracies, were admis-

(1) 7 Can. Cr. Cas. 38.
(2) 30 O.R. 93.
(3) 3 Cohen Cr. App. R. 77.
(4) 4 Cohen Cr. App. R. 161.
(5) 111 L.T. 167.
(6) Ryan & M. 166.
(7) 25 Times L.R. 330.
(8) Dears. & Bell 205.
(9) 8 Can. Cr. Cas. 423.
(10) 25 Q.B.D. 202.
(11) 13 L.J. Mag. Cas. 131.
(12) 4 F. & F. 389.

sible only upon a charge of conspiracy to defraud. That charge should not have been preferred and evidence tending to prove it was clearly prejudicial to a fair trial on the remaining counts of the indictment. This evidence was not admissible under the other counts and the jury should have been so directed. The view that, by holding that there was ample evidence of some offence and, consequently, no substantial wrong or miscarriage occurred cannot prevail; the court cannot be the judge of what may have influenced the minds of the jury where evidence of an important character was improperly admitted: *Allen* v. *The King*(1); *Bray* v. *Ford*(2); *Makin* v. *Attorney-General of New South Wales*(3), at pages 69-70.

The first count, which charges theft, is bad for duplicity: sec. 853, sub-sec. 3, Criminal Code; Halsbury, Laws of England, vol. 9, p. 340; *Reg.* v. *Lamoureux*(4), at p. 103; Archbold (24 ed.), pp. 75, 76, 81, 84; *Rex* v. *Molleur*(5); *Rex* v. *Michaud*(6); The judge should have charged the jury as to what constitutes theft, explained the nature of colour of right, that taking must be against the will of the owner, and also that these elements were lacking in the case.

The second count is bad for duplicity or for triplicity; both conspiracy and receiving are charged, an earlier conspiracy "theretofore," and a later receiving. It confuses charges for receiving what had been embezzled, what had been stolen, and what had been obtained by a conspiracy to defraud. See Halsbury, vol. 9, p. 678.

(1) 44 Can. S.C.R. 331.
(2) [1896], A.C. 44.
(3) [1894], A.C. 57.
(4) 4 Can. Cr. Cas. 101.
(5) 12 Can. Cr. Cas. 8.
(6) 17 Can. Cr. Cas. 86.

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Nowhere in the Extradition Treaty, signed at Washington on 12th July, 1889, is conspiracy to defraud mentioned; by article 3, no person surrendered may be tried for any offence other than that upon which he was surrendered. See also the "Extradition Act," R.S.C., 1906, ch. 155, secs. 30 to 32; and R.S.C., 1906, ch. 142, secs. 22 and 23; *In re Gaynor and Greene* (1).

As to count four, the judge did not explain to the jury that the money in question was not parted with upon the strength of any false representation made by the accused knowing it to be false. No payment was made except by authority of contract or order-in-council. There can be no agency in crime: *Reg.* v. *Butcher*(2), at p. 19.

The practice adopted of including in one indictment many different offences is vicious, because the evidence admitted upon any count has a prejudicial effect against the prisoner on other counts, and particularly so where different kinds of crimes are charged with an alternative count of receiving: *Per* Hawkins J. in *Reg.* v. *King*(3), at p. 216.

The accused cannot be guilty of all four offences as found by the jury. The conviction could only be on one of these counts, but there is a specific verdict of guilty on each count: *Reg.* v. *Russett*(4); *Rex* v. *Fisher* (5). He cannot be guilty of any two offences. The penalties vary. The whole conviction is bad. One guilty of stealing goods as a principal cannot be convicted of receiving them: Halsbury, vol. 9, page 678 (footnote *n*). To be guilty of receiving stolen pro-

(1) 9 Can. Cr. Cas. 205.
(2) Bell C.C. 6.
(3) [1897], 1 Q.B. 214.
(4) 17 Cox C.C. 534.
(5) 103 L.T. 320.

perty it must have been taken by a person other than the person accused of receiving: *Reg.* v. *Lamoureux* (1); *Reg.* v. *Coggins*(2); *Reg.* v. *Perkins*(3).

The indictment is also bad for duplicity. Cyc., vol. 22, 376: "An indictment or information must not in the same count charge the prisoner with the commission of two or more distinct and separate offences and in case it does so it is bad for duplicity." The jury having found the prisoner guilty of theft, four kinds of receiving and false pretences, at the same time found him to be a conspirator. The Crown deliberately went to trial upon an indictment defective and bad for duplicity, triplicity and improper joinder, without considering the reservations made by Mr. Justice Holmes' judgment in the Supreme Court of the United States. The Crown should stand or fall by its own deliberate action. The conviction should be quashed.

The object of a motion to quash before trial is to preserve the rights of the accused at all stages, and particularly in the event of a verdict against the accused. The Crown has the right to amend, to sever, to elect which counts shall be proceeded upon—if necessary to prefer a new indictment or new indictments. But the Crown did not do so and the accused is entitled to the benefit of all the preliminary objections taken upon the motion to quash the indictment. The indictment was preferred and found when appellant was outside the Dominion of Canada, to the knowledge of the Attorney-General of Manitoba. The motion that was made under section 898 of the Criminal Code was absolutely necessary to preserve the rights of the accused as to any defects. The

(1) 4 Can. Cr. Cas. 101. (2) 12 Cox. C.C. 517.
(3) 5 Cox. C.C. 554.

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objection then taken was that the indictment had been preferred by the Attorney-General without legal authority. The Attorney-General knowing that the accused was not in Canada, in his absence, and while extradition proceedings were in progress, caused the indictment to be laid. The Attorney-General had no right to avail himself of the power to prefer an indictment in the absence of the accused and while he had himself undertaken proceedings under the "Extradition Act." His consent to preferring the indictment is not a mere formality: *Reg.* v. *Bradlaugh*(1).

J. B. Coyne K.C. and *R. W. Craig K.C.* for the respondent. The appeal to the Supreme Court of Canada can only be based on the grounds as to which there was a dissent in the Court of Appeal for Manitoba: *McIntosh* v. *The Queen*(2); *Eberts* v. *The King*(3); *Mulvihill* v. *The King*(4); See also *Rice* v. *The King*(5); *Gilbert* v. *The King*(6). The second count is not in contravention of the "Extradition Act" and the treaty. It is in the exact terms of the Canadian warrant for Kelly's apprehension, of the American complaint or information, of the American warrant for his apprehension, and of the extradition commissioner's recommendation to the Secretary of State; the accused was surrendered for trial on this charge.

As to conspiracy, see Russell on Crimes (7 ed.), pp. 146 and 191; *Reg.* v. *Parnell*(7), at p. 515; Taylor on Evidence (10 ed.), sec. 591. The offence is complete when the agreement is made: *Reg.* v. *Connelly*(8);

(1) 15 Cox C.C. 156.
(2) 23 Can. S.C.R. 180
(3) 47 Can. S.C.R. 1.
(4) 49 Can. S.C.R. 587.
(5) 32 Can. S.C.R. 480.
(6) 38 Can. S.C.R. 285.
(7) 14 Cox C.C. 508.
(8) 25 O.R. 151.

Rex v. *Parsons*(1). If, therefore, two persons pursue by their acts the same object, often by the same means, one performing one part of the act and the other another part so as to complete it with a view to the attainment of the common object they were pursuing, the jury are free to infer that they had been engaged in a conspiracy to effect that object: *Reg.* v. *Murphy*(2), *per* Coleridge J.; *Rex* v. *Cope*(3); *Rex* v. *Pollman*(4) at page 233.

A person concerned in any part of the transaction alleged as conspiracy may be found guilty, though there is no evidence that he joined in concerting a plan until some of the prior parts of the transaction were complete: *Rex* v. *Lord Grey*(5); *Rex* v. *Hammond*(6); Stephen's Digest of Evidence (4 ed.), pages 6 and 7.

See also *Rex* v. *Wilson*(7); *Reg.* v. *Shellard*(8); *Reg.* v. *Blake*(9).

The evidence is admitted on the ground that the act or declaration of one is the act or declaration of all when united in one common design. It is the principle of agency which, once established, combines the conspirators together and makes them mutually responsible for the acts and declarations of each: Wright, Criminal Conspiracy, p. 213, and pp. 212, 216; Russell on Crimes, p. 192; Roscoe, 355 at foot; *Rex* v. *Johnston*(10); *Rex* v. *Nerlich*(11); *Reg.* v. *Jessop* (12); *Reg.* v. *Charles*(13), at p. 502; *Reg.* v. *Desmond* (14). There is direct evidence of Kelly's part in

(1) 1 W. Bl. 392.
(2) 8 C. & P. 297.
(3) 1 Str. 144.
(4) 2 Camp. 229.
(5) 9 St. Tr. 127
(6) 2 Esp. 719.
(7) 19 West. L.R. 657; 21 Can. Cr. Cas. 105.
(8) 9 C. & P. 277.
(9) 6 Q.B. 126.
(10) 6 Can. Cr. Cas. 232.
(11) 24 Can. Cr. Cas. 256.
(12) 16 Cox C.C. 204.
(13) 17 Cox C.C. 499.
(14) 11 Cox C.C. 146.

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tampering with witnesses, fabricating and suppressing evidence, and upholding the fabricated evidence before the Public Accounts Committee.

When a criminal act has been proved and it is desired to connect the accused therewith it is relevant to shew that he had or had not a motive for the act or means and opportunity of doing it or that he had made preparations with that end in view or had threatened to do the act; the subsequent conduct of the accused often furnishes still further cogent evidence of guilt, *e.g.*, possession of recently stolen property, flight, or the fabrication or suppression of evidence: 13 Halsbury, pp. 447, 448; Wigmore on Evidence, sec. 278; *Moriarty* v. *London Chatham and Dover Rway. Co.*(1). The fabrication or suppression of evidence is none the less admissible because the accused called others to his assistance. If conspiracy were the charge it would not be necessary to set out the overt acts: *Reg.* v. *Blake*(2), at page 133; *Rex* v. *Hutchinson* (3); *Reg.* v. *O'Donnell*(4); *Rex* v. *Gill*(5). And if some overt acts were set out, the Crown would not be confined to them, but might prove others: *Reg.* v. *Stapylton*(6), *per* Wightman J., at p. 71.

Crown counsel's address was not an appeal to prejudice, but a plain and decided statement of the evidence. There can be no wrong done when statements are founded on evidence. The jury could not possibly have come to any other conclusion than that of the guilt of the accused on the evidence submitted irrespective altogether of the language of Crown counsel complained of. This is not a ques-

(1) L.R. 5 Q.B. 314.
(2) 6 Q.B. 126.
(3) 11 B.C.R. 24; 8 Can. Cr. Cas. 486.
(4) 7 St. Tr. N.S. 637.
(5) 2 B. & Ald. 204.
(6) 8 Cox C.C. 69.

tion which can be reserved for the opinion of the court of appeal: *Rex* v. *Nerlich*(1), *per* Hodgins J. at p. 317; *Rex* v. *Banks*(2).

As to clause 15 of the reserved case and the charge of trial judge regarding the statement of accused to the jury not being made under oath. The accused had no right to make a statement. He had the right to go into the witness-box and give his evidence on oath. There is a distinction between the English and Canadian Acts. The former has a saving section, negativing what would otherwise be the law, and providing that, notwithstanding the fact that he may give evidence on oath, the accused may still make an unsworn statement: *Rex* v. *Krafchenko*(3), at pp. 658, 659. As to what would be considered comments, see *Rex* v. *King*(4), at page 434; and *Rex* v. *McGuire*(5). The remarks complained of do not constitute a comment prohibited by the "Canada Evidence Act," section 4, sub-section 5: in *Rex* v. *Hill* (6) and in *Reg* v. *Coleman* (7) there was direct comment on failure to testify. See *Reg.* v. *Weir* (8), at pages 269-271; *Rex* v. *Aho* (9); *Rex* v. *Guerin* (10).

The powers of the appellate court are stated in the Criminal Code, secs. 1018, 1019 and 1020. Some substantial wrong or miscarriage must have been occasioned at the trial. The court may give separate directions as to each count and may pass sentence on any count unaffected by any wrong or miscarriage which stands good, or may remit the case to the court below

(1) 34 O.L.R. 298.
(2) (1916) W.N. 281.
(3) 24 Man. R. 652.
(4) 9 Can. Cr. Cas. 426.
(5) 9 Can. Cr. Cas. 554.
(6) 7 Can. Cr. Cas. 38.
(7) 30 O.R. 93.
(8) 3 Can. Cr. Cas. 262.
(9) 8 Can. Cr. Cas. 453; 11 B.C. Rep. 114.
(10) 14 Can. Cr. Cas. 424.

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with directions to pass such sentence as justice may require. A new trial is not justified here under sec. 1019.

There was no reserve case submitted on joinder of counts and argument on that point must be eliminated. *Rex* v. *Hughes*(1), at 454. There was no dissent in the Court of Appeal on this point. There was no objection to joinder before pleading, as required by the Code, sec. 898: *Reg.* v. *Flynn*(2). Counts may be joined as in this indictment: *Rex* v. *Lockett*(3); *Rex* v. *Seham Yousry*(4); *Reg.* v. *Poolman*(5); *Rex* v. *Beauchamp*(6); *Reg.* v. *Smith*(7). Under the Code, sec. 857, this is a matter in the discretion of the trial judge, and is not subject to review. There was a conviction on counts 1, 2, 4 and 5. No question was reserved for the Court of Appeal as to whether such verdict was inconsistent.

As to the charge on count 1 as to theft, and as to colour of right. The fraudulent contracts constituted no colour of right: *Reg.* v. *Kenrick*(8). As for "against the will of the owner," there was no question as to that in the evidence. The evidence was that the funds were wrongfully taken and converted.

As to count 4, obtaining money by false pretences, the statement of the law by the trial judge was sufficient to guide the jury in reaching a verdict so long as there was evidence to convict on such a charge.

The opinions of the CHIEF JUSTICE and DAVIES J. are delivered by Anglin J.

(1) 17 Can. Cr. Cas. 450.
(2) 18 N.B.Rep. 321.
(3) (1914), 2 K.B. 720.
(4) 31 Times L.R. 27.
(5) 3 Cohen Crim. App. 36
(6) 25 Times L.R. 330
(7) Dears. 494.
(8) 5 Q.B. 49.

IDINGTON J.—This appeal arises out of a reserved case in which the learned trial judge had submitted to the court below seventeen questions. On the hearing of that appeal two of the learned judges hearing it, dissented, on points hereinafter referred to, from the judgment of the Court of Appeal.

Under the authorities cited in argument, including *Reg.* v. *McIntosh*(1); *Rice* v. *The King*(2); *Gilbert* v. *The King*(3); *Curry* v. *The King*(4); *Eberts* v. *The King*(5), at p. 26; *Mulvihill* v. *The King*(6), and other cases cited in the reports of these decisions, I do not think there can longer be a doubt that our jurisdiction to hear an appeal from a court of appeal in a criminal case is bounded by the lines of clear dissent on any point raised therein relative to any of the questions of law properly involved in the submission of the reserved case.

A dissenting opinion relative to something outside that which can properly be made part of a reserved case or fails to bear upon the points of law properly involved in such case as reserved, can form no part of what we are concerned with.

I respectfully submit that the expressions of the dissents herein are, as I read them, not clearly confined within these lines. For example: as regards the grounds taken relative to the questions raised by the matter in the address of counsel for the Crown I doubt if such an address can be in itself the subject of a reserved case. I shall presently deal at length with that subject and the arguments founded on what for brevity's sake I may call the conspiracy aspect of the case, when what I refer to will more fully appear.

(1) 23 Can. S.C.R. 180.
(2) 32 Can. S.C.R. 480.
(3) 38 Can. S.C.R. 284.
(4) 48 Can. S.C.R. 532.
(5) 47 Can. S.C.R. 1.
(6) 49 Can. S.C.R. 587.

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I merely desire here to submit, respectfully, that for want of that definite application of each dissent to the reserved question it relates to, or what the exact grounds are intended to be covered thereby, and as the dissents may have implied more than I might find appears, in order to avoid mistakes, I shall proceed to deal consecutively with each question in the whole reserved case. I am not, therefore, to be assumed as departing from what I have just now said of the limits of our own jurisdiction to act.

There is another boundary to our jurisdiction expressed in the language of sec. 1019 of the Criminal Code, which is as follows:—

1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the court of appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted: 55-56 Vict. ch. 29, sec. 746.

Applying this section enables me, for my part, to dispose of the case, without entering at length, and in minute detail, upon some of the nice questions which may be involved in the dissenting opinions.

There was a motion made by counsel for the appellant to quash the indictment, and refused by the learned trial judge.

The first six questions submitted concern the validity of this refusal and raise the further question of whether or not, if there be in any case an error therein, there was as a consequence thereof and the admission of objectionable evidence a mistrial.

There are six counts in the indictment. The sixth, which is for perjury, was, with the consent of the Crown, directed to stand over and not to be tried with the others.

The fifth has been disposed of by the Court of Appeal.

The first and fourth are ordinary counts for theft and false pretences, respectively, and I fail to see how any serious question can have been raised as to them.

The second and third counts may be open to the criticism that they are of doubtful import, but as the first and fourth counts enabled the whole of the evidence to be given, which was properly admissible on the trial, there cannot now, in face of the section quoted above, be any question of serious import raised as to the validity of the learned judge's refusal to quash.

The attempt to use the particulars delivered ten days later than this motion to quash, illustrates how absurd this part of the contention in the case is.

The complaint made that the learned trial judge did not, in his charge, enter upon a specific attempt to deal in detail with, and direct the jury as to, each of these counts, and what they mean and might be held to imply, seems unfounded, for his mode of treatment left the appellant without any ground of complaint in regard thereto. Had he done as suggested I imagine there might have been some ground for suggesting that the minds of the jury had been thereby confused.

The case was presented by him in his charge as one of stealing, or receiving that stolen, or of obtaining by false pretences. He wisely abstained from needlessly entering upon such a field of mystification as we have had presented to us to deal with and hence his charge misled nobody.

There was at the close of the trial a distinct question put by the foreman of the jury which led the learned judge to tell the jury they could not bring in a verdict of guilty on both these second and third counts,

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but must, if either included in a verdict of guilty, select one or other thereof.

Their verdict was guilty on the first, second, fourth and fifth counts.

There was, therefore, no substantial wrong or miscarriage in the refusal to quash or in consequence thereof.

As to question 7, which is as follows:—

7. Was I right in my charge to the jury on the first count of the indictment as to theft or was my charge insufficient in law so as to be prejudicial to a fair trial of the accused?

There is raised thereby perhaps the most important and difficult question in the reserved case.

The learned judge relied upon section 347 of the Criminal Code and I think he was right in doing so. It is a most comprehensive definition of theft and is as follows:—

347. Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, any thing capable of being stolen, with intent,—

(*a*) to deprive the owner, or any person having any special property or interest therein, temporarily, or absolutely, of such thing, or of such property or interest; or,

(*b*) to pledge the same or deposit it as security; or

(*c*) to part with it under a condition as to its return which the person parting with it may be unable to perform; or,

(*d*) to deal with it in such a manner that it cannot be restored to the condition in which it was at the time of such taking and conversion.

2. Theft is committed when the offender moves the thing or causes it to move or to be moved, or begins to cause it to become movable, with intent to steal it.

3. The taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment.

4. It is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person converting: 55-56 Vict., ch. 29, sec. 305.

"Anything capable of being stolen" might not cover money in the bank to the credit of any person, but

surely it does include a cheque to draw that money. I think a cheque being an order for money is a valuable security within the words of the indictment. Can it be said that the fraudulent means resorted to in order to induce the Lieutenant-Governor and others to do those acts which resulted in the preparation of the cheque and its due signature having preceded its existence, therefore the appellant guilty with others in bringing those acts about, can have acquired a colour of right to use it or convert it to his use?

I think not, and that if the appellant by reason of his fraudulent acts was not entitled to have received any of the cheques issued to him, he had no right to convert them to his use.

They each remained the property of the Crown recoverable by respondent, if so advised, from appellant at any instant until passed into the hands of the bank without notice. The language of sub-sec. 4 seems clearly to bear this out and to cover just such cases as this.

The later sections dealing with what used to be called embezzlement are in harmony with this view. The evident purpose of the section, as a whole, was to make clear that the fraudulent nature of the dealing was to be the test of whether or not the wrongful conversion was to be treated as theft or not.

Counsel for respondent in their factum suggest that the moneys had been stolen by the Minister and thereby there was a conversion of the money to which appellant was a party as accessory and hence he was liable as a principal.

My difficulty is in extending the section to a theft of money in the bank for it contemplates a taking which could not, I submit, be within the meaning of the section.

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The same counsel in argument also submitted the amendment to the English "Larceny Act" in 1861, section 70, aimed at officers of the government, and that such amendment was introduced by the Act introducing English law into Manitoba.

In my view it is not necessary to pass any opinion upon this contention.

If appellant could be guilty of stealing the cheques, then there is no need for prosecuting the inquiry.

The eighth question seems upon the evidence hardly arguable.

Clearly there was an obtaining of money by false pretences whatever may be said of the other charges as a matter of law.

The ninth question, which is as follows:

> 9. Was I right in admitting evidence as to acts, conduct, admissions, conversations and facts relating to some one or more of those named in the second count, namely: Rodmond P. Roblin, Walter H. Montague (since deceased), James H. Howden, George R. Coldwell, R. M. Simpson and Victor W. Horwood, to which the accused was not a party, and if I have erred, was the same prejudicial to a fair trial of the accused?

raised at first, in argument, a doubt in my mind, when it was urged by counsel for appellant that the moneys obtained had all been obtained before the end of December, 1914, and the offences charged had then been completed and much of the evidence here in question related to later events.

It was alleged that what transpired later was in fact nothing but evidence of a new conspiracy and neither had nor could have had any direct relation to or be in any way a necessary result of the original conspiracy.

If the facts would justify this or some such way of looking at the admissibility of the later evidence I agree a grave question would have arisen.

It is, however, quite clear when one is enabled by a knowledge of the evidence to grasp the actual situation that this contention of appellant is hardly worthy of serious consideration.

The Crown alleges in fact the existence of a conspiracy on the part of those named, or some of them, including the accused, to use the opportunity of the erection of the public buildings—known as Parliament Buildings—for the improper purpose of diverting funds ostensibly voted by the legislature for that purpose, and the property of the Crown as charged, into the hands of some one for the purpose of forming part of a political campaign fund, or possibly dividing or distributing amongst them, or some of them, moneys so diverted.

It matters not what the purpose was so long as moneys were, from time to time during the progress of such works, to be diverted from their proper purpose as designated by the legislature.

There was evidence that justified such an inference and it was of such weight as to entitle the Crown to have the whole relative thereto fully developed.

Touching the mere questions of admissibility of such evidence the learned trial judge had to consider the nature of the charges either as alleged in the pleadings or presented by counsel for the Crown, and then the evidence already presented tending to support any such pretensions and determine whether in view of all that had preceded such later developments could reasonably be connected therewith.

In default of that being quite apparent from the case as developed, learned trial judges often, for convenience sake, have to rely upon the undertaking of the counsel presenting such like evidence that it will be connected with that preceding or to follow in such

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a way as to be relevant to the issues in question and maintain the contention put forward.

The mere technical questions of admissibility as presented in the question does not therefore go very far.

If, however, it should in such case turn out that the evidence could not be connected with other evidence in a way to form an arguable case, the consequences would have to be dealt with effectively to see that there was no miscarriage of justice. Here it is not merely the admissibility as that is put in the question that might have been involved.

Not only was it contended that the evidence of the later acts I have referred to were inadmissible, but also that the whole evidence of conspiracy, or to put it in another and less controversial form, of agreement to act together in pursuance of the common purpose of diverting a part of the money appropriated for said buildings, so attacked was quite inadmissible unless appellant was present.

I cannot assent thereto. Whatever our reason will maintain as fairly inferable from the circumstances presented must be the test. The accused, of course, must be so connected with those circumstances or part thereof as to justify, by that test, the maintenance of the inference argued for.

But, unfortunately for the appellant, his connection with the later developments has been shewn in fact to be so intimate and close that there is no need for straining the application of the principles I am relying upon to bring home to him the desire to destroy evidence and hinder its production and promote thereby the concealment of all that had transpired which might tend to shew him and others as having designed by their

co-operation to divert and to have succeeded in diverting moneys from their destined purpose.

And the desire to destroy, when existent in some bosoms, seems soon to produce destruction.

In each of the sections 69 and 70 of the Criminal Code there has been formulated a legislative guide expressive of the law which may be relied upon as an effective answer to all that has been put forward or that may be implied therein, in any way, bearing upon the many questions or many forms of the same question in contending against the use of anything done by others unless clearly and expressly directed by him.

The second sub-section of said section 69, is as follows:—

> 2. If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose: 55-56 Vict., ch. 29, sec. 61.

The general and comprehensive declaration of the law binds and goes a long way to define what may be admitted in evidence in cases of this kind.

It is but a deduction of that which in reason, must necessarily open the way to the introduction of evidence, in order to lay before the court those circumstances, from which it may be reasonable to infer concurrence of action on the part of the accused in regard to what is in question.

It is quite clear from the evidence that though the moneys got had been paid before the end of December, 1914, yet the scheme, as a whole, was far from complete, and had been only interrupted by steps in the way of inquiry before a committee of the legislature, which seemed likely to lead to an exposure that would prevent its full fruition. Hence it became necessary

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for those concerned, actively led by the accused as commander of the forces as it were, to destroy evidence and keep witnesses out of the way. He had been paid far in excess of the work done and was proceeding with further execution of the work. That payment, however, was a mere incident of all that had been planned.

I have no doubt that all that which was introduced as evidence at the trial in the way complained of, in order to prove concealment of a fraudulent purpose in relation to said payments, was properly admissible and evidence from which proper inferences might be drawn tending to establish that purpose and the character thereof.

I shall presently advert to another aspect of this question of conspiracy and its bearing on the case.

Question 10 seems, as put, hardly arguable.

Question 11 seems of the same nature and to call for the same reply, for, as put, it does not indicate that there was any evidence adduced which bore only upon the third count and could have an improper bearing upon other counts.

Question 12 was hardly pressed before us and I see no reason why such an affidavit should not be admitted under the circumstances. Moreover, the objection has no support in the dissenting opinions. On the contrary it is overruled in that of Mr. Justice Richards.

The same answer may be made as to questions 13 and 14 save that the learned judges dissenting made no observation anent same.

Question 15 is as follows:—

15. Was I right in my comments upon the statement of the accused to the jury, with respect to it not being made under oath, and if so, was this prejudicial to a fair trial of the accused or a violation of the "Canada Evidence Act?"

I desire to consider this and part of Question 17, together.

It seems difficult to understand how the proper remark of the learned trial judge can be construed as an infringement of the "Evidence Act."

It may be quite permissible for the accused, when undefended, to state his version of what has been given in evidence in order to bring home to the minds of the jurors the possibility that the evidence as it stands or, either by reason of the way in which it has been presented in the giving thereof or the summing up of Crown counsel may mislead, and by his statement induce a reconsideration of anything so tending. Any misleading construction put upon it to the detriment of the accused may thereby be cured.

When the accused in his address chooses to present his version and adds thereby something in way of statement of fact relevant to that which is properly before the jury, they are not only entitled but bound to consider what the accused has said including his statement of alleged fact.

But they, when considering same, can only properly consider it in the way of an explanation which may induce them to turn their minds towards the evidence which has been sworn to and see if as a whole it can properly bear the interpretation which the statement of fact made by the accused suggests as a possibility.

If on the evidence it cannot properly be so understood their duty is to discard the statement entirely for it is not evidence. That is in substance the effect of what the learned trial judge told them and therefore, his charge is in that regard unobjectionable.

The learned judge undoubtedly erred as he suggests, in allowing the accused to wander far beyond the issues

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and introduce topics and allege statements of pretended fact which had nothing to do with the simple issues of fact properly before the court. No one had the slightest right to do so, and above all things to make charges against or to insult opposing counsel by dragging in something as the accused did, which had nothing to do with the issues being tried.

If the accused dispensed with counsel, as quite possibly he did, in hopes of being allowed to drag in by way of his address something which was not permissible and what no counsel could or would venture upon doing, it is to be regretted he was permitted the measure of success he got.

As I gather from the learned judge's charge he felt he had erred and tried to rectify it by pointing out that statements of the accused in an address are not evidence and are not to be treated as such. He would have erred if he had failed under such circumstances in making plain as he did the law on the subject.

Question sixteen is as follows:—

16. Similarly were any of the observations of counsel for the Crown so inflammatory or improper as to prejudice the fair trial of the accused or to be a violation of the "Canada Evidence Act?"

The question as presented does not, I incline to think, put forward any question of law and hence is beyond that which we are entitled to act upon. It is put forward, however, at great length and, if I may be permitted to say so, given undue prominence.

We have presented in appellant's factum extracts culled from an address which occupies twenty-five printed pages of the appeal book. It is not difficult when such extracts are taken from their context to try and create an unpleasant impression. Some of these extracts are unfair presentations of what was intended.

The late Sir James Stephen, in his History of the

Criminal Law of England, vol. 1, p. 429, deals with the question of Crown counsel addresses, and there says:—

> It is very rare to hear arguments pressed against prisoners with any special warmth of feeling or of language; one reason for which no doubt is, that any counsel who did so would probably defeat his own object. Apart, however, from this, it is worthy of observation that eloquence either in prosecuting or defending prisoners is almost unknown and unattempted at the bar. The occasion seldom permits of it, and the whole atmosphere of English courts in these days is unfavourable to anything like an appeal to the feelings—though, of course, in particular cases, topics of prejudice are introduced.

Some few things said by counsel in summing up perhaps transgress these traditions of the English bar.

But wherein exists the question of law raised?

It certainly does not appear in the question sixteen or in these extracts as self evident.

I am not prepared to lay down as law that out of a Crown counsel's address there cannot arise ground for a reserved case.

I can imagine a case (such as does not exist here) of counsel misstating the law and the fact in such terms as to call for the prompt interference of the trial judge, and for his rectification of any wrong done thereby, by warning and directing the jury not to be misled thereby.

It is not the misstatements in the address which alone can furnish ground for a reserved case upon a point of law, but those coupled with failure on the part of the learned trial judge to see such errors rectified, that, in my opinion, can constitute grounds for a reserved case. In such event the least that should be required is a statement in the reserved case concisely setting forth exactly what is complained of. A general suggestion such as put in questions 16 and 17 does not satisfy what should be required.

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It does not seem to me that we have here any such definite statement of what is in question as the statute requires to be set forth in a stated case reserved for the appellate court.

In any event we are here confined to what appears in the dissenting opinions.

Mr. Justice Richards selects the criticism by the Crown counsel of the failure of the accused to be defended by counsel. The whole of the episode and real or affected resentment because a postponement of more than two weeks for preparation by counsel was refused deserved severe criticism. And I am not prepared to find any legal ground for interference merely because the language in which it was couched might have been better chosen, when the conduct in question deserved some observations from both Crown counsel and the learned trial judge to have been passed upon it. A firm, temperate rebuke was in order if respect for the bench is to be maintained.

Mr. Justice Richards further selects the misstatement of the law by the Crown counsel as to the crimes charged in the indictment, but, as I most respectfully submit, it may be my misfortune that my own view rather accords with that in substance which I take it was intended to be presented by the Crown counsel rather than what Mr. Justice Richards holds. I hardly think we can make much of that complaint.

Again he selects the expression as to accused thinking himself to be guilty. As I read the address it contains two pages of evidence quoted by counsel attempting to demonstrate in a fairly arguable manner that such is the inference to be drawn from the evidence quoted.

Counsel certainly on this occasion and others should not have stated, as he did, his own opinion,

instead of making a submission of his contention for consideration by those addressed.

I am not prepared to hold that there was any substantial wrong or miscarriage created either thereby or by the omission of the learned trial Judge to specifically call attention to the error and warn the jury against it.

The remaining passages, selected by Mr. Justice Richards as the subject of observation, seem to me of the character which (as Sir James Stephen remarks in the quotation above) would tend to defeat counsel's object.

I am quite sure the matters with which they deal could have been presented in a calm, lucid way that would have carried more weight with the jury and had a crushing effect, if the evidence is to be believed, beyond anything that is complained of.

And hence I fail to find that the omission of the learned trial judge to specifically deal therewith in each phase thereof, furnishes a reason to believe there has been any substantial wrong or miscarriage.

I repeat it is only by virtue of such omissions that a question of law can arise.

The learned trial judge's charge was fair and in general terms covered all that is gathered thus from the address of counsel.

Mr. Justice Haggart assigns nothing further on this question than that already referred to by Mr. Justice Richards.

In parting with this part of the case I think it is due to Mr. Coyne to say that whatever may be said or thought of the error in the mode of address used by his leader in summing up, he ought not to have been attacked, as he has been, for he was doing no more

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than his duty in repudiating what accused improperly dragged into the case.

I cannot think that under the circumstances the granting of a new trial, by reason of anything that is thus complained of, would conduce to the due administration of justice.

There remains for consideration the objection taken by Mr. Justice Richards in one form, and by Mr. Justice Haggart in another, relative to the charge of conspiracy alleged to be made in the second and third counts of the indictment and all bearing thereupon or flowing therefrom. These counts cannot, I submit, be held to be in law an indictment for conspiracy.

They are, by the express language used, clearly intended to be charges against the accused, of unlawfully receiving money, valuable securities or other property, belonging to the respondent which had been stolen by means of a conspiracy.

How can that be pretended to be a count framed to charge a conspiracy? If nothing had been adduced in evidence but that tending to establish a conspiracy and on the trial all reference to its successful accomplishment had been omitted, would any court or judge listen long to a prosecuting counsel professing to desire the charge of conspiracy to be submitted on such a count to a jury and proposing to ask them to find the accused guilty of conspiracy? I venture to think no judge could be got to assent to such a proposition.

It seems to me this is the proper test to apply to what is suggested and elaborately argued relative to the infringement of the Extradition Treaty under which the accused was surrendered.

So tested, there is not a single ground upon which

in reason or authority the claim to exclude evidence because it would tend to prove a conspiracy, can be maintained.

Again, suppose the words

by means of an unlawful conspiracy by fraudulent means of Thomas Kelly aforesaid, Rodmond P. Roblin, Walter H. Montague (since deceased), James H. Howden, George R. Coldwell, R. M. Simpson, Victor H. Horwood and others unknown to defraud His Majesty

had been omitted from each of these second and third counts and each then stood as a count in the ordinary form of obtaining money or valuable securities, or property by false pretences, and it had been attempted to prove exactly what has been proven and no one ever used the word "conspiracy" but the facts were offered to conclusively establish the means whereby the wrongs complained of had been accomplished, would any trial judge rule out any of the evidence? On what ground could he?

The charge is, in this amended count I suggest, that the money, or securities, or property had been theretofore stolen. The means used is not stated in the amended form I suggest. How could the judge be asked to reject the evidence? Would he listen to, or give effect to, the argument that it had unexpectedly been disclosed that the accused was one of those who had counselled the original crime of theft and therefore he could not be convicted of unlawfully receiving that which he was an accessory to the stealing of?

The fact is notorious that in many criminal circles there exist men who act as fences. Could such a man secure his acquittal on a charge of receiving stolen goods, by proving that he had directed those usually doing the actual stealing and bringing him the goods, to take these goods in question from some one he had pointed out?

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Such proof would constitute him a principal liable to be found guilty of the theft.

Whoever supposed that because it had this or in some such way developed that the man accused of receiving stolen goods was in fact liable to be charged as a principal, he would be entitled to his acquittal?

Since when has it been law that a man indicted for a minor offence can claim acquittal on any such theory?

I have always supposed that the Crown was entitled to prosecute for that of which a man was clearly guilty even if he was suspected of being liable to be held for a higher or greater offence and a diligent inquiry might produce evidence thereof.

Whatever might be the duty of a Crown officer under such circumstances can have no bearing upon the legal result.

The Crown is entitled to lay the charge for whatever is deemed appropriate to the evidence at hand. And if tried for that for which the Crown has so chosen to indict him, the accused can never again be arraigned and tried for another offence upon the same facts.

Those apprehensive that the accused might suffer wrong by reason of such a proceeding will be relieved by a perusal of those parts of Archbold's Criminal Pleading, Evidence and Practice (22 ed.) pp. 150 *et seq.* where the work deals with the subjects of *autrefois acquit* and *autrefois convict*, and cites the numerous authorities on the subject.

So much for the possible wrong or miscarriage.

Moreover does it not seem idle to argue about the wrong done by a suggested possibility of these counts containing more than one charge, in face of the provisions for inserting in one indictment any number of offences and only one or two, but none of these, are excepted from being so dealt with.

Then again we have the further provisions contained in section 951, of which the first sub-section is as follows:—

951. Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included.

This alone should be held to cover all the objections revolving around these two counts and dispose of all except the conspiracy question already dealt with and about to be referred to. Though the section just quoted and others give wide scope for acting under in order to relieve trials from the danger of being wrecked by some mere play upon words or trifling frivolities so dear to the hearts of ancient pleaders now dead, the duty remains to have it kept clear during the trial what the court is about to try and is trying an accused for.

Not only as I submit was there no doubt in this case in the minds of any one, but special pains were taken by counsel for the Crown and the learned trial judge to make clear that there was no charge of conspiracy made by the indictment, and the only reference made thereto was part of the inducement in the pleadings explaining the means whereby the crimes charged were accomplished. I imagine no juryman in Manitoba was ever stupid enough to fail to understand what he was thus told.

To meet some points pressed upon us though not open for action as I read the reserved case, I may add a few sentences and cite some precedents covering things so urged or pointed at. Even the question of a man being charged with receiving that which he might

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not only be charged with having stolen but was in fact guilty of, is covered by authority in the case of *Reg.* v. *Hughes*(1).

There might have been raised a more arguable case than some parts of this one on the ground of the verdict of guilty being entered for both the theft and the receiving of that stolen inasmuch as the punishments respectively assigned to such offences are not the same. Counsel for appellant seemed to think some such question was raised and put it forward in several ways. The case of *Rex* v. *Darley*(2) and other cases referred to in Chitty's Criminal Law (18 ed.), when dealing with the law as it stood one hundred years ago, suggest the contention would have been unavailing.

What could be dealt with in a practical common sense fashion under the state of law then cannot surely furnish obstacles to the execution of justice now in view of the effort made by the legislature to remove such like barriers from the successful administration of justice and reduce all that is involved to the simplicity so much to be desired.

The appeal should be dismissed.

DUFF J.—There was, I think, no evidence to support a conviction on the charge of theft. In each case the authorities having custody on behalf of the Crown of the moneys paid to Kelly intended to pass the property in these very moneys to Kelly. Except as to the contention advanced on behalf of the Crown to which I am about to refer, it is sufficient to say that touching this branch of the appeal I adopt the reasoning of Mr. Justice Richards.

The answer to the learned judge's reasoning put

(1) Bell C.C. 242; 8 Cox C.C. 278.

(2) 4 East 174.

forward by counsel for the Crown appears in the following extract from the factum:—

Mr. Justice Richards errs in holding that count 1 of the indictment is negatived by the evidence. He apparently looks at the count as charging Kelly with actually himself stealing or embezzling the moneys. He apparently overlooks Kelly's position as an accessory before the fact to misappropriation of the public funds by the ministers. If he does not overlook this, then his view must be based on a restricted view of the definition of theft in the Criminal Code, sec. 347, which would limit the operation of that section to the *taking* of anything capable of being stolen, all the cases cited by him being judgments dealing with the question of the offence of larceny at common law. This leaves out of consideration theft by conversion under this section, which is committed whenever a person already in possession of personal property, with the owner's consent, fraudulently and without colour of right converts it to his own use or to the use of any other person than the owner of it with intent to deprive the owner of such property, or so to deal with it that it cannot be restored. The contention of the Crown is, and the evidence shews, that the cheques upon the funds of His Majesty the King in the right of the Province of Manitoba, and the moneys subsequently paid on those cheques were received under circumstances that constituted a theft or embezzlement by Messrs. Roblin, Coldwell, Howden and Montague in combination with Messrs. Kelly, Simpson and Horwood. To this Kelly contributed by being an accessory before the fact, and is therefore in law a principal in the commission of the offence, under sec. 69 of the Criminal Code, by reason of which there is no longer any distinction between a principal and an accessory before the fact.

See Crankshaw, p. 72:—

"A principal may be the actual perpetrator of the act, that is, the one who, with his own hands or through an innocent agent, does the act itself; he may be one who, before the act is done, does or omits something for the purpose of aiding some one to commit it; he may be one who is present aiding and abetting another in the doing of it; or he may be one who counsels or procures the doing of it, or who does it through the medium of a guilty agent."

The assumption underlying this argument is that the Ministers Roblin, Coldwell, Howden and Montague being in possession of moneys of the Crown could be convicted of unlawful conversion of the moneys under section 347 of the Criminal Code. When pressed for evidence that these moneys were in the possession of these ministers in contemplation of law, that is to say, within the meaning of the enactment

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relied upon, counsel were unable to point to any evidence of such possession. The fallacy of the argument lies in taking it for granted that the political (as distinguished from legal) control of the machinery of administration which, subject in the last resort to the authority of the Lieutenant-Governor, rested in the hands of these persons was equivalent in law to such possession and that in putting such machinery in motion, which they were able to do by falsifying the facts and thereby enabling Kelly to procure the moneys in question, they were guilty of the criminal offence of conversion within the contemplation of section 347.

The point may be illustrated by reference to the moneys paid under authority of orders-in-council. It was argued that as these ministers, or some of them, constituted a majority of the executive on whose advice the orders were passed, their acts in procuring the passing of them, and indirectly, by means of the orders, the issue of cheques payable to Kelly amounted to "conversion" in point of law.

But in truth these moneys were the moneys of His Majesty lawfully disbursable only on the order of His Majesty's representative, the Lieutenant-Governor (acting it is true on the advice of his Executive Council) and by the instrumentality of cheques signed by certain permanent officials, one of them being the Auditor. The moneys were in the possession of the Crown subject to disposition only by following a procedure prescribed by law; and though the advice of the Executive was a necessary part of this procedure, it was by no means the whole of it. Nor were the other essential acts, such for example as the concurrence of the Lieutenant-Governor which in these cases was obtained by deceiving him as to the facts of a character so purely ministerial as to justify

the conclusion that these moneys were in law under the control of the ministers as depositaries. The truth is that, in law, the function of these persons was advisory only, the effective executive acts were the acts of others.

This is, of course, not to say that the conduct of Roblin and his associates, regard being had to their obligations as holders of high public office, was not (leaving out of view the law relating to conspiracy and obtaining money under false pretences) such conduct as the law notices and punishes as criminal under another head or other heads than theft.

The charge of receiving moneys knowing that such moneys had theretofore been embezzled, stolen or fraudulently obtained also, in my opinion, fails for the reason that up to the moment when the moneys in question were "received" by Kelly they remained in possession of the Crown and had not up to that moment been "obtained" by anybody not entitled to have them. The appellant is consequently entitled to have the conviction against him in respect of count No. 1 and count No. 2 quashed as being unsupported by evidence.

Mr. Coyne, as counsel representing the Crown, quite properly stated in the argument that the Crown submitted to the judgment of the Court of Appeal being treated as if it provided under section 1020 of the Criminal Code that the penalty should be limited to the lowest maximum penalty allowed by law to be imposed as the result of a conviction on the first, second and fourth counts.

I have nevertheless expressed my opinion upon the points above discussed because that, as I think, is due in strict justice to the appellant. In a court of morals no difference may be perceptible between the crime

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charged in the first count and that charged in the fourth count; yet the law does (as the difference in severity of the penalties attached to these crimes respectively demonstrates) regard the first mentioned offence as much the graver and it is right I think to state my opinion that of the graver offence he could not properly be convicted.

Before coming to the crucial questions relating specifically to the conviction on count number four it is convenient to deal with the objection (which might have been a formidable one if founded in fact) that the trial as actually conducted was in truth a trial for conspiracy—a non-extraditable offence. The objection has no sub-stratum of fact. The officers of the Crown were entitled, and indeed it was their duty, in the circumstances, to bring before the jury all facts legally admissible in evidence which might tend to establish the fraud charged to the satisfaction of the jury. The design and the concerted action in furtherance of it were rightly proved and emphazised—not for the purpose of obtaining a conviction for conspiracy as a substantive offence—but as establishing the responsibility of Kelly for certain acts and as exhibiting the character and operation of the dishonest scheme which, as the Crown alleged, disclosed the criminal intent that was an essential ingredient in the offence charged under any of counts one, two or four.

The appellant asks for a new trial in respect of the fourth count of the indictment on the ground that the law was departed from at the trial in (1) comments alleged to have been made on his failure to testify on his own behalf; (2) the reception of inadmissible evidence; (3) unfairness of the trial in respect of extreme

and inflammatory observations by counsel for the Crown.

As to the first of these grounds I can find nothing, which, when fairly construed, amounts to such comment within the meaning of the statutory prohibition.

As to the second ground (which was also put in the form of an objection that the learned judge failed to point out to the jury the evidence admissible under counts one and two that would not be admissible under count four) the only exception requiring comment is that relating to evidence of acts which were done after the last of the payments in question had been made (December, 1914), and to which Kelly was not proved to be an immediate party. Kelly it is said could not be held to be a party to these acts indirectly or constructively by reason of the conspiracy proved to obtain these moneys by fraud, as the object of that conspiracy was completely accomplished when the last payment was made. This objection is not, I think, well founded. These acts it was argued with a great deal of force (and I am inclined to think the argument is sound) which were concerned with measures for the prevention of discovery and disclosure were well within the original design. But be that as it may there is sufficient evidence of concert in preventing discovery and disclosure to establish a subsidiary conspiracy in which Kelly was involved with that as its object; and acts done in furtherance of such a conspiracy would be admissible in support of the charge of *mens rea*.

As to all these alleged grounds for granting a new trial it should be observed that the jurisdiction of the court of Crown cases reserved in Manitoba as well as the jurisdiction of this court in criminal appeals is

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derived from statute and that in exercising that jurisdiction both courts are strictly bound by the rule that no new trial can be granted unless there has been some error, by which "some substantial wrong or miscarriage" has been occasioned "on the trial" (Crim. Code, sec. 1019).

The guilt of the appellant as regards the offence charged by the fourth count (obtaining money by false pretences) is demonstrated by evidence indisputably admissible No jury directing its attention exclusively to that evidence could, unless bent upon not giving effect to the law, have failed to find a verdict of guilty on that count.

In these circumstances there was obviously no "miscarriage;" and assuming there was some technical "wrong" there can be in my judgment no "substantial wrong" from the admission of inadmissible evidence if it must be affirmed that relatively to the whole mass of admissible evidence that which is open to exception is merely negligible and that in the absence of it the verdict could not have been otherwise. This conclusion is in no way inconsistent with the acceptance of the criterion suggested in *Makin's Case*(1), at pages 70 and 71. In such a case the impeached evidence cannot in any practical sense be supposed "to have had any influence upon the verdict."

As to the ground numbered three upon which a new trial is prayed it may be added that although some of the observations of the learned Crown counsel were no doubt excessively heightened, it is impossible to think that in the circumstances of this case the accused could suffer in consequence of them. Such expressions could not deepen the effect of a bare recital of the

(1) [1894] A.C. 57.

facts in the story which the officers of the Crown had to put before the jury.

The opinion of the Chief Justice, Mr. Justice Davies and Mr. Justice Anglin was delivered by

ANGLIN J.—Although the conviction of the appellant on three distinct counts in an indictment—No. 1, for theft, No. 2 for receiving, and No. 4 for obtaining money by false pretences—was upheld by a majority of the learned judges of the Court of Appeal for Manitoba, the Chief Justice, as we understand with the concurrence of Mr. Justice Perdue and Mr. Justice Cameron, said (35 West. L.R. 57):—

It is difficult to see how the accused should for one crime be found guilty on the first, second and fourth counts. That he has committed a crime seems by the evidence to be clearly established, and it is perhaps best established under the fourth count.

I assume that the trial judge in pronouncing sentence will consider that the accused was found guilty of but one crime, and in considering the maximum sentence allowed by law I think he should be guided by the lowest maximum fixed by law for either of the three crimes set forth in the first, second and fourth counts.

This course being taken, I do not think such substantial wrong or miscarriage was occasioned at the trial as would justify a new trial under sec. 1019 of the Code.

There seems no necessity to interfere with the finding of guilty on the inconsistent counts. He was certainly guilty of one of them and as he will be punished on one only, I would follow the course taken in *Rex* v. *Lockett*(1).

The formal judgment of the court, however, does not direct that the penalty to be imposed shall be so limited; but Mr. Coyne, while vigorously insisting that the conviction on all three counts should be sustained, stated at bar in this Court that, as counsel representing the Crown, he submitted to the judgment of the Court of Appeal being dealt with as if it contained a provi-

(1) [1914] 2 K.B. 720, at p. 733; 83 L.J.K.B. 1193.

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sion under section 1020 of the Criminal Code limiting the penalty as indicated by the learned Chief Justice.

Having regard to all the circumstances of the case, and especially to the possible embarrassment which may have been caused by the trial together of five separate counts, and to the fact that the learned trial judge, while he carefully defined each of the offences charged, deemed it advisable to abstain from instructing the jury as to the facts in evidence bearing upon each branch of the indictment, we think the position taken by counsel for the Crown eminently proper and that "we ought to treat the verdict as a verdict on the lesser charge," namely, that of obtaining money by false pretences: *Rex* v. *Norman*(1), at page 343; *Rex* v. *Lockett*(2).

On this charge we find no dissent in the Court of Appeal on the two propositions; that the count itself was properly laid and that there was sufficient evidence to justify conviction upon it. The appellant urges as grounds for a new trial on this count, warranted by the opinions of the two dissenting judges, (*a*) that the conduct of the case may have given the jury the impression that the accused was on trial for conspiracy—a non-extraditable offence; (*b*) alleged comment on the failure of the accused to testify on his own behalf; (*c*) inflammatory and improper observations of Crown counsel; (*d*) failure of the learned trial judge to direct the attention of the jury to evidence favourable to the accused and to correct mis-statements of law by Crown counsel; and (*e*) the reception of inadmissible evidence and the failure of the learned judge to instruct the jury that certain evidence, though admissible on other

(1) [1915] 1 K.B. 341. (2) [1914] 2 K.B. 720, at pages 733-4.

counts, should not be considered in disposing of the fourth count.

If ground (*a*) is covered by any question in the reserved case, in view of the explicit and reiterated warning given to the jury by the trial judge (emphasizing similar statements made to them by counsel for the Crown and by the defendant himself) that "the accused is not charged with conspiracy"—"what he is charged with is not conspiracy"—and again, "Remember that it is not the direct charge he is answering"—it is impossible to accede to the suggestion that the jury may have been misled as to the offences really charged; (*b*) There was no comment whatever on the failure of the accused to testify. His right to do so was not mentioned during the trial. The learned judge merely discharged his duty in warning the jury against treating the statement which he had allowed the accused to make as the equivalent of sworn testimony; (*c*) Whether there is any question of law reserved on this point is, to say the least, questionable.

But without dwelling further on the several grounds urged, and without determining that in regard to any of them there has been such error in law as would, if "some substantial wrong or miscarriage (had been) thereby occasioned on the trial" (Crim. Code, sec. 1019), have entitled the appellant to a new trial, we are of the opinion that his guilt on the fourth count has been established by uncontradicted evidence, of which the admissibility upon that count has not been and could not be successfully challenged, so complete and so convincing that in regard to that count a substantial miscarriage on the trial is out of the question and the matters complained of, whether taken singly or cumulatively, are "most unlikely to have affected the

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verdict:" *Ibrahim* v. *The King*(1), at page 616, if indeed it is not impossible that they could have had any influence upon it: *Makin* v. *Attorney-General of New South Wales*(2).

So overwhelming is the proof furnished by the evidence not excepted to, that no honest jury could have returned other than a verdict of guilty of obtaining money by false pretences had the conduct of the case been entirely free from all the alleged errors of omission and commission. No substantial wrong was occasioned on the trial of the fourth count, and the conviction upon it, is in our opinion, unassailable.

Since we also concur in the view of the learned Chief Justice of Manitoba that the punishment of the appellant should not exceed the maximum penalty which might be imposed had the conviction been upon the fourth count alone, the questions raised as to the first and second counts, to use the language of counsel for the Crown, have become academic. We therefore express no opinion upon them.

Appeal dismissed.

Solicitors for the appellant: *Richards, Sweatman, Kemp & Fillmore.*

Solicitor for the respondent: *The Attorney-General for Manitoba.*

(1) [1914] A.C. 599.

(2) [1894] A.C. 57, at pages 70-1.

JOSEPH BELANGER (SUPPLIANT)...APPELLANT;

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*Nov. 3.
*Dec. 11.

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Government railways—Construction and maintenance—Level crossings—Regulations by Governor in Council—Construction of statute—"Government Railways Act," R.S.C., 1906, c. 36, ss. 16, 49, 54—Negligence—Act of third person—Liability of Crown for damages.

The right to construct Government railways across highways conferred by section 16 of the "Government Railways Act," R.S.C., 1906, ch. 36, is subject to the continuing duty imposed upon the Government railway authorities that, in regard to the relative levels of the railway tracks and the highways, so long as any such crossings are maintained on the level of the roads the railway tracks shall not rise or sink more than one inch above or below the surface of the highways.

Regulations made by the Governor in Council under the provisions of section 49 and falling within section 54 of the "Government Railways Act," R.S.C., 1906, ch. 36, must not conflict with specific enactments of the statute; a regulation which may be the cause of conditions existing which are inconsistent with explicit requirements of the statute must be construed as subordinate to an implied proviso that nothing therein shall sanction a departure from any special requirement of the statute: *Institute of Patent Agents* v. *Lockwood* ((1894) A.C. 347) and *Booth* v. *The King* (51 Can. S.C.R. 20) referred to.

A level crossing of the Intercolonial Railway had planking between the rails which raised the roadbed so that the tracks did not rise more than an inch above the surface of the highway. Under a regulation for the guidance of trackmasters and trackmen, made by the railway authorities, the planks were removed during the winter season to permit safe operation of snowploughs and flangers, during this season the space occupied by the planking being filled by snow and ice. In April, before the use of snowploughs and flangers had been discontinued, the ice and snow melted and left

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

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the tracks about six inches above the roadbed. After the usual inspection by the trackmen, some unknown person placed a fence-rail against one of the tracks to assist sleighs over the obstruction and, later in the day, suppliant in driving his sleigh along the highway had his foot crushed between the fence-rail and the track and sought damages from the Crown for the injuries sustained:—

Held, that the condition of the crossing constituted negligence of officers and servants of the Crown while acting within the scope of their duties and employment in the construction and maintenance of the railway in consequence of which the Crown was liable in damages notwithstanding that the resulting injury might not have occurred but for the intervening act of some unknown third person: *Latham* v. *R. Johnson & Nephew* ((1913), 1 K.B. 398), referred to.

APPEAL from the judgment of the Exchequer Court of Canada, by which the suppliant's petition of right was dismissed with costs.

The circumstances of the case are stated in the head-note.

Lane K.C. and *S. C. Riou K.C.* for the appellant.

R. V. Sinclair K.C. and *Léo Bérubé* for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be allowed.

The learned judge of the Exchequer Court in his notes of judgment says:—

It is true that section 16 of the "Government Railways Act" provides that no part of the railway which crosses any highway shall rise or sink below the level of the highway more than one inch; but assuming that the track at the place in question did not absolutely comply with such requirement, it cannot be contended that it was the cause of the accident. Obviously the proximate, determining and effective cause of the accident was the encounter by the suppliant of the post upon the track and which is conceded by the pleadings to have been placed there by persons unknown. Had there been no post on the track there would have been no accident. The officers or servants of the Crown are not charged with having placed the *pieu* on the track, and no evidence whatsoever has been adduced to trace any negligent act on their part in that respect. The employees declare that if it had been there when they passed over the section in the morning they would have seen and removed it, and that is readily understood and believed. There might

have been negligence on behalf of the employees if the evidence had established that the post had negligently remained on the track for several days or an unreasonable time.

It is quite certain, in fact it is practically admitted, that the rails at the highway crossing were laid in contravention of the statute, section 16, ch. 36, "Government Railways Act," which provides that

no part of the railway which crosses any highway, unless carried over by a bridge, or under by a tunnel, shall rise above or sink below the level of the highway more than one inch; and the railway may be carried across or above any highway subject to the provisions aforesaid,

and were so laid as to create a nuisance.

Not only did the Crown owe a duty to the suppliant to construct its line at the highway crossing in accordance with the provisions of the statute, but there was a clear breach of that duty for the consequences of which the Crown is liable unless the intervening act of some unknown third party in placing the round stick between the rails is, as the learned judge finds, a reason for saying that the plaintiff's injuries were not the result of the Crown's breach of duty. As was said in *Crane* v. *South Suburban Gas Co.*(1), at pages 37-8:—

The intervention of a third party may break a link in the chain which connects the wrong and the injury resulting from the wrong if the intervention is the near cause of the injury, that is, if the original wrongdoer had no reason to contemplate the possibility of the intervention.

But it is part of the Crown's case that by reason of the height at which the rails were left above the level of the highway the practice had grown up of placing such round sticks between the rails. The learned judge says:—

Some of the witnesses say there were often people travelling over the rails who would place round sticks of wood to enable them to cross

(1) [1916] 1 K.B. 33.

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easier, that they did it themselves, but that they usually removed those sticks of wood after passing.

As was said recently, people who create a dangerous nuisance on a highway will not save themselves by trying to divert the argument into refined discussion about negligence and intervening acts of third persons. This dangerous pactice should not have been tolerated and we cannot sanction the suggestion that as a result the Crown must escape liability.

Reference was made to the "Rules and Regulations" for the guidance of trackmasters and trackmen. But regulations cannot operate as amendments of the statute by virtue of which the crossing of a highway at rail level is permitted. A regulation may provide for something to be done consistent with the requirements of the statute, but it is not permitted, under guise of regulating the management and proper use and protection of Government Railways (sec. 46), to amend the statute which determines the conditions subject to which the railway may be carried across a highway at rail level.

IDINGTON J.—There is no dispute as to the fact that appellant was seriously injured by reason of the road crossing the Intercolonial Railway being left in such a condition that someone, in order to get across the railway track, had resorted to the expedient of placing a stake between the rails in order that it would raise his sleigh above the rails and thus facilitate his crossing, and that stake being left there when appellant's team reached the same place rolled underneath the runners of his sleigh till it squeezed appellant's foot between it and the iron rail.

The learned trial judge holds that this does not furnish a cause of action. I cannot agree with such

holding. I think the condition of things at the time and place in question must be looked at as a whole and the causes thereof inquired into and the crucial question asked, if in truth the violation of the statute which fixed the kind of crossing to be made and kept there by respondent was not the true cause of that whole condition of things and the only answer to be made to the question so put.

The "Government Railways Act," by section 16, provides as follows:—

> 16. No part of the railway which crosses any highway, unless carried over by a bridge, or under by a tunnel, shall rise above or sink below the level of the highway more than one inch; and the railway may be carried across or above any highway subject to the provisions aforesaid.

The railway in question at the time of the accident shewed the rails exposed five inches instead of one inch above the level of the highway, and thereby rendered it almost if not altogether impossible for loaded sleighs to cross such a barrier without those in charge thereof resorting to some such expedient as someone evidently had resorted to in placing a stake or other like material to help in crossing the iron rails.

This condition of things was so well known that counsel for respondent sets forth in his factum herein the fact and alleges it was well known to appellant.

He seeks to justify this by some regulations which I hold cannot override the statute. Indeed, so far as I can see, there is nothing in the statute authorising the making of regulations which can in any way support or justify any regulation tending to suggest such an interference with the highway and violation of the statute.

The apparently notorious fact of teamsters being compelled to resort to such an expedient and habitually leaving the material so used on the railway track and

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highway renders the answer made of want of notice futile. A municipality if responsible for the continuation of such a state of things could not plead want of notice.

The allegation that the railway sectionmen removed such things when found by them, and that the track was clear or made clear when they came to work in the morning and that it was cleared on the morning in question, cannot avail much when it is quite clear that there was good sleighing on the highway on either side of the track but none over it on the 3rd April, the day of the accident.

Indeed at that time of the year, as any and every foreman must have known, the likelihood of someone adopting the only and well-known expedient in question in the course of a few hours ought to have induced him to restore the track to a travellable condition.

The plan of throwing a few shovels full of snow on the track in early morning to be melted away long before noon at that season of the year, seems but an idle trifling with the travellers on the highway who had a right to see the statute observed and whether observed or not to enjoy an easy and safe way to cross the railway provided by respondent.

The accident took place between twelve and one o'clock in the day time. What might have happened in the course of the night in such a case is not pleasant to contemplate.

Those who act in such a way as the servants of respondent did in regard to this crossing cannot be held to have discharged their duty.

Their conduct in this case was just such negligence within the scope of their duty as caused the injury to the appellant of which he complains, and for which the statute provides the remedy invoked herein.

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The suggestion made in the respondent's factum that the appellant well knew the conditions with which he was confronted, and ought to have waited till an approaching train had passed and then picked up this wood off the track and avoided the possible accident, and that his failure to do so should be held contributory negligence, comes with rather a bad grace from respondent.

That phase of the case is not dealt with by the learned trial judge beyond saying appellant might have waited.

Experience teaches us that a team of horses is much easier managed when across the track than facing it to see a passing train, and the fair inference is that appellant in crossing was exercising due caution.

The damages are not assessed and in my view that the appeal should be allowed with costs throughout the case must go back to the learned trial judge for the assessment of damages unless the parties can as they ought to agree upon the amount.

DUFF J.—There are two questions for decision on this appeal. First: Has the suppliant proved that the injury suffered by him was "caused by the negligence of" some

> officer or servant of the Crown while acting within the scope of his duties or employed upon, in or about the construction, maintenance or operation of the Intercolonial Railway

(sub-sec. f, sec. 20, Exchequer Court Act as amended by 9 & 10 Edw. VII. ch. 19)? Secondly, assuming the injuries were so caused in the sense that some such negligence was a *causa sine quâ non,* is it the proper conclusion that such negligence was not a juridicial cause in view of the circumstance that the suppliant would probably have escaped injury had it not been

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for the intervening act of some other person or persons for whose conduct the Government is in no way responsible?

The Intercolonial Railway crosses a public road, near Cacouna Station, and on the day on which the appellant suffered the injury in respect of which he claims reparation (3rd April, 1913), the highway at the crossing being bare of snow and ice, the railway rose above the level of the highway to the extent of about five inches, thus constituting a considerable obstruction. Somebody had placed a post between the rails with the object, it may be assumed, of reducing the inconvenience due to the obstruction and facilitating the use of the crossing for the passage of sleighs. The appellant, walking beside his sleigh loaded with deals which his son was driving over the tracks, had his foot caught between this post and one of the rails and severely crushed by the pressure of the sleigh.

There is sufficient evidence of negligence on the part of some "officer or servant" of the Crown "acting in the scope of some duty or employment" in connection with the Intercolonial Railway in the fact itself that at this place the railway rose above the surface of the highway to the extent mentioned. This conclusion rests upon section 16 of the "Government Railways Act," ch. 36, R.S.C., 1906, which is in these words:—

> Sec. 16. No part of the railway which crosses any highway unless carried over by a bridge, or under by a tunnel, shall rise above or sink below the level of the highway more than one inch; and the railway may be carried across or above any highway subject to the provisions aforesaid: R.S. ch. 38, sec. 11.

The effect of this section appears to be that the Government authority having charge of the Government railways may rightfully carry the railway across a highway, but to this right, if the railway passes over

by means of a level crossing, is attached the correlative duty to see that the railway does not rise above the level of the highway more than one inch; and this duty, I think, is a continuing duty resting upon the railway authority so long as the railway is maintained there. It was not, I think, incumbent upon the appellant, as suppliant, to name the particular servant or officer of the Crown alleged to be charged with the performance of this duty; it was enough, I think, to shew that the duty was undischarged. It may be presumed, if that be necessary to support the suppliant's case, that all necessary appointments had been made for carrying out the law.

All of which would appear to be sufficiently plain; but it is proper to notice an argument addressed to us on behalf of the Crown, which is that certain rules purporting to be made under section 49 of the "Government Railways Act," require and sanction a practice which to some extent, it is said, modifies the rigour of section 16 and defines the duties of those responsible for the condition of highway crossings. Under this practice, at such crossings the rails are laid in such a way as to leave a difference in level between the natural surface of the highway and the top of the rails considerably greater than one inch. During the seasons in which the roads are free from ice and snow, this difference in level is reduced by raising the highway level by means of planks; in winter these planks are removed, the natural filling of snow or ice serving the same office. This is pursuant to No. 48 of certain "Rules for the guidance of Trackmasters and Trackmen" made professedly under the authority of section 49 of the "Government Railways Act" which is in these words:—

En la saison propice, le chef d'equipe devra donner instructions a ses contre-maîtres de faire enlever des madriers près des rails aux

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traverses de chemin pour permetter facilement les operations du "flanger."

The "flanger" commonly used cannot be operated, it is said, while the highway and the rails are maintained at the relative levels prescribed by section 16; and, consequently, while the "flanger" is in operation it is not practicable to employ such means for reducing the inequality of levels. In the regulations placed before the learned trial judge, the rules of 1906, there is no specific provision requiring the highway to be planked; but the rules of 1893 contained this section:

Sec. 32. All public road-crossings must be either planked and securely spiked or paved with blocks or other suitable materials.

The argument based upon these rules is that, under the practice observed at the date of the accident, the "flanger" being still in operation it was the duty of those charged with the care of the track at the place named to keep the track clear and consequently, the existence of a state of things forbidden by section 16 cannot be imputed to them or any other officer or servant of the Crown for negligence—the rules and regulations enacted and promulgated for their guidance by the Governor in Council having, it is affirmed, been observed not only in the letter but in the only way which was practicable, due regard being paid to the necessities of railway operation.

There is, however, it may be noted, no evidence that the only practicable method of clearing the track of snow is by the use of a "flanger" of such construction as to necessitate the removal of the planks during the operation of it; nor is there any evidence shewing it to be impracticable to retain the planks in place so long as the flanger is not actually passing over the highway.

In dealing with this argument it is necessary to consider the status of the rules in question relatively to

section 16. Sections 49 and 50 are the provisions we have to apply. They are in these words:—

Sec. 49. The Governor in Council may, from time to time, make such regulations as he deems necessary,—

(*a*) for the management, proper use and protection of all or any of the Government railways, including station houses, yards and other property in connection therewith;

(*b*) for the ascertaining and collection of the tolls, dues and revenues thereon;

(*c*) to be observed by the conductors, engine-drivers and other officers and servants of the Minister, and by all companies and persons using such railways;

(*d*) relating to the construction of the carriages and other vehicles to be used in the trains on such railways: R.S., ch. 38, sec. 43.

Sec. 54. All such regulations made under this Act shall be taken and read as part of this Act: R.S., ch. 38, sec. 44.

The rules put before us would *primâ facie* fall within the authority of either sub-section *a* or sub-section *c* of section 49. It may well be doubted, I think, whether it is the proper construction of these general provisions to hold that under them any regulation dealing with any matter falling strictly within the specific enactment of section 16 is not beyond the scope of these sub-sections. The language of the last clause of section 16 is emphatic, the authority to carry the railway across the highway being given subject to the proviso that the railway and the highway shall be maintained at the relative levels therein provided for: *Grand Trunk Pacific Rway. Co.* v. *Fort William Land Investment Co.* (1).

It is not, however, necessary to pass upon that question.

For the purposes of this judgment I assume the effect of section 54 to be that regulations made by the Governor in Council which are of such a nature as to fall within the ambit of section 49 when that section is read

(1) [1912] A.C. 224.

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and construed without reference to other sections of the Act are, when passed, to be "taken and read" as part of the Act and that the authority of the Governor in Council to pass such regulations is incapable of being called judicially in question. I assume, in other words, that these regulations are to be treated as the House of Lords treated the rule which was in question in the *Institute of Patent Agents* v. *Lockwood*(1), at page 360. On that assumption it necessarily follows that if there is a conflict between one of the provisions of the Act and one of the regulations passed under section 49 the question devolving for decision upon the court having the duty of applying the regulation is first: Which is the governing enactment, the section or the regulation? Lord Herschell in his judgment in the case just mentioned says (at page 360) that where such a conflict arises the enactment itself would probably be treated as supplying the governing consideration and the regulation subordinate to it. In view of the last clause of section 16 to which I have just alluded I see no difficulty in holding that in this case the regulation, in so far as it is inconsistent with section 16, must give way; or, as it is perhaps better to put it, the regulation must be read as subject to an implied proviso that nothing in it shall be considered to sanction a departure from section 16.

It follows that there was neglect of duty within the Exchequer Court Act, section 20, sub-section *f*.

But was this neglect of duty the "*cause*" of the suppliant's injury in the sense that the Crown is responsible for the consequences of it within the meaning of that Act? The rails, in the condition in which they were, constituted, as I have said, a not incon-

(1) [1894] A.C. 347.

siderable obstruction to traffic upon the highway. The natural consequence of the physical condition of the crossing—and the consequence to be expected in view of the fact that upon this road there was the ordinary amount of travel—was the very thing which happened, namely that somebody would endeavour to facilitate the passage of sleighs by some such device as that which was actually resorted to. This being so, the connection between the breach of the duty arising under section 16 and the appellant's injury is complete; the intervening act of the person who placed the post in the road does not interrupt the chain of causality. As Lord Justice Hamilton said in *Latham* v. *R. Johnson & Nephew*(1), at page 413, a person who in violation of duty leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for a further intervening act of a third person that injury would not have occurred. The conditions of responsibility under section 20 of the "Exchequer Court Act" are therefore fulfilled and the suppliant is entitled to redress. I agree that the more convenient course is to refer the proceedings back to the Exchequer Court for the assessment of the damages.

ANGLIN J.—The plaintiff was injured at a highway level crossing of the Intercolonial Railway on the 3rd of April, 1913. The planking usually placed between and immediately outside the rails at such crossings had been removed for the winter season and had not yet been replaced. The snow and ice, which during the greater part of the winter fill up the space

(1) [1913] 1 K.B. 398.

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or depression left by the removal of the planking, between and outside the rails, had been thawed by the heat of the Spring sun, thus leaving the rails projecting some six or seven inches, it is said, above the level of the highway. No doubt to facilitate driving across the railway, some person had, earlier in the day, placed a log or fence rail between the tracks and had left it there. The plaintiff, when taking his heavily laden sleigh across, walked beside it. The runners of the sleigh instead of mounting the log or fence rail pushed it forward and the plaintiff's foot was caught between it and the projecting rail, thus causing the somewhat serious injury of which he complains.

The obligation imposed by section 16 of the "Government Railways Act," R.S.C., ch. 36, that:—

> No part of the railway which crosses any highway unless carried over by a bridge, or under by a tunnel, shall rise above or sink below the level of the highway more than one inch,

is absolute and unqualified. The carrying of the railway across the highway is made subject to this condition. It appears from the judgment of Mr. Justice Audette that section 22 of the rules and regulations for the guidance of trackmasters and trackmen passed in 1893, which, however, I do not find in the case before us, provided that

> All public road crossings must be either planked and securely spiked or paved with blocks or other suitable material.

This regulation was presumably made in compliance with the obligation imposed by section 16 of the statute. No such provision is found in the rules and regulations for employees of Government railways, of 1906, put in at the trial, which, however, by Rule No. 20, require that section-foremen shall see that crossings of public roads are kept in good condition and are not obstructed. Rule No. 48 directs that the

chief of equipment shall at the proper season give instructions to his foremen to cause the planking next to the rails on highway crossings to be removed in order to permit flangers to operate easily. The book of rules and regulations put in, as exhibit A., does not shew upon its face, not do I find in the record any evidence, that the rules and regulations which it contains were made under section 49 of the "Government Railways Act," which empowers the Governor in Council to make regulations:—

(*a*) for the management, proper use and protection of all or any of the Government railways including station houses, yards and other property in connection therewith,

and

(*c*) to be observed by the conductors, engine drivers and servants of the Minister and by all companies and persons using such railways.

In dealing with this case, however, I shall treat Rule No. 48 as within section 54 of the statute which enacts that

All such regulations made under this Act shall be taken and read as part of this Act.

Under sections 73 and 74 of the statute the contravention of rules so authorized is penalized.

That the rails on the crossing projected several inches above the level of the highway when the plaintiff was injured was conceded and counsel for the Crown sought to justify the existence of this state of affairs by invoking Rule No. 48, to which I have referred. He also relied upon evidence to the effect that the use of snowploughs carrying an apron in front required the removal of the planking at such crossings midway between the rails as well as immediately next to them. A flanger had been used upon the crossing as recently as the 28th of March and there is evidence that its use was sometimes required in the month of

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April. Under these circumstances, if regulation No. 48 justified the planking being kept up until the season had so far advanced that the use of flangers and snow-ploughs was not likely to be further required, I would be disposed to agree with the contention of the respondent that failure to replace the planking before the 3rd of April could not be regarded as negligence. But no regulation, although passed by the Governor in Council under section 49, can be allowed to override the explicit requirement of section 16 of the statute. If no construction can be placed upon regulation No. 48 which will bring it into harmony with that section, it cannot be regarded as having been made within the authority conferred by section 49, or, if so made, it must be treated as subordinate to the precise and definite prohibition of section 16. On the other hand it must if possible be given a construction which will not conflict with the statute: *Booth* v. *The King*(1); *Institute of Patent Agents* v. *Lockwood*(2), at page 360. So, dealing with regulation No. 48, I would be inclined to construe it as authorizing the section foremen to keep highway crossings without planks next to and between the rails only at such times and during such periods as the spaces which the planks ordinarily occupy are actually filled up by other material (snow and ice, or gravel) in such manner that at no time shall the rails project above the highway more than one inch. As already stated the obligation imposed by section 16 is absolute and unqualified, and the duty which it imposes is paramount. To a charge of a breach of that duty the regulation invoked does not afford an answer.

I entertain no doubt that the omission to per-

(1) 51 Can. S.C.R., 20. (2) (1894) A.C. 347.

form such a duty is negligence in law. Negligence on the part of an officer or servant of the Crown while acting within the scope of his employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway, causing death or injury or loss to the person or property, is actionable under section 20 (*f*) of the "Exchequer Court Act" (9 & 10 Edw. VII. ch. 19).

There remains the inquiry whether the negligence thus established was the cause of the injury sustained by the plaintiff. The learned assistant judge of the Exchequer Court reached the conclusion that it was not—that that injury was rather attributable to the act of the person who had placed and left the log or fence-rail between the rails. But it is obvious that if there had not been the space or depression between the rails it would not have been necessary to place the log there to facilitate crossing, and that, if so placed, it would not have caused the jamming of the plaintiff's foot between it and the rails. It was because the rail projected as it did several inches above the highway, quite as much as because the log or post had been placed where it was, that the plaintiff's foot was caught and jammed between the two. The placing of the log between the rails was no doubt a contributory cause of the accident; but certainly no more so, and probably not as much so, as the unlawful projection of the rails above the level of the highway. It follows that the negligence of its servant who was responsible for leaving the crossing in the condition in which it was renders the Crown liable: *City of Toronto* v. *Lambert*(1).

Although there was a suggestion that the plaintiff was himself guilty of negligence which contributed to

(1) 54 Can. S.C.R. 200.

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his injury, there has been no finding to that effect in the Exchequer Court and the evidence in my opinion does not warrant our making such a finding.

The appeal should be allowed with costs in this Court and in the Exchequer Court. As there has been no assessment of plaintiff's damages and it would not be satisfactory that we should attempt to make that assessment upon the evidence in the record, unless the parties can come to an agreement as to the amount proper to be allowed the case should be remitted to the Exchequer Court in order that the damages may be fixed. The learned assistant judge of that court saw the plaintiff and the witnesses and he is in a much better position than we are to determine either upon the evidence already taken, or upon additional evidence if he should deem it necessary, the amount the plaintiff should recover.

BRODEUR J.—En vertu de la loi des chemins de fer de l'Etat, S.R.C. ch. 36, sec. 16, il est décrété qu'aux traverses à niveau des grandes routes le chemin de fer ne doit pas s'élever au-dessus ni s'abaisser au-dessous du niveau de cette route de plus d'un pouce.

Pour remplir les exigences de cette disposition statutaire on met sur l'Intercolonial des madriers entre les rails afin que les voitures puissent facilement traverser la voie.

Mais, par contre, on avait l'habitude en hiver, à Cacouna, où l'accident en question dans cette cause a eu lieu, d'enlever ces madriers et de laisser une cavité de quatre à cinq pouces de profondeur. Tant que la neige subsistait il n'en résultait aucun inconvénient mais au printemps, lorsque la neige était fondue, les voitures d'hiver qui circulaient sur la route éprouvaient les plus grandes difficultés et des particuliers parfois

jetaient entre les rails des pieux pour faciliter le passage des traineaux.

L'appelant le 3 avril, 1913, arriva pour traverser la voie à Cacouna et il y avait un pieux qui avait été placé là par des mains inconnues. Sa voiture était chargée et il eut beaucoup de difficulté à pouvoir traverser la voie. Le pieu qui se trouvait avoir été ainsi mis sur la voie a été entrainé par la voiture et lui écrasa le pied. De là pétition de droit réclamant des dommages résultant de cet accident.

Il n'y a pas de doute que si la voie avait été tenue conformément à la loi, si on avait maintenu cette dernière de manière à ce qu'elle ne fût pas plus basse que d'un pouce du niveau du chemin public, l'accident ne serait pas arrivé.

On allègue à l'appui de la défense que des règlements on été adoptés par le gouverneur en conseil pour autoriser l'enlèvement de ces madriers durant l'hiver.

Il est possible que ce règlement soit légal. Mais, d'un autre côté, le gouvernement est toujours tenu d'observer la loi et de voir à ce que la voie ne soit jamais plus basse que le niveau du chemin public. Si les règlements que l'on invoque ne peuvent pas être observés sans violer cette disposition de la loi, alors je considère qu'ils sont illégaux; car l'autorité exécutive n'a jamais le droit, en faisant des règlements, de déroger aux dispositions formelles du statut.

Mais il y a plus. Le règlement lui-même que l'on invoque n'a pas été observé car il exigeait de laisser au milieu de la voie un certain nombre de madriers et malheureusement cela n'a pas été fait.

Je dois ajouter, de plus, que depuis l'accident en question on n'enlève plus ces madriers mais on laisse la voie telle qu'elle était.

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La cause première de l'accident est donc la violation du statut et du règlement. Il est bien vrai que le pieu qui avait été déposé sur la voie par une main inconnue a contribué à l'accident. Mais les autorités du chemin de fer savaient que les gens étaient obligés d'avoir recours à ces moyens pour pouvoir traverser la voie; et, de fait, l'un des employés de l'Intercolonial nous apprend dans son témoignage que tous les matins on avait l'habitude d'enlever ces pieux et que celui qui a été trouvé sur la voie lorsque l'appelant l'a traversée y avait été évidemment mis dans la journée.

Encore une fois, si on avait observé les dispositions de la loi l'accident ne serait pas arrivé. Et d'ailleurs, je considère que l'intimé est responsable malgré le fait que l'une des causes de l'accident fût l'acte d'un tiers qui aurait jeté sur la voie ce pieu. Il n'est pas permis à une personne qui a été la cause effective du dommage de dire qu'il y a eu également d'autres causes: *Clark* v. *Chambers*(1).

Je suis donc d'opinion que le jugement *a quo* qui a renvoyé la pétition de l'appelant, est mal fondé et doit être renversé.

Quant au montant des dommages les parties devront tâcher de s'entendre et si elles ne peuvent en venir à cela alors le dossier devra être renvoyé en Cour d'Échiquier qui en déterminera le montant.

L'appel est donc maintenu avec dépens.

Appeal allowed with costs.

Solicitor for the appellant: *S. C. Riou.*
Solicitor for the respondent: *Léo Bérubé.*

(1) 3 Q.B.D. 327.

THE WESTERN CANADA POWER COMPANY (DEFENDANTS) .... APPELLANTS;

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*Oct. 25
*Dec. 30

AND

CHARLES S. BERGKLINT (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence—Employer's liability—Competent superintendence—Common employment—Contributory negligence.

B. was employed by the company as a labourer in preparing a site for a power house, and was working on a narrow ledge on a hillside preparing a place on which to erect a drilling machine. Stones or earth falling from above struck him and he fell off the ledge to the bottom of the excavation sustaining severe injuries. In an action against the company for damages under the common law it was contended that failure to protect the workmen by a barrier above the ledge was negligence for which defendants were responsible.

Held, per Davies and Anglin JJ., that such negligence was that of the company's superintendent, a fellow servant of B., and the company was not responsible.

Per Duff and Anglin JJ., following *Wilson* v. *Merry* (L.R. 1 H.L. Sc. 326), that, as it was proved that the company had appointed a competent engineer to take charge of the work, invested him with the requisite authority and responsibility for protecting the workmen and supplied him with the materials necessary for the purpose, they had discharged their duty towards their employees and were not responsible for the injury to B.

Judgment of the Court of Appeal (22 B.C. Rep. 241) reversed, Idington and Brodeur JJ. dissenting.

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

The material facts are stated in the headnote.

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

(1) 22 B.C. Rep. 241.

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Sir Charles-Hibbert Tupper K.C. for the appellants. The preparation of the hill from time to time was not a "system" defects in which would entail liability: *Allen* v. *New Gas Co.*(1).

The appellants are within the doctrine in *Wilson* v. *Merry*(2). See also *Canada Woollen Mills* v. *Traplin*(3), per Nesbit J.; *Hedley* v. *Pinkney & Sons S.S. Co.*(4), at page 226; *Wood* v. *Canadian Pacific Railway Co.*(5); *Canadian Asbestos Co.* v. *Girard*(6).

The employer is not bound to take unusual or extraordinary precautions: *Weems* v. *Mathieson*(7).

S. S. Taylor K.C. for the respondent. The jury's verdict should not be disturbed on appeal: *Canadian Woollen Mills Co.* v. *Traplin*(3); *Creveling* v. *Canadian Bridge Co.*(8).

The company must provide a safe system and a safe place to work: *Grant* v. *Acadia Coal Co.*(9); *Ainslie Mining and Railway Co.* v. *McDougall*(10); *Brooks, Scanlon O'Brien Co* v. *Fakkema*(11).

DAVIES J.—This is an action brought to recover damages for injuries sustained by the plaintiff while he was engaged with two other workmen on a narrow ledge (3 or 4 feet broad) of an almost precipitous cliff or rock bluff some 85 feet in vertical height, 35 to 45 feet above him and 40 feet or more below him. The work these men were doing was the preparing of a level place on which to stand a power drill in order to blast off a column or jutting of rock on the face of the rock

(1) 1 Ex. D. 251.
(2) L.R. 1 H.L. Sc. 326.
(3) 35 Can. S.C.R. 424.
(4) [1894] A.C. 222.
(5) 6 B.C. Rep. 561; 30 Can. S.C.R. 110.
(6) 36 Can. S.C.R. 13.
(7) 4 Macq. 215, at p. 226.
(8) 51 Can. S.C.R. 216.
(9) 32 Can. S.C.R. 427.
(10) 42 Can. S.C.R. 420.
(11) 44 Can. S.C.R. 412.

cliff against which it was proposed to build the side of the defendants' power house. The defendants were as a fact at the time of the accident preparing a site for an extensive power plant. The top of this edge on which plaintiff was working was some 35 or 40 feet above the floor or bottom of the rock excavation which had been made at the base of the cliff for the power house and the companies' operations had been carried on for a period extending over six or seven months, employing 300 to 400 men.

No drilling had been made immediately above the ledge on which plaintiff was working but blasting was necessary to blow out the column of rock which if left would interfere with the building up of the power house wall.

The operation was one incidental to the main work the parties were engaged in of preparing a site for and erecting a power house As a matter of fact it took about 9 or 10 hours only to complete and was a mere incident or detail in the general operations or work of construction of the company. That the work in which plaintiff was engaged at the time he fell off this ledge or rock was dangerous work is unquestionable.

That the entire work or operations of the company had been entrusted to a skilled, competent general manager and engineer, Mr. Haywood, was proved beyond any possible doubt, as also that he had been furnished with ample powers and with all appliances, material and workmen necessary to carry out the work successfully or the credit, if required, to procure them.

The case had already been tried once and was retried by order of this court.

A number of pertinent questions had been prepared by counsel for submission to the jury; but the latter

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were told by the trial judge that it was not imperative for them to answer these questions and that they could find a general verdict.

They did, unfortunately, ignore the questions and found a general verdict "for the plaintiff with $10,000 damages at common law."

We must assume that all questions of fact necessary to sustain that verdict were found in plaintiff's favour and amongst these that the defendants were guilty of negligence which proximately caused the accident and that the plaintiff was not guilty of contributory negligence. What the defendants' negligence consisted in the jury did not find, but I assume we must hold that it was in not having placed a barrage of logs along the top of the cliff, as contended by plaintiff should have been done. No other negligence is suggested or given in evidence. As a matter of fact, the general manager and engineer gave it as his opinion that such a barrage would increase rather than lessen the plaintiff's danger. In this he was supported by Colonel McDonell and other witnesses, but I do not think it is possible to say that the jury would not on the whole evidence be warranted in finding that the barrage was a reasonable and necessary precaution for the safety of the plaintiff and his co-workers.

The Court of Appeal for British Columbia sustained the judgment which the trial judge entered on the verdict for the plaintiff and from that judgment this appeal is taken.

The facts were that this vertical rock 100 feet high on a ledge of which about half way down plaintiff went with two others to do the blasting was capped by a sloping hillside which plaintiff had been ordered before going on with the blasting below to clear from rocks and loose stone and material and make what

was known as a "berm" just above the top of the cliff for his own protection and that of his fellow-workmen when they descended to do the blasting on the ledge below.

His own evidence was to the effect that they had done this work all right and made the necessary "berm" but that nevertheless when he went on the ledge below and was about or in the act of drilling the necessary holes in the ledge for blasting something fell from the cliff above either stone, sand or clay, he did not know which, and knocked him off the ledge. The general verdict for the plaintiff rebuts the proof of contributory negligence and therefore it must be assumed that plaintiff and his co-workers had done their duty and efficiently carried out their orders to clear the hill-side from all stones and had made a proper "berm" at the edge of the cliff.

The question immediately arose whether reasonable precautions had under the facts as proved been taken to prevent the falling of this stone, sand or clay, and, if they had not, whether their absence was due to the negligence or error of judgment of the superintendent manager for which the company was liable.

The rival contentions were, first, on the part of the plaintiff, that the work being an admittedly dangerous one more than ordinary precautions should have been taken and that, in addition to the "berm" being made at the top of the cliff, there should have been a barrier of logs or plank on or slightly above the brink of the rock cliff to prevent rolling stone and other debris from injuring employees working below; that the absence of such a precaution made the place below an "unsafe" one for men to work in and brought the company within the rule which made them liable in case of injury to their workmen, whether such was

caused by the neglect on their superintendent engineer's part to provide the safety barrage or not.

On the other hand, appellant contends that the plaintiff must fail in maintaining his claim for three reasons; first, contributory negligence; secondly, voluntary assumption of the risk; and thirdly, that negligence, if there was any with respect to the barrage of logs, or error of judgment in not providing such barrage, was that of their superintendent, a fellow-servant of the plaintiff, for which the company was not responsible.

It may be that, looking at the jury's finding in connection with the charge of the trial judge, the first two contentions of appellant should not be sustained.

I am of opinion that his last contention must be given effect to and the appeal allowed.

The general proposition is not challenged that it is the duty of the employer and one which he cannot delegate to another so as to relieve himself of liability to provide his workmen, at any rate in the first instance, with a reasonably safe place to work in and reasonably suitable and necessary materials and appliances to work with. The question immediately arises whether the facts of this case bring it within the rule.

The work the company was engaged in was the construction and installation of a large power house. Some 300 men or more had been engaged for many months preparing the tail race and the foundations for this house. It was intended to build one side of the power house up against the vertical cliff spoken of. The special work plaintiff was engaged in when injured was a mere detail of that general work. As a fact, the blasting off of this ledge of rock to enable the wall to be erected only took a few hours, 9 to 10. It was work of a kind which obviously had to be carried on

under the judgment and control of a skilled manager. The directors of such a company are not as a rule men competent for such a task. It must be delegated. It was work undertaken for the very purpose of carrying out the duty which the law casts upon them of providing a safe place for their men to work in.

If their duty is enlarged further and to the extent contended for and if it extends to the work antecedently necessary to create a "safe place" and done for that very purpose, however necessarily changing from day to day and however incidental to the main work of preparing a "safe place," then it seems to me the doctrine of common employment, as laid down by the House of Lords in *Wilson* v. *Merry*(1), and applied by the courts ever since, would be greatly restricted. I can find no authority for so enlarging the rule as to the absolute liability of the master to provide a safe place for his workmen to work in. The place this plaintiff was working in was admittedly a dangerous one and known to the workmen to be so. The duty of the master was to provide a competent and skilled manager to superintend it who, in his turn, having been supplied with everything necessary, would determine what reasonable precautions were necessary to be taken. I cannot accede to the argument that for an error of judgment on his part in that regard the master would be liable. The work was a mere detail in the preparations for constructing a safe power house.

Mr. Taylor sought to meet the point that the work in question was a mere detail or incident of the work being carried on by contending that it was the company's duty to have had that barrage of logs during all the months the workmen were engaged in preparing the foundations of the power house at the cliff's base.

(1) L.R. 2 H.L. Sc. 326.

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But the necessity for such a protection is disproved by the fact that not a single man was injured of the hundreds employed during these months, when 300 to 400 men were employed, by anything which fell from the cliff above. We are, however, dealing now with the facts of this case, the blasting off of a column or shoulder of stone from the cliff's side, a single detail of a vast work; and after considering all the authorities cited I am of the opinion that the facts do not bring the plaintiff's case within the rule, excluding the doctrine of common employment.

I do not think the decisions of this court at variance with that I have reached in this appeal. They affirm the main proposition of the absolute duty which cannot be delegated by the master, of providing a safe place for his workmen to work in. They do not go the length of saying that if a master in the attempted discharge of his duty so to provide a safe place for his workmen employs a skilled and competent man as his superintendent, furnishes him with everything necessary to do his work effectively and provides the "safe place" the law contemplates and does not personally actively interfere with the work, the master is liable to his workmen for damages caused to them from the negligence or error in judgment of such competent manager in carrying out every detail of that work.

In the case in this court chiefly relied upon of *Ainslie Mining and Railway Co.* v. *McDougall*(1), a majority of this court held that under the facts there proved it was not open to the employer to invoke the doctrine of common employment. The facts at the time of the accident complained of were as regards the mine-owners' duties to their employees, that the mine owners were there for the first time placing their men at work

(1) 42 Can. S.C.R. 420.

in a mine which was held not to be at the time a safe place for the workmen to work in.

In the later case of *Brooks, Scanlon, O'Brien Co.* v. *Fakkema*(1), the court seems to have held that the damages awarded the injured workman were the result either of a defect in the *original installation* of the engine which caused the damage or in a defective system.

I do not think the principle upon which either of these cases was decided applicable in the present case, where the doctrine of the absolute responsibility of the master is invoked. The work of constructing such a power house was necessarily changing from day to day, the particular work on which plaintiff was engaged was a mere incident or detail in the general work, the control and carrying out of which had been necessarily delegated to a competent engineer and the general work was one undertaken to discharge the master's absolute duty of providing a safe place for the workmen to be employed in his power-house.

I at one time thought the late case decided by the Judicial Committee, *Toronto Power Co.* v. *Paskwan*(2), might be applicable, where it was held, as the headnote of the report states:—

> The duty towards an employee to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself and cannot be delegated to his servants. He is not bound to adopt all the latest improvements and appliances; it is a question of fact, in each particular case, whether there has been a want of reasonable care in failing to install the appliance the absence of which is alleged to constitute negligence.

In that case, the jury found *inter alia* that the accident was due to the company's negligence through their master mechanic in failing to install proper safety appliances and to employ a competent signalman

(1) 44 Can. S.C.R. 412. (2) [1915] A.C. 734.

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which the Judicial Committee said was not an unreasonable finding under the evidence and they dismissed an appeal from a judgment holding the master liable.

In the case before us, I hold, however, that the master's duty was not, under the circumstances, an absolute one and that it was open to him to invoke the doctrine of common employment. His attention had

not been called by any previous occurrence to the danger

which the absence of the suggested barrage of logs might cause and nothing had occurred to induce him to actively interfere with the management and control he had wisely and necessarily delegated to his competent engineer foreman.

I would, therefore, allow the appeal and dismiss the action

IDINGTON J. (dissenting) —This case has been tried twice as a result of our disposition of the appeal as reported(1). The pleadings were amended before the second trial and the evidence adduced thereon has tended to clear up some matters relative to the relation of the directorate of appellant to the work in question and their knowledge of how that was being carried on.

I need not re-state my view of the law which should govern such cases.

The evidence applicable thereto adduced on the last trial furnishes ample ground for the jury to find the verdict they have and to maintain the judgment entered for respondent.

The work was carried on under the eyes and direction of a local branch of the directorate and thus the case brought well within the decision of this court in the

(1) 50 Can. S.C.R. 39.

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case of *Ainslie Mining and Railway Co.* v. *McDougall* (1), and numerous other cases upon the liability of companies who so install their works as to render them unsafe for their workmen employed therein.

The latest case cited of *Toronto Power Co.* v. *Paskwan*(2), seems to leave no question upon that part of the matters involved in that branch of the case.

Moreover, the evidence on the second trial brings out more clearly than its presentation on the first trial that it was the original installation of the work that was at fault.

The nature of the work that was being done by the workmen had changed from month to month as the work progressed but the same source of danger existed throughout and needed the same sort of protection, which respondent has urged throughout, in order to render the place a reasonably safe one to work in.

On the main ground of the appellant's contention it, therefore, fails.

Some minor matters were urged as to misdirection which appellant claimed entitled it to a new trial. I have considered these but can find nothing which would justify ordering a new trial.

Indeed, the appellant seems to me to have very little ground, if any, to complain of the charge of the learned trial judge.

Anything its counsel objected to on the trial with any semblance of reason was corrected. And the alleged misdirection relative to evidence rejected, or improperly admitted, even if tenable at all which I doubt, cannot be said to have produced any miscarriage.

I think the appeal should be dismissed with costs.

(1) 42 Can. S.C.R. 420.
(2) [1915] A.C. 734.

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DUFF J.—This is the second appeal to this court arising out of the same action each having been brought after a trial before a jury in which the verdict and judgment were given in favour of the plaintiff (respondent) See *Bergklint* v. *Western Canada Power Co.*(1). The respondent was injured when working as a drill-helper on the side of an excavation which the appellant company was making to provide a site for its power house at Stave Falls in B.C. While engaged in clearing the narrow ledge on which he was standing in order to place the drill he was helping to work he was struck by something coming from the edge of the cliff, some 35 feet above, and losing his balance in consequence fell to the bottom of the ravine, a distance of some 50 feet, and was very severely injured. The respondent's complaint upon which the action was based was that the appellant company negligently failed to provide sufficient protection against injury by rock or soil falling from the top of the cliff. The respondent was unable to say precisely what it was that struck him, but it must be taken for the purposes of the appeal that he was struck by rock or gravel or earth with sufficient momentum to throw him off his balance. The excavation was a large one, 400 feet in length by 100 in width, and the work was in progress many months. The respondent's case was that the appellant company should have provided a barrier at the edge of the cliff to protect the workmen from the danger of falling material. The course actually adopted by the engineer in charge of the work, who was entrusted with full responsibility with respect to such precautions, was from time to time at places where men were about to work on the cliff side to have a gang of men clear away

(1) 50 Can. S.C.R 39.

from the top of the cliff such materials as appeared to be possible sources of danger. It has been found by the jury, and I shall of course assume it as the basis of this judgment, that the engineer in pursuing this course, in failing, that is to say, to provide something in the nature of a physical barrier at the place where Bergklint was injured, was negligent and that, if the appellant company is answerable for his negligence, the respondent is entitled to succeed and the appeal should be dismissed. The appellant company's defence, in so far as it is material in the view I take of the case, was that Mr. Hayward, the engineer in charge of the works, was entrusted by the company with authority and with the responsibility of taking whatever precautions for the protection of the workmen might be required by a proper regard for their safety and that he was supplied with sufficient means to enable him to provide any protection that in his judgment might be expedient and that Mr. Hayward's competence not being really questioned the appellant company had thereby discharged its duty to its employees. In answer to that (it may be mentioned) it was contended that there was sufficient evidence to shew such actual intervention by Mr. McNeil, the vice-president of the company, as to justify the jury in finding that the company was directly responsible through Mr. McNeil. I may say at once, and I dismiss the point with this observation, that I think there is no such evidence.

The question is: Could the company discharge its duty to its workmen, in respect of such precautions, by the employment of Mr. Hayward, a competent engineer, and by giving him the authority and the resources which were given to him? On the present appeal the fact that the necessary authority and resources were given to Mr. Hayward cannot be disputed.

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The question upon which it is now our duty to pass is in substance the question decided by the majority of the court adversely to the respondent on the previous appeal. On that occasion the view expressed was that the circumstances of the respondent's employment and of the work in which the appellant company was engaged were such as to take this case out of that class of cases in which the rule is that the owner is responsible not only for taking due care to see that the employee has a safe place to work in but is bound to see that due care is taken by those to whom he commits the performance of the duty; in other words, is responsible for failure on their part to exercise due care to that end. The opnion was expressed, that having regard to the conditions—the character of the work and the physical surroundings—the duty of providing protection for the workingmen from time to time as the work progressed was a duty in the nature of a duty of superintendence requiring the judgment of the man on the spot for its efficient performance and was therefore not one of the duties in respect of which it is said that the master cannot divest himself of the responsibility by delegating it to an employee. The case seemed to fall within the actual decision in *Wilson* v. *Merry*(1), where the owner was held by the appointment of a competent superintendent with adequate means and resources to have discharged or divested himself of his responsibility regarding so grave a matter as providing "local ventilation" in a shaft where workmen were engaged in opening a drift into an unworked seam of coal—an explosion of fire damp having been the consequence of neglect. That, as was pointed out on the previous occasion, was regarded by several

(1) L.R. 1 H.L. Sc. 326.

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of their Lordships as being in the nature of a duty of superintendence and therefore naturally devolving upon the superintendent of the mine.

It may indeed be a question, in view of the judgment delivered in the last appeal on this point, whether the respondent is not estopped from raising the question now. The evidence now before us in so far as it differs from the evidence on the previous trial, as stated in the judgments previously delivered, is not in its bearing on this point more favourable than that evidence was to the respondent. On the last trial the respondent strongly pressed the contention that the escape from the top of the cliff of the material that struck him was probably due to the existence of exceptional conditions at the place where it occurred—that the material had been loosened by the action of water, there being as he alleged a trickling of water near by. It is true that the judgment directed a new trial only but this order was made on the ground that the trial judge had not left to the jury the question whether or not the duty of taking precautions and resources sufficient to enable him to take them effectively had been entrusted to Hayward. There is some authority indicating that where a court of appeal in granting a new trial decides a substantive question in the litigation, that question, for the purposes of that litigation, is to be taken to have been conclusively determined as between the parties. I refer without further discussion to the observations of Lord Macnaghten in *Badar Bee* v. *Habib Merican Noordin*(1), at p. 623, and to their Lordships' decision in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*(2), (see especially p. 41 as to the effect of determinations

(1) [1909] A.C. 615. (2) 11 Ind. App. 37.

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in interlocutory judgments upon the rights of parties in the suits in which the judgments are given). It seems quite clear that for this purpose we are not confined to the formal judgment; *Kali Krishna Tagore* v. *Secretary of State for India*(1), and *Petherpermal Chetty* v. *Mumandi Servai*(2), at p. 108.

It is true, however, that the record of the previous trial and appeal are not formally before us and moreover that the point was not taken and has not been argued by counsel. As I think the appeal should be allowed on other grounds, I say nothing more about it.

What I have said touching the ground of judgment given by the majority of the court on the previous appeal would be conclusive and I should leave the matter there were it not for an argument based upon the decision of the Privy Council in *Toronto Power Co.* v. *Paskwan*(3), pronounced since the judgment in the last appeal was given. The judgment of their Lordships was delivered by Sir Arthur Channell and in the course of that judgment, at pp. 737 and 738, he says:—

> The contention of the defendants is that they performed their duty by leaving the selection and care of the plant to a competent man, and they rely mainly on a well-known passage in the judgment of Lord Cairns in *Wilson* v. *Merry*(4). Reliance was also placed on *Cribb* v. *Kynoch*(5), and *Young* v. *Hoffman Mfg. Co.*(6). It is, of course, true that a master is not bound to give personal superintendence to the conduct of the works, and that there are many things which in general it is for the safety of the workman that the master should not personally undertake. It is, necessary, however, in each to consider the duty omitted, and the providing proper plant as distinguished from its subsequent care, is especially within the province of the master rather than of his servants.
>
> In *Cribb* v. *Kynoch*(5) and *Young* v. *Hoffman Mfg. Co.*(6) the question arose as to the duty of a master to have inexperienced persons in his employ properly instructed in the way to perform dangerous work, and that is a matter which it is fairly obvious must in almost all cases be done for the master by others. The supplying of that which in the opinion of a jury is proper plant stands on rather a different footing.

(1) 15 Ind. App. 186, at p. 192.
(2) 35 Ind. App. 102.
(3) [1915] A.C. 98.
(4) L.R. 1 H.L. Sc. 326, at p. 332.
(5) [1907] 2 K.B. 548.
(6) [1907] 2 K.B. 646.

I cannot infer from His Lordship's observations that their Lordships in any way questioned the actual decision in *Wilson* v. *Merry*(1), and I think there is nothing in their Lordships' judgment or in the decision affecting the considerations upon which the opinion expressed on the previous appeal was based.

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One point not previously mentioned calls for a word. The appellant company incorporated by letters patent and governed by the Dominion Companies Act passed certain by-laws which authorized the appointment of executive committees selected from the members of the board of directors and the investing of such committees with such powers as the directors should deem advisable. An executive committee was appointed for Vancouver which consisted of three members of the board of directors and the by-law appointing them at the same time provided that Mr. Hayward, who was not a director, should be authorized to attend the meetings and to take part in all its deliberations and be "*ex officio* a member of the committee." There was also a power of attorney executed by the company conferring large powers upon these four persons to be exercised by any two or three of them. It is argued that Mr. Hayward by reason of being a joint donee of the powers under the power of attorney stood in the same relation to the company for the purposes of this action as the board of directors themselves. The answer to that is that Mr. Hayward was general manager and engineer in charge and as such exercised only such powers as were vested in him by virtue of his appointment to those offices, or otherwise entrusted to him as general manager or engineer in charge; and it was as general manager and engineer in

(1) L.R. 1 H.L. Sc. 326, at p. 332.

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charge that he was entrusted with the duty to provide protection for the workmen.

It was not in the exercise of powers vested in him under the power of attorney jointly with the members of the executive committee proper that he is chargeable with negligence.

The company could not moreover be chargeable with notice through Hayward of the negligence found against him. There is not the slightest evidence of want of good faith on Hayward's part and if notice of the facts known to Hayward be imputed to the company notice also must be imputed of Hayward's opinion that the precautions taken by him were sufficient. In these circumstances and in view of Hayward's admitted qualifications, assuming the company is not responsible for Hayward's omissions it cannot be charged with wrongful neglect in failing to direct that some additional precaution should be provided.

ANGLIN J.—The facts of this case and its surrounding circumstances are fully set out in the judgments delivered on the former appeal to this court; *Bergklint* v. *Western Canada Power Co.*(1); and in assigning reasons for the conclusion which I have reached, that the present appeal should be allowed and the action dismissed, I find it necessary to add little to what I then said.

The only material variation in the evidence at the new trial is that the plaintiff has now emphasized water conditions on the hillside as a definite and all-important element of danger—a development which I should regard with grave suspicion.

The second trial (in the order for which I reluctantly concurred) has resulted in a general verdict for the

(1) 50 Can. S.C.R. 39.

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plaintiff, his recovery being increased, however, from $5,500 to $10,000.

The sole ground of negligence on the part of the defendants now relied upon is the failure to have provided an overhead barrier or shield of logs for the protection of the plaintiff and the workmen engaged with him—and that is the fault on which it is claimed for him that the jury based their verdict in his favour.

After careful consideration of it, the evidence now before us seems to me to establish that the overhead protection of a shield or barrier of logs or planks is required only where sufficient clearing of the hillside is not feasible or is too expensive; that it was entirely practicable in the present case to have thoroughly cleared away all debris and loose stuff from above the place where the plaintiff was working when injured; that he and his associate workman had been instructed to so clear it and had assumed to discharge that duty; that there were no conditions present which would render clearing properly done inefficient or inadequate as a protection; and that it was only when assured that the work of clearing had been properly done that the foreman allowed the plaintiff to go upon the ledge in order to proceed with the preparation for drilling at which he was engaged when injured. Apart altogether from any question of contributory negligence or any issue of *volens*, if trying the action I think I should unhesitatingly hold that the facts in evidence would not support a finding that the omission to have a shield of logs placed above the workmen's heads amounted to actionable negligence, and that, if it was a mistake at all, it was the result of a mere error of judgment which should not entail liability.

But assuming that it was open to the jury on any theory suggested to have found that it was negligence,

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it was clearly that of the superintendent Hayward, who was undoubtedly a fellow-employee of the plaintiff.

Counsel for the plaintiff urged that the shield of planks or logs was required as a protection throughout the entire period of the construction of the defendants' works for men working in the valley below and on the hillside, and that its absence should therefore be regarded as a defect in original installation or a failure to make proper provision in the first instance—from liability for which no delegation of duty, however comprehensive, to officials, however competent and well equipped, could relieve the employer. *Toronto Power Co.* v. *Paskwan*(1), affords a recent and a very striking illustration of the absolute character of that duty. The evidence before us, however, does not support this contention. The guard or barrier of logs is not dealt with, even by the expert witnesses called by the plaintiff, as such a permanent or relatively permanent requirement.

An attempt to shew knowledge of conditions and control of, or interference in, the superintendence or management of the works by the directors of the company, or any of them, utterly failed. Everything in the nature of superintendence and management was unqualifiedly entrusted to Mr. Hayward. As the learned trial judge put it in his charge:—

> It does not appear that they (the directors) in any way interfered in the practical physical operation of the work. In other words, they were simply business men who left the practical duties to the superintendent and his staff.

Yet the jury may have based their verdict upon a finding—made, of course, without any evidence to warrant it—that the directors did attempt to manage or supervise the work themselves and were negligent in doing so, since, notwithstanding what he had stated

(1) [1915] A.C. 734.

as to the lack of evidence, the learned judge left it to the jury to say whether they had in fact so interfered.

I find nothing in the record to alter the view taken by other members of the court as well as myself on the former appeal that the provision of suitable protection for employees engaged as the plaintiff was when injured

could properly be delegated to a competent superintendent or foreman (furnished with adequate means and resources) whose negligence would not render the employer liable at common law.

With my Lord the Chief Justice I thought that upon the case then before us it was clear beyond question that this duty had been so delegated and that the furnishing adequate means and resources to the superintendent was conceded.

A new trial was ordered because in the opinion of my brother Duff(1), the trial judge had in effect refused to leave to the jury the question

whether the duty of superintendence was in fact in this case retained by the directors or others having authority to exercise the general powers, or whether, on the contrary, Mr. Hayward had such authority and resources at his command and was under a duty expressed or implied to use them in furnishing the suggested safeguards, if such safeguards were reasonably necessary.

Mr. Hayward's competency has never been in question. Whatever may have been the case upon the former record, his duty and authority in the premises and the adequacy of the resources at his command are put beyond controversy by the evidence now before us. Yet the jury may have found otherwise, since the learned trial judge, notwithstanding that he had told them that Hayward was a competent superintendent, that the duties of superintendence had been left to him and that he and Fraser, the foreman,

had at their command, according to the evidence, for the purpose of fulfilling their duties, the necessary facilities, appliances and funds,

nevertheless afterwards explicitly left it to them

(1) 50 Can. S.C.R. at p. 50.

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to determine whether Mr. Hayward, the superintendent, had full authority to superintend the work and whether he had at his command all the necessary appliances and facilities for so carrying on the work, adding that, if they should so find, the plaintiff could not succeed (at common law) on that branch.

Whether the verdict at common law was based on supposed failure of the directors to charge Hayward with the full duties of superintendence, or to supply him with the necessary means and resources, or upon some personal negligent interference by the directors or some of them, cannot now be known. But upon whatever view the jury may have proceeded the verdict is against the evidence and perverse.

For these reasons (some of them more fully stated in the report of the former appeal at pp. 57-70) I am with respect of the opinion that if there was any fault (I incline to think there was not) on Mr. Hayward's part, it did not entail liability of the company at common law.

In order that the plaintiff should recover under the "Employers' Liability Act" it would be necessary to treat the verdict as a finding that the failure to protect him and his fellow workmen by a shield of logs was negligence in superintendence on the part of Mr. Hayward. At the former trial this aspect of the case raised on the pleadings was practically abandoned. The trial judge then told the jury, without objection, that, if the plaintiff should recover at all, it must be at common law. At the second trial, although evidence was given in support of the claim under the Act and the jury was invited to deal with it, they ignored it and merely found

for the plaintiff for $10,000 under the common law.

In his factum on the present appeal and at bar in this court counsel for the respondent made not the slightest allusion to this branch of his client's claim. More-

over, as I have already pointed out, in view of the manner in which the case went to the jury, it is impossible to say that their verdict, holding the defendants liable at common law, was not based upon a finding that the directors of the company had personally interfered in the management and supervision of the work and had been themselves negligent therein. There is no assurance that the verdict proceeded upon negligence on the part of Hayward, which would be necessary to sustain a judgment under the "Employers' Liability Act" If we were otherwise at liberty to deal with the case upon an aspect of it ignored by the jury and not presented in argument before us, this uncertainty about the meaning and effect of the verdict would appear to present an insuperable obstacle to our now holding the plaintiff entitled to recover under the "Employers' Liability Act."

The appeal should be allowed and the action dismissed. If the defendants ask them, they are entitled to all the costs of the litigation of which we have power to dispose.

BRODEUR J. (dissenting).—This is an accident case which already came before us, *Bergklint* v. *Western Canada Power Co.*(1), and in which the majority of this court was of opinion that a new trial should take place. It was then stated that there was evidence upon which a jury might have found that the duty of providing proper safe-guards had been entrusted to a competent person provided with the necessary means of doing so and that the failure of the trial judge to leave this question to the jury necessitated a new trial.

I was then of opinion that the findings of the jury were sufficiently supported by evidence and warranted judgment in favour of Bergklint.

(1) 50 Can. S.C.R. 39.

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A new trial has taken place and some of the objections raised against the former verdict have disappeared.

It had been found in the first verdict that the defendants had been negligent in not sufficiently clearing the face of the incline and placing barriers to prevent rolling stones and other debris from causing injury to the employees.

It was decided by the Court of Appeal of British Columbia that this insufficient clearing having been carried out by Bergklint and his fellow-workmen that there was contributory negligence on his part and that the verdict in his favour should be set aside.

On the new trial this question of clearing was, of course, the subject of evidence and it is shewn very clearly, in my opinion, that the clearing was well done and, in the language of the general manager of the company,

it was properly cleared of anything that would drop or break down.

That phase of the case was not very strongly pressed upon us; but the main question which was argued was that the verdict of the jury under the doctrine of *Wilson* v. *Merry*(1), could not be supported. In that case of *Wilson* v. *Merry*(1), it was stated by Lord Cairns that what the master is bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do it and to furnish them with adequate materials and resources for the work.

It is contended by the respondent on this appeal that barriers should have been erected on the cliff in order to protect the servants of the company working below against rolling stones or debris which might come from that cliff. Blasting was being done constantly

(1) L.R. 1 H.L. Sc. 326.

and it was necessary that some protection should be used in order that no debris should reach the men.

That question of giving protection to the men by means of barriers is controverted, it being claimed by the appellant company that those barriers would not give proper protection.

According to my opinion, the company was not bound to use all the latest improvements and appliances. It is a question of fact in each particular case whether there has been negligence in failing to install any appliance: *Toronto Power Co.* v. *Paskwan* (1).

The jury in this case has brought in a general verdict of negligence against the company. They evidently found that those barriers whould have constituted, in the circumstances, a proper protection and that the neglect of the company to install these appliances constituted on its part a case of negligence.

There was certainly evidence on which the jury could find such a verdict and I have come to the conclusion that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Tupper, Kitts & Wightman.*

Solicitors for the respondent: *Taylor, Harvey, Grant, Stockton & Smith.*

(1) [1915] A.C. 734.

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*Nov. 3, 6.
*Dec. 30.

THE HONOURABLE JOSEPH-CAMILLE POULIOT (PLAINTIFF) .. APPELLANT;

AND

THE TOWN OF FRASERVILLE (DEFENDANT) .... RESPONDENT.

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

Expropriation—Municipal corporation—Statutory powers—Lands outside municipality—Appointment of arbitrators—Procedure—Award —"Towns Corporations Act," R.S.Q., 1888, arts. 4561-4569—*Charter of Town of Fraserville,* 3 *Edw. VII., c.* 69; 6 *Edw. VII., c.* 50—*Quebec "Expropriation Act,"* 54 *Vict. c.* 38—*Words and phrases—"Avoisinant"—"Adjoining."*

The statutes incorporating the Town of Fraserville, (3 Edw. VII., ch. 69' 6 Edw. VII., ch. 50 (Que.)), by section 183 gave power to expropriate lands both within and outside the limits of the municipality and section 193 substituted a new section to replace article 4561 of the Revised Statutes of Quebec, 1888, in regard to expropriations. In expropriating lands outside its limits for an electric lighting system the town proceeded under articles 4562 to 4569 of the "Towns Corporations Act," R.S.Q., 1888, incorporated as part of the charter by force of article 4178, R.S.Q., 1888, and obtained an order appointing an arbitrator on behalf of the owner from a judge of the Superior Court. Notwithstanding objection by the owner, an award was made and he brought action to set it aside on the ground that, by section 193, the application of articles 4562 to 4569 was confined, in the case of the Town of Fraserville, to expropriations within its limits and, as to expropriations beyond that area, nominations of arbitrators could be made only by the Attorney-General as provided by the "Expropriation Act," 54 Vict. ch. 38.

Held, Anglin J. dissenting.—That the sixth section of the Act, 6 Edw. VII., ch 50, by specifically authorizing the municipality to expropriate lands outside its limits enacted provisions incompatible with those of article 4561, R.S.Q., 1888, as so replaced by section 193, and it was, therefore, repealed as the repugnant provisions of the later statute prevailed. *The King* v. *The Justices of Middlesex* (2 B. & Ad. 818), and *In re Cannings and County Council of Middlesex*

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

([1907], 1 K.B. 51), followed. Consequently, the procedure adopted for the appointment of arbitrators was proper and the award was valid.

The statute, 6 Edw. VII., ch. 50, by section 6, authorizing expropriations outside the town, in the French version made use of the phrase "dans ou en dehors de la ville et les municipalités avoisanantes," while the English version used the term "adjoining municipalities." The 297th section of the charter provided that in the event of discrepancy preference should be given to the French version.

Held, that the statute should be interpreted according to the meaning of the broader term "avoisinantes," used in the French version and, consequently, in exercising such powers of expropriation, the municipality was not limited to taking lands in contiguous municipalities.

Per Anglin J.—By section 193 of the charter the application of the provisions of the "Towns Corporations Act," arts. 4165 *et seq.* R.S.Q., 1888, is expressly confined to expropriations within the town; section 193 was not excluded from the charter nor impliedly repealed by the amendment of 1906 to section 183, and the appointment of arbitrators by the judge was an usurpation of the jurisdiction conferred by articles 5754*d* and 5754*e*, R.S.Q., 1888 (54 Vict. ch. 38, sec. 1), upon the Attorney-General of the province.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of Letellier J., in the Superior Court for the District of Kamouraska, which dismissed the plaintiff's action with costs.

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

St. Germain K.C. and *St. Laurent K.C.* for the appellant.

Stein K.C. for the respondent.

DAVIES J.—The single question upon which I have entertained any doubt in this case is whether the appointment of arbitrators to determine the damages to which the appellant was entitled for or by reason of the expropriation by the respondent of certain lands of his outside of the Town of Fraser-

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ville should have been made by the Attorney-General under the provisions of the general "Expropriation Act" or by a judge of the Superior Court under the articles of the "Towns Corporations Act"—4561 to 4569—and the subdivision sec. 11 "Expropriation for Municipal Purposes."

The argument for the appellant is that section 4561 of these general expropriation sections was "replaced for the Town" of Fraserville by article 193 of ch. 69, 3 Edw. VII., (1903), amending the charter of Fraserville, that by this amendment the town's power of expropriation was limited to lands, buildings and structures "in the town" and that, therefore, the general provisions of the "Towns Act" relating to the manner of expropriation did not apply to these lands which were outside of the town's jurisdiction and powers.

The respondent, on the other hand, contends that so far as the construction of its electric light works was concerned this limitation on the town's power of expropriation "to lands, buildings and structures within the town" was removed by article 6 of the amendment to its charter in 1906, and that the methods by which this power of expropriation so extended should be exercised are to be found in the articles 4561 to 4569 of the "Towns Corporations Act" under the general heading of "Expropriation for Municipal Purposes."

The respondent invokes in support of its argument articles 4178 and 4179 of the "Towns Corporations Act" the first of which declares generally that the provisions of this chapter apply to every town etc. and

unless expressly modified or excepted they constitute part of its charter,

and the latter of which enacts

for any of the provisions of this chapter not to be incorporated in the charter it must be expressly declared that such provisions specifying them by their numbers shall not form part thereof.

Article 4561 of the "Towns Corporations Act," R.S.Q., 1888, title XI., conferring *power* of expropriation upon towns within the scope of the town's jurisdiction was amended, in 1903, by article 193 of ch. 69, 3 Edw. VII., limiting that power to land etc. "in the *town*" but this limitation, so far as the construction and maintenance of the electric works of the town were concerned, was done away with by the amendment of 1906 before referred to, and the land of the appellant, outside of the town, was under that amending power legally expropriated for the electric purposes of the town.

This extension of the limitation put upon the town's powers of expropriation then, it is said, necessarily left the provisions of the "Towns Corporations Act" as to the *method of procedure* applicable and so do not admit of the application of the general "Expropriation Act." I admit the difficulties in reaching a conclusion and have given the point much consideration. After reading the carefully prepared opinion of Mr. Justice Brodeur, I have concluded that his construction of the different statutes is right, that the proceedings taken to appoint the arbitrators under the "Towns Corporations Act" were correct and that the appeal should be dismissed with costs.

IDINGTON J.—I agree in the main herein with the reasons assigned by the courts below. But I have had some difficulty in trying to reconcile the enactment of section 193 of 3 Edw. VII., ch. 69, of Quebec, with the provisions necessary to be observed in the case of expropriation outside the town.

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It is quite clear the peculiar wording of that section never was necessary, for the scope of the jurisdiction of the town, as it stood in the section thus supplanted, covered and was limited to that needed.

I think the section 6 of 6 Edw. VII., ch. 50, three years later, amending section 193 of the first mentioned Act may be taken as an implied repeal of the limitation implied in the word "town" in said section 193, so much in evidence in the argument.

I conclude the two cannot stand together and the later one should prevail. Then the general provisions of the "Municipal Act" relative to town corporations does the rest.

I do not overlook the alternative properly and forcibly presented by Mr. St. Germain. His proposition relative to the general enactment providing for the Attorney-General naming the umpire or a sole arbitrator in case of disagreement, does not cover the whole ground involved in the questions raised herein. I need not elaborate.

In short the legislation has to be given some sort of sensible meaning.

At this stage it should not be expected of us to reverse the finding as to amount (especially when two of the board were selected by a judge) of the award of arbitrators acting within their powers when unanimously maintained by the courts below.

I admit the appellant has presented some plausible and, possibly, cogent reasons for his contention. But I fail to see anything more therein than what in the last analysis is matter of opinion of what the market value is of that taken.

Special advantages have been and must be tested by their value; not by what the owner may imagine and try to dictate as a price.

There does not seem any good reason to believe all these things were ignored by the majority of the arbitrators.

The only other matter of legal principle involved in the appellant's allegations, upon which we could properly act, is that relative to the expropriation being in part founded upon a resolution instead of by-law.

He has not so much to complain of in that regard as either plaintiff had in the cases of *Larin* v. *Lapointe* (1), reversed in the Privy Council under the name of *Lapointe* v. *Larin*(2), and *Robertson* v. *City of Montreal* (3). In the former the non-observance of forms of procedure as prescribed by statute did not seem of importance in the court above when the unanimous council in fact had directed something to be done without pursuing the method laid down in the statute; and in the latter case the majority of this court held a similar departure from the prescribed path by way of a by-law when substituted by using a resolution was not *ultra vires* or at least so far so that a ratepayer or contracting party could complain.

I think the appeal should be dismissed with costs.

DUFF J.—There is only one point requiring discussion. It arises in this way. The legislative charter of the Town of Fraserville, which is contained in an Act of the Legislature passed in the year 1903, was amended in 1906 in such a way as to provide that, for the purposes of establishing and maintaining a system of electric lighting, the municipality should have compulsory powers of expropriation as regards immovables both within and without the town. (Sec. 183, ch. 69, 3 Edw. VII., as amended by 6 Edw. VII., ch. 50,

(1) 42 Can. S.C.R. 521.
(2) (1911), A.C. 520.
(3) 52 Can. S.C.R. 30.

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sec. 6.) The municipality in acquiring for these purposes property outside its territorial limits has proceeded on the assumption that the machinery for expropriating land outside as well as that inside the town is the machinery provided by articles 4562 to 4569 of the "Towns Corporations Act," R.S.Q., 1888, which with certain immaterial modifications became incorporated in the charter of 1903 by force of article 4178, R.S.Q., 1888. The appellant denies that these provisions of the "Towns Corporations Act," although incorporated in the charter and applicable to expropriations within the town, have any operation when an expropriation of property beyond the limits of the town is in question. Admittedly if the appellant is right in this contention the proceedings now impeached before us are invalid because if these enactments of the "Towns Corporations Act" are not the enactments by which such proceedings are governed then the method of procedure which it was the duty of the municipality to follow in such expropriations was that prescribed by the "Expropriation Act" and admittedly the procedure so prescribed was departed from in essential respects.

The question for determination is: Was the municipality, in expropriations of property outside the town, entitled to avail itself of the provisions of the "Towns Corporations Act" above referred to?

The point of the difficulty can, I think, be most clearly put by first explaining the contention of the appellant. The articles 4562 to 4569 of the "Towns Corporations Act" relating to expropriation which the municipality says are applicable and the appellant denies to be applicable to such expropriations are preceded by article 4561 which is the first section in a fasciculus under the sub-title "Expropriation for Municipal Purposes." This article is in the following words:—

The council may, by complying with the provisions following, appropriate any land required for the execution of works ordered by it within the scope of its jurisdiction: 40 Vict. ch. 29, sec. 386.

The charter of 1903 did not adopt article 4561 as it stands. The first section of a group of sections of the charter bearing the sub-title "Expropriations" is section 193 which deals with that article as follows:—

L'article 4561 des Statuts Refondus est remplacé, pour la ville, par le suivant:

Le conseil pourra s'approprier, dans la ville, le terrain et les batiments ou constructions nécéssaires à l'exécution des travaux ordonnés par lui, dans les limites de ses attributions, en se conformant aux dispositions suivantes;

and it will be observed that the article which by this enactment is, as regards the Town of Fraserville, substituted for article 4561 expressly confines the powers thereby given to cases of expropriation *within the town*.

Now the appellant argues that the effect of this substituted article and especially of the words

le conseil pourra s'approprier dans la ville * * * en se conformant aux dispositions suivantes

is to limit the application of the "*dispositions suivantes*," that is to say, of articles 4562 to 4569 of the "Towns Corporations Act" to such expropriations. The appellant assuming that point to be safely reached, has, of course, no difficulty in establishing the conclusion which indeed necessarily follows that the charter itself neither explicitly nor by reference to the "Towns Corporations Act" provides any machinery for the expropriation of the property outside the town and consequently that for such purposes the municipality must resort to the "Expropriation Act."

Not only is this argument a plausible one but it must, I think, be conceded that the view advanced by the appellant of the construction and effect of section 193 of the charter of 1903 is an admissible construction;

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indeed, at the conclusion of the argument I was strongly inclined to think that it was the right construction and that effect ought to be given to it.

There is, of course, some degree of *a priori* probability against the inference that the legislature intended to prescribe in respect of compulsory powers exercisable for the same object and by the same municipality one machinery where the property to be taken is within the municipality and a different machinery where the property to be taken is outside the municipality; where it is admitted that one set of machinery is not better adapted than the other set to either class of expropriation—as is the case here.

I feel at liberty to adopt the respondent's construction if it appear from the point of view of verbal interpretation to be a reasonably admissible one, even though from that standpoint alone the appellant's construction should be in some degree the preferable.

I find no difficulty in holding that the respondent's construction is a reasonably admissible construction. I have already pointed out that section 183, which confers compulsory powers simply, neither in the charter of 1903 nor in the amendment of 1906 has anything to say on the subject of machinery. So it must be observed when the article is narrowly examined, that article 4561 of the "Towns Corporations Act" is primarily concerned not with machinery but with the conferring of substantive powers. It is a comprehensive provision which declares that when the municipality orders works that it has jurisdiction to order the municipality shall have authority to take the necessary land. It is quite true that the article adds that this may be done by complying with the subsequent provisions, but this phrase adds nothing to the construction which would have been put upon the

article and the subsequent provisions if it had been absent and it certainly is not necessary to read it as restricting the scope of the succeeding articles by limiting their application to cases of expropriation by the municipality under the *general* powers conferred by the article 4561 itself. What effect then is to be attributed to section 193 which declares that article 4561 is replaced by an article in which the *general* powers of expropriation thereby conferred are limited in their application to those cases in which the property required is situated within the town. The answer to this question is dictated by the fact that the substituted article, like article 4561 itself, is primarily a provision dealing with substantive powers of expropriation, a comprehensive provision applying to all cases not specifically provided for in which it is necessary to take land for municipal purposes within the town. The charter contains a number of sections conferring such powers for specific purposes. Must we conclude that the machinery provided by the succeeding articles is available only in cases of expropriation under the residuary powers thus conferred? I repeat, such is not the necessary result of the limiting words. There is nothing in the language of the substituted article and nothing in that of articles 4562 to 4569 which are part of the charter requiring us to hold that the machinery provided by these articles is not available for proceedings in exercise of powers given for specific purposes under other provisions of the charter such as that found in section 183.

These in outline are the reasons (they are, I think, in accordance with those of my brother Brodeur) from which I have concluded that we are entitled to hold that the judgment of the court below was not erroneous.

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ANGLIN J. (dissenting).—In my opinion the appellant is entitled to succeed on the ground that the application of the expropriation provisions of the "Towns Act" (R.S.Q., 1888, arts. 4561 *et seq.*) is by section 193 of the charter of the Town of Fraserville, enacted in 1903, expressly confined to expropriations within the town. The French version of section 193 puts this restriction beyond any possibility of doubt.* The method to be pursued in the case of expropriations outside the limits of the town, which have, since 1903, been authorized by section 182 of the charter for waterworks purposes, and are now by an amendment to section 183, passed in 1906, also authorized for the purposes of the town electric lighting system, is not expressly provided for in the charter. If, notwithstanding the fact that article 4561 of the Revised Statutes of Quebec, 1888, has been "replaced *for the town*" by a section which restricts the application of the method of expropriation provided by the succeeding group of articles in the Revised Statutes to expropriations within the town, that group of articles applies also to expropriations outside the town, the restriction

*R.S.Q., 1888, (French version.) Art. 4561.—Le conseil pourra s'approprier le terrain nécessaire à l'exécution des travaux ordonnés par lui dans les limites de ses attributions, en se conformant aux dispositions suivantes.— (English version.) Art. 4561.—The council may, by complying with the provisions following, appropriate any land required for the execution of works ordered by it within the scope of its jurisdiction.

Charter of Fraserville, (1903,) 3 Edw. VII., ch. 69. (French version.) Sec. 193.—L'article 4561 des Statuts Refondus est remplacé, pour la ville, par le suivant:—Le conseil pourra s'approprier, dans la ville, le terrain et les bâtiments ou constructions nécessaires à l'exécution des travaux ordonnés par lui, dans les limites de ses attributions, en se conformant aux dispositions suivantes.— (English version.) Sec. 193.—Article 4561 of the Revised Statutes is replaced, for the town, by the following:—The council may, by complying with the following provisions, appropriate any land, buildings and structures in the town, required for the execution of works ordered by it, within the scope of its jurisdiction.

thus imposed would be meaningless and ineffectual—a result so abhorrent to sound construction that it can be accepted only if inevitable. Articles 4562 *et seq.* of the Revised Statutes of Quebec, 1888, were not excluded from the town charter: they necessarily had their place in it subject to the "express modification" made by section 193 of the town charter of 1903. Articles 4178 and 4179 of the Revised Statutes of Quebec, 1888, therefore, do not conflict with the view I take of the effect of section 193 of the charter, which is that, for the Town of Fraserville, articles 4562 *et seq.* of the "Towns Act" (arts. 4178 *et seq.*, R.S.Q., 1888), must be read as if article 4561 had been originally enacted in the terms of section 193 of the town charter. So reading them, it would, I think, be clearly impossible to hold articles 4562 *et seq.* applicable to outside expropriations under section 182 of the charter, enacted concurrently with section 193, and there is no reason for outside expropriations authorized by the amendment of 1906 being in a different plight so long as section 193 of the charter was left unaltered. The corporation in making these outside expropriations, whether under section 182 or under the amendment to section 183, was thus driven to resort to the provisions of the general expropriation law contained in articles 5754 (*a*) *et seq.* of the Revised Statutes of 1888 (54 Vict. ch. 38, sec. 1), which are expressly made applicable in all cases where powers of expropriation are conferred by a statute that does not determine the mode in which they are to be exercised. Counsel for the respondent contended that inasmuch as the power to expropriate outside the limits of the town for the purposes of its electric lighting system was not given by the town charter as consolidated in 1903, but was conferred only by an amendment of 1906,

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upon the adoption of that amendment the restriction effected by the words "in the town" in section 193 of the charter of 1903 should be deemed repealed by implication. I cannot agree with that contention. There is no repugnancy or inconsistency such as it requires as a foundation. It takes no account of the existence in the charter of 1903 of the provision made by section 182 for outside expropriations. Such an implied repeal as is contended for might possibly follow if the statutes did not contain the general provision above referred to for cases in which the mode of expropriation is not defined by the law conferring the right. But with that provision available necessity for extending the scope of section 193 does not arise, and short of absolute necessity there is no sufficient ground for an implication of repeal of the limitative words which it contains.

The ground of appeal, which should thus, in my opinion, prevail, is, no doubt, technical and, in view of the concluding sentence of article 5566 of the Revised Statutes of Quebec, 1909, as amended by 1 Geo. V., ch. 56, sec. 19, is of no importance except in the present case. Yet it may not be rejected on that account since it involves the jurisdiction of the arbitrators.

If the provisions of articles 4562 *et seq.* of the Revised Statutes of Quebec, 1888, did not apply, the judge of the Superior Court usurped the jurisdiction conferred by articles 5754*d* and 5754*e* (54 Vict. ch. 38, sec. 1) on the Attorney-General of the province. The appellant has never acquiesced in the appointments made by the Hon. Mr. Justice Cimon, who purported to act as *persona designata*. *Canadian Northern Ontario Ry. Co.* v. *Smith*(1). His order was

(1) 50 Can. S.C.R. 476.

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not appealable. The respondent's plea of *res adjudicata* is, in my opinion, not well founded.

I think I should add that upon the other grounds taken the appeal, in my opinion, fails for the reasons stated by the learned Chief Justice of the court of appeal.

BRODEUR J.—Il s'agit d'un appel de la décision de la Cour du Banc du Roi, qui a confirmé unanimement un jugement de la Cour Supérieure dans une action en nullité de sentence arbitrale.

La Ville de Fraserville, l'intimée, désirant exproprier certains terrains appartenant à l'appelant et dont elle avait besoin pour son système d'éclairage, a donné avis d'expropriation sous les dispositions de l'acte des corporations de ville de 1888; et, comme l'appelant refusait de nommer son propre arbitre et le tiers arbitre, la corporation intimée s'est adressée à un juge de la Cour Supérieure pour faire la nomination (arts. 4565-4569*a* S.R.Q., 1888).

L'appelant a comparu devant le juge et a prétendu que la corporation n'avait pas le droit de s approprier les terrains en question parce qu'ils étaient en dehors du territoire dans lequel elle pouvait exercer son droit d'expropriation.

Le juge, ayant débouté l'appelant de ses prétentions et ayant donné acte à ce dernier de ses objections, a nommé comme l'arbitre de l'appelant celui qu'il lui avait désigné et il a également nommé le tiers arbitre.

L'arbitre de l'appelant et le tiers arbitre ont rendu une sentence arbitrale par laquelle on lui accordait une somme de près de $5,000.

L'arbitre de la corporation était d'opinion qu'une somme moindre devait être payée. La decision de la majorité des arbitres fut acceptée par la corporation et le montant fut dûment offert.

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Il ne peut donc y avoir de contestation sérieuse quant au montant de l'indemnité.

L'appelant prétend cependant avoir droit à une plus forte somme. Mais comme les trois arbitres sont d'opinion que le montant offert l'indemnise suffisamment et comme ils ont procédé d'une manière juste, légale et équitable, la sentence arbitrale de la majorité dévrait être maintenue.

L'appelant demande en outre que la sentence soit mise de côté sur le principe (1) que la nomination de son arbitre et du tiers arbitre aurait due être faite non pas sous les dispositions de l'acte des corporations de ville (art. 4565 et 4569*a*) mais sous les dispositions de l'acte général des expropriations de 1890 (54 Vict. ch. 38), (2) que la corporation n'avait pas les pouvoirs statutaires requis pour exproprier ses terrains.

1.—NOMINATION DES ARBITRES.

La ville de Fraserville était régie lors de l'expropriation en question, en 1908, par un acte spécial de 1903 (3 Edw. VII. ch. 69) et par l'acte général des corporations de ville (arts. 4178 et suivantes des Statuts Refondus de 1888).

L'acte général des expropriations de 1890 (54 Vict. ch. 38) déclarait que ses dispositions s'appliquaient aux cas où la législature n'avait pas autrement pourvu au mode d'expropriation.

Il y était déclaré que si une partie refusait de nommer son arbitre alors l'autre partie pouvait demander au Procureur-Général de la province de faire la nomination d'un seul arbitre. Et si chaque partie avait choisi son arbitre alors le tiers arbitre était nommé par le Procureur-Général.

Dans l'acte des corporations de ville le pouvoir d'expropriation pour une ville était d'abord décrété par l'article 4561 S.R.Q. (1888) et les articles suivants

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(4562 à 4570) déterminent la procédure à suivre dans les expropriations.

Dans les articles 4565 et 4569*a* il y est déclaré que si une des parties refuse de nommer son arbitre ou le tiers arbitre, alors un juge de la Cour Supérieure aura jurisdiction pour faire cette nomination.

Alors la différence entre l'acte général des expropriations et l'acte des villes c'est que dans le premier cas le Procureur-Général fait les nominations d'arbitres et que dans le cas des expropriations par des villes elles sont faites par le juge de la Cour Supérieure.

L'appelant prétend que "l'acte Général des Expropriations" s'applique au cas actuel parce que les terrains sont en dehors de Fraserville vu que la législature, dans le cas de Fraserville, aurait déclaré que le mode d'expropriation des corporations de ville ne s'appliquerait que dans le cas où les expropriations auraient lieu dans les limites de la ville.

Il se base sur la section 193 de l'acte spécial de 1903 qui a rappelé l'article 4561 des corporations de ville et l'a remplacé par un nouveau.

L'article 4561, tel que nous le trouvons dans les Statuts Refondus de 1888, se lisait comme suit:—

Le conseil peut s'approprier le terrain nécessaire à l'exécution des travaux ordonnés par lui dans les limites de ses attributions en se conformant aux dispositions suivantes.

L'amendement fait par la section 193 de la charte de Fraserville est comme suit:—

193. L'article 4561 des Statuts Refondus est remplacé pour la ville par le suivant:

Le conseil pourra s'approprier, *dans la ville, le terrain et les bâtiments ou constructions* nécessaires à l'exécution des travaux ordonnés par lui dans les limites de ses attributions, en se conformant aux dispositions suivantes.

Cet article 4561 des Statuts Revisés de 1888 avait pour but, comme on le voit, de donner aux villes le droit d'expropriation.

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Comme il ne référait pas aux bâtisses, il fut décidé dans le cas de Fraserville d'ajouter ces mots "et les bâtiments ou constructions" au mot *terrain* afin de rendre bien clair le droit de la ville de Fraserville d'exproprier non-seulement les terrains mais les bâtisses qu'on y aurait érigées. Et il était décrété aussi en même temps que ces expropriations ne pouvaient se faire que dans la ville. C'était en 1903 que l'article 4561 fut ainsi amendé. Mais en 1906 de nouveaux pouvoirs d'expropriation furent accordés â la ville pour son système d'éclairage et cette fois la ville ne fut pas restreinte à son propre territoire mais on lui a donné le pouvoir d'aller en dehors dans les municipalités avoisinantes.

La législature, cependant, lui a donné ce pouvoir additionnel non pas en retranchant les mots "dans la ville" de l'article 4561 tel qu'amendé en 1903 mais en faisant une nouvelle section. Cette nouvelle section est claire et non ambigue et personne ne prétendra qu'elle ne met pas à néant les restrictions imposées par l'article 4561 tel qu'amendé.

Si par la loi de 1903 la ville de Fraserville ne pouvait exproprier que dans les limites de son territoire pour son système d'éclairage, l'amendement de 1906 lui donne clairement le droit d'aller au dehors de son territoire pour perfectionner son système d'éclairage.

Ces deux dispositions sont donc contradictoires et quoique l'article 4561, tel qu'adopté en 1903, n'ait pas été formellement rappelé en 1906 il devient incompatible avec la loi de 1906 et alors la dernière doit prévaloir, vu qu'elle contient la volonté du législateur telle qu'exprimée en dernier lieu.

Lord Tenterden disait dans la cause de *The King* v. *The Justices of Middlesex*(1):—

(1) 2 B. & Ad. 818, at p. 821.

Where the proviso of an Act of Parliament is directly repugnant to the purview of it, the proviso shall stand and be held a repeal of the purview, as it speaks the last intention of the makers.

"The usual rule as stated" par sa seigneurie le juge Farwell dans la cause de *In re Cannings and County Council of Middlesex*(1):—

is that where there are two public general Acts with inconsistent provisions the later Act prevails.

La procédure en expropriation qui doit être suivie pour les terrains situés en dehors du territoire d'une ville est celle indiquée par les articles 4562 et suivants S.R.Q.

En vertu de l'article 4178, qui est le premier article de l'acte des corporations de ville, il est déclaré que:

les dispositions du present chapitre s'appliquent à toute municipalité ou corporation de ville établie par la législature de cette province, et à *moins de modification ou d'exception expresse font partie de la charte.*

L'article 4179 est encore plus explicite et dit:—

Pour empecher l'incorporation de quelques articles du présent chapitre dans la charte, elle doit *les en exclure expressément en les désignant par leurs* numéros d'ordre.

Où se trouve la disposition de la charte de Fraserville qui déclare expressément en les désignant par leurs numéros d'ordre que les articles 4562 et suivants ne font pas partie de sa charte?

Y a-t-il dans la charte de Fraserville une seule disposition qui déclare expressément que les articles 4565 et 4569*a* qui pourvoient à donner au juge juridiction pour la nomination des arbitres ne font pas partie de sa charte? Il n'y en a aucune.

L'article 4561 invoqué par l'appelant ne s'occupe pas particulièrement de la procédure à suivre dans les expropriations mais détermine le droit lui-même d'expropriation.

(1) [1907] 1 K.B. 58.

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Et quant à la procédure à suivre, les dispositions des articles 4562 et suivants s'appliquent et il serait illégal d'avoir recours à la loi générale d'expropriation qui ne s'applique pas aux corporations de ville.

La nomination des arbitres a été dûment et légalement faite par le juge de la Cour Supérieure.

L'appelant d'ailleurs ne souffre aucune injustice puisque la corporation consent à lui payer le montant que son propre arbitre a décidé de lui donner.

2.—POUVOIR D'EXPROPRIATION.

Un autre point qui a été également soulevé par l'appelant est que la ville de Fraserville ne pouvait pas exproprier son terrain parce qu'il ne se trouvait pas dans une municipalité avoisinante.

La rivière et le lac en question sont situés à environ une quinzaine de milles de Fraserville. La ville, pour maintenir son système d'éclairage, était évidemment obligée d'aller en dehors pour alimenter son pouvoir d'eau. A certaines saisons de l'année la rivière où elle prenait son pouvoir s'asséchait et ne pouvait fabriquer la lumière nécessaire.

Il paraitrait que le lac et le cours d'eau possédés par l'appelant était les seules propriétés propices qui existaient dans les environs. Il s'agaissait de faire avec ces lacs et ces cours d'eau des réservoirs qui conserveraient l'eau que l'on distribuerait ensuite dans le cours de l'été, lorsque le cours d'eau où la ville prenait son pouvoir s'assècherait. Elle a alors obtenue, en 1906, le droit d'exproprier des propriétés en dehors de son territoire par le statut (6 Edw. VII., ch. 50, sec. 6) qui déclare qu'elle pourra:—

Obliger les propriétaires ou occupants de tous terrains ou propriétés dans *ou en dehors de la* ville *et les municipalités avoisinantes,* à laisser

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faire sur leurs propriétés tous les travaux nécessaires à la construction, au maintien et à la réparation du systeme d'éclairage électrique, et le conseil pourra exproprier tout terrain nécessaire à cette fin, sauf indemnité pour les dommages réels causés à tels terrains ou propriétés.

On se sert de l'expression *municipalités avoisinantes* dans la version française, des mots "adjoining municipalities" dans la version anglaise.

Le mot "adjoining" me paraît un peu plus restreint que celui "d'avoisinant"; et comme en vertu de la charte de Fraserville, sec. 297, il est déclaré que dans le cas de divergences entre la version française et la version anglaise la version française sera adoptée de préférence, je dis que nous devons alors considérer tout particulièrement le mot "avoisinant."

Le mot "avoisinant" veut dire *être* à *proximité d'un lieu,* ne veut pas nécessairement dire immédiatement voisin.

D'ailleurs le législateur avait tellement peu en vue les municipalités attenantes à la ville qu'il n'y en a qu'une seule, savoir la paroisse de la Rivière du Loup qui entoure Fraserville. Quand il a autorisé, par conséquent, la ville de Fraserville à exproprier dans les municipalités avoisinantes, il voulait évidemment parler des municipalités qui se trouvent être à une certaine proximité, mais qui ne sont pas nécessairement attenantes à la ville.

Les terrains en question sont à une quinzaine de milles de la ville. Ce sont les seuls que la ville pouvait exproprier pour son système d'éclairage. C'était certainement ceux qu'elle avait en vue quand elle s'est fait autoriser par la législature. Alors il ne peut pas y avoir de doute, suivant moi, que la corporation avait le droit d'exproprier les terrains de l'appelant.

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Pour toutes ces raisons, je considère que le jugement qui a renvoyé l'action du demandeur est bien fondée et doit être confirmé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *St. Germain, Guérin & Raymond.*

Solicitors for the respondent: *Lapointe, Stein & Levèsque.*

SUSAN HAMILTON AND OTHERS (DEFENDANTS) .... APPELLANTS;

AND

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

1916 *Nov. 16, 17 29
1917 *Feb. 6

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Title to land—Adverse possession against Crown—"Nullum Tempus Act"—Interruption of possession—Information of Intrusion—Judgment by default—Acknowledgment of title—"Real Property Limitations Act" (Ont.).

A judgment by default, on information of intrusion against persons in possession of Crown lands, which was never enforced did not interrupt such possession and prevent it ripening into title under the "Nullum Tempus Act."

"The Real Property Limitations Act" of Ontario (C.S.U.C. ch. 88, sec. 15; R.S.O. [1914] ch. 75, sec. 14) providing that an acknowledgment of title in writing shall interrupt the adverse possession does not apply to possession of Crown lands and such acknowledgment is not an interruption under the "Nullum Tempus Act."

The provision in the "Ontario Limitation of Actions Act" of 1902, making an acknowledgment apply to interrupt possession of Crown lands is not retroactive or, if it is, it cannot apply to a case in which the adverse possession had ripened into title before it was passed.

Per Duff J.—As intrusion does not, in itself, deprive the Crown of possession the occupation required to attract the benefit of the first section of the "Nullum Tempus Act," 9 Geo. III., ch. 16, is not technically possession; but lands are "held or enjoyed" within the meaning of that section where facts are proved which, in litigation between subject and subject, would constitute civil possession as against the subject owner.

The judgment of the Exchequer Court (16 Ex. C.R. 67) in favour of the Crown on information of intrusion was reversed, Fitzpatrick C.J. holding that the Crown had failed to prove title, Idington, J., that the claim was barred by the negative clause of the first section of the "Nullum Tempus Act," and the other judges that the defendants had obtained title by operation of the "Nullum Tempus Act."

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

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APPEAL from the judgment of the Exchequer Court of Canada(1) in favour of the Crown on information of intrusion.

The information of His Majesty the King was filed in the Exchequer Court for the purpose of recovering possession of a piece of land situated at the south-east corner of Rideau Street and Mosgrove Street in the City of Ottawa. The land was portion of the ordnance lands of the City of Ottawa, the title being vested in Her late Majesty's Officers of Ordnance and was partly occupied at one time by what was known as the By-Wash or Waste-Weir Reserve extending from the Rideau Canal Basin to Rideau street through which the overflow or surplus waters of the canal found their way from the canal basin as it existed many years ago. The appellants' grandparents went into possession of this land in the year 1832 without having acquired a title from the Officers of Her Majesty's Ordnance. In the month of February, 1890, an information was filed in the Exchequer Court of Canada against the parties then in possession thereof, including the parents of the defendants in the present action. No defence was filed and judgment was obtained by default, and entered for possession of the lands and premises in the information mentioned, and upon that judgment a writ of possession was issued to the sheriff of the County of Carleton and placed in his hands. Subsequently an order was obtained for the issue of a new writ of possession which writ was duly issued on the 16th day of January, 1902, and placed in the hands of the sheriff.

The said defendants were not evicted under the judgment and writs of possession above mentioned,

(1) 16 Ex. C.R. 67.

but continued in possession of the land, and as they had died it was considered advisable by the Crown to exhibit a new information against the defendants in this action, who claimed, and were in occupation of the land. They entered a defence in which they denied the title of the Crown and further pleaded that the title to the lands was vested in them inasmuch as they and their parents had been in uninterrupted, actual, visible and continuous possession and enjoyment of the lands and premises since the year 1832, and were still in full possession and enjoyment thereof. To this defence the respondent replied setting up the former proceedings and the judgment which was obtained against the persons under whom the appellants claim, and further pleaded that the defendants either as defendants in the present action or as claiming under the defendants in the former action, were estopped from denying the Crown's title.

The action came on for trial before Mr. Justice Cassels in the Exchequer Court on the 11th May, 1915. In support of the information the Crown placed in evidence all the proceedings in the former action of intrusion, and also produced a letter written by Susan Cousens and Sarah Cousens to the then Minister of Public Works. The former of these persons, Susan Cousens, was afterwards Susan Hamilton and mother of the appellants in this action, and one of the defendants in the former action. That letter is as follows:—

"Ottawa City,
"17th October, 1871.

"Sir,—We the undersigned (being sisters) beg to inform you that having understood that the small property or lot situated on the southern side of Rideau street and adjoining the by-wash (leading from the

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Canal) on the west side of it, on which there is a wooden building, has been applied for by the St. George's Society for the purpose of erecting a hall thereon. We would hope that the same might not be sold, as we consider our right to it cannot be alienated from the length of time said lot has been possessed by our family, namely, 39 years. Our father the late James Cousens in his lifetime settled upon this lot in 1832 with permission of the Ordnance Department, our mother outlived our father and resided upon this property for a number of years and at her decease bequeathed it to us, and we have continued upon it ever since. Our father's name was entered upon the books of the Department at the time of his settling down here which was then called By-town, these facts are known to many of the citizens.

"The corporation taxes levied from time to time have been duly paid all along to this date, and we most urgently and respectfully solicit that the aforesaid lot be sold to us, as we consider we have the prior right and are willing to pay any reasonable amount for a deed of the same.

"We remain,
"Your most obedient servants,
"SUSAN COUSENS.
"SARAH COUSENS.

"Hon. H. L. Langevin, C.B."

The judgment delivered by Mr. Justice Cassels held that His Majesty was entitled to recovery of possession of the said lands.

Fripp K.C. for the appellants. The Crown did not prove title. The "sixty feet around the basin and by-wash" reserved to the Crown by 7 Vict. ch. 11, when

the unused lands were restored to former owners, must mean to refer to the junction of the basin and by-wash and so does not include our land.

And title must be proved: *Doe d. Fitzgerald* v. *Finn*(1); *The Queen* v. *Sinnott*(2); *Tuthill* v. *Rogers*(3).

The letter to Sir H. Langevin in 1871 was no acknowledgment of title. See *Doe* d. *Curzon* v. *Edmonds*(4).

The appellants were never dispossessed during the sixty years; *Day* v. *Day*(5); and the provisions of the Ontario "Limitation of Actions Act" cannot affect them.

Hogg K.C. for the respondent. The judgment obtained by the Crown in 1890 and the letter to Mr. Langevin in 1871 are, and either of them is, sufficient to uphold the judgment appealed against.

Where an effectual claim is made by the Crown within the sixty years, its remedy is not barred: *Attorney-General for British Honduras* v. *Bristowe*(6), at pages 155-6.

As to the acknowledgment see Halsburys Laws of England, vol. 19, page 132.

THE CHIEF JUSTICE.—The Attorney-General for the Dominion of Canada brought this suit by information claiming possession of certain lands and premises therein described and which now are, and for the past eighty-four years have been, in the possession of the defendants or their predecessors in title.

The matter comes before the courts in a rather curious fashion because in the year 1890 the Attorney-General brought a similar suit to recover possession of those, amongst other lands, and obtained judgment in

(1) 1 U.C.Q.B. 70.
(2) 27 U.C.Q.B. 539.
(3) 1 Jo. & Lat. 36.
(4) 6 M. & W. 295.
(5) L.R. 3 P.C. 751.
(6) 6 App. Cas. 143.

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default of pleading. Possession, however, was never had under this judgment and no writ of possession has been issued or applied for in the name of His present Majesty. The defendants then interested in the lands now in question are dead, and the Attorney-General has thought it necessary to take these proceedings in which he must prove the title of the Crown in right of the Dominion. The defendants have been in possession for more than twenty years since the judgment of 1890.

Whether the Crown could have relied simply on the judgment by default of 1890 as establishing the title of the Crown is a question which I think we are not called on to decide, because in the present proceedings counsel for the Crown set up a title which he stated at the opening of the trial, as follows:—

His Lordship:—How did the Crown get title to it?
Mr. Hogg:—The Crown got title under the original statutes. The canal was constructed under the statute of 8 George the Fourth, and by 7 Victoria, ch. 11. That statute vested the property in the principal officers of Her Majesty's Ordnance in Great Britain: that the Rideau Canal and all its appurtenances became vested in the Principal Officers of Ordnance, and remained in that way until Confederation, and became part of the property of the Dominion of Canada under the "Confederation Act." That is the short history of the title, so far as the Crown is concerned.

This is clearly erroneous. If the canal and all its appurtenances remained vested in the Principal Officers of Ordnance until Confederation, there is nothing in the "British North America Act, 1867," which would have made it the property of the Dominion of Canada.

The "British North America Act" by section 108 provides that

the Public Works and Property of each Province enumerated in the third schedule to this Act shall be the property of Canada;

the third schedule is headed

Provincial Public Works and Property to be the Property of Canada;

the first item in this schedule is

Canals with Lands and Water Power connected therewith

and the ninth is

Property transferred by the Imperial Government and known as Ordnance Property.

Now there is no doubt that the Rideau Canal was Ordnance Property and as such it appears to this day in the schedule to the "Ordnance and Admiralty Lands Act" (R.S.C. [1906], ch. 58). If, therefore, it passed to the Dominion under the "British North America Act 1867," it was as Ordnance Property. The legal advisors of the Crown have evidently supposed that it passed like ordinary canals the Property of the Province under the first enumeration in the third schedule of

Canals with Land and Water Power connected therewith.

This is the only item of the third schedule which is printed in the extract from the "British North America Act" 1867, given in the printed

Schedule of Statutes and Parts of Statutes to be referred to on argument of this Appeal.

But whether the canal passed to the Dominion under the first or the ninth item in the third schedule it would be, of course, an essential link in the title to prove that it was at Confederation the property of the Province of Canada, and not only has no attempt been made to shew this, but counsel, as appears from his statement above quoted, has set up that it then remained vested in the Principal Officers of Ordnance.

It does not follow, of course, that because the title which the Crown has set up in this suit is bad it has not really a good title. I am certainly aware that there are a number of statutes dealing with the Rideau Canal but I do not think it is incumbent on the court to search amongst pre-Confederation statutes and other evi-

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dences of title for the purpose of seeing if a good title can be made out. Moreover, there may be points of difficulty and doubt arising on these statutes and documents. It would, indeed, seem absurd to suppose that the court should have to deduce the title and decide upon its validity independently of either of the parties to the suit.

The statute of the Province of Canada, 19 Vict. ch. 45, can scarcely be looked upon as a model of clearness or accuracy. If it is to be held to establish that the Ordnance properties of which it purports to dispose had been transferred to the province, it would seem that this could only be by implication; there is no recital to that effect such as we find in the Dominion statute, 40 Vict. ch. 8, whereby certain other Ordnance property transferred directly to the Dominion was disposed of. In the provincial statute, on the contrary, there is only a recital of the intention that they should be transferred whilst the second schedule to the Act, which alone can be material here, is headed

Military Properties in Canada *proposed* to be transferred to the Provincial Government.

The description in the schedule is, however, of the most meagre description; indeed it does not seem to deal with the canal at all. The schedule is in the following form:—

THE SECOND SCHEDULE.

Referred to in this Act being the Schedule of Military Properties in Canada proposed to be transferred to the Provincial Government.

Situation	Approximate Quantity of Land. A. R. P.	Description of Buildings or Military Works.
	(Amongst the Properties enumerated are)	
Rideau and Ottawa Canals	....	City of Ottawa, Barracks. Blockhouses and Adjuncts of the Canals.

The canal, it will be seen, is only mentioned as giving the "situation" of the properties mentioned in the third column. Again are we to suppose that the lands on either side of the canal and round the basin and by-wash are to be considered "adjuncts of the canal"? Even if they are included in this expression may not the Province of Ontario have some claim to these lands?

I am, of course, giving no opinion on any of these points and merely mention them as possible difficulties arising on the title of the Crown; it is unnecessary to pursue their consideration further since I hold that it was for the respondent to shew title which has not been done. I think as I have already intimated that the respondent having set up in this suit a title which is defective cannot be heard now to say that the judgment given by default in 1890 establishes that the title of the Crown is a good one.

If the lands now claimed are Dominion property they are apparently subject to the "Ordnance and Admiralty Lands Act," and this might be of importance to the defendants even if the judgment appealed from were upheld since the Act reserves special privileges to persons in actual occupation of such lands with the assent of the Crown. With this, however, we are not immediately concerned.

The Crown permitted the defendants or their predecessors in title to remain in undisturbed possession for fifty-eight years before taking action in 1890 and took no steps to enforce the judgment then obtained during the ensuing twenty-four years. During this long lapse of time all parties concerned have died. The form of government of the country has been repeatedly changed, and the then newly founded and insignificant By-town has become a great city, the

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capital of the Dominion of Canada. Under these circumstances, I think the courts need not hesitate to require the strictest proof of a claim to oust the defendants. Failing this, I think substantial as well as legal justice will have been done by leaving them undisturbed in the possession which they have so long held.

This is a case in which we may recall what the Privy Council has said concerning the difference in the relation between the Crown and the subject in this and in older settled countries. Such long periods of time as those prescribed in the "Nullum Tempus Act" seem to consort more with the slowly altering conditions in the latter, than with those in a country which has witnessed such phenomenal changes as Canada during the past century. Without encroaching on the functions of the Legislature we may endeavour to mitigate the hardships of a rigorous enforcement of rules which change of time and place render oppressive.

Holding the view above stated it is not necessary for me to deal with other points raised at the trial and dealt with in the judgment of the learned judge of the Exchequer Court. The plaintiff not having proved title cannot recover judgment on the claim for possession of the lands. The appeal must be allowed and the action dismissed with costs.

DAVIES J.—Several questions arose out of this appeal which, I confess, I have had some difficulty in solving.

A copy of a plan of a portion of the Rideau Canal, dated in 1847,

shewing the boundaries as marked on the ground of the land belonging to the Ordnance at Bytown (Ottawa) and the part of lot C, Concession C, in the Township of Nepean taken from N. Sparks

signed by Michael McDermott, C.E. and P.L.S., and also by the Lieutenant-Colonel and a number of officers of the Royal Engineers was apparently received in evidence at the trial, though objections were taken to its reception. A witness proved it to be a copy of the original plan on file in the Department of the Interior, Ottawa, Ordnance Branch, and I do not doubt it was properly received.

If properly in evidence, it would place beyond doubt the fact that the lands in question were part of the 60 feet around the basin and by-wash of the Rideau Canal.

The Ordnance stones X. Y. marked O. B. S. on the plan shew the by-wash to have extended to Rideau Street. There is no evidence whatever as to the date when these ordnance boundary stones were placed but they must have been so placed before the date of McDermott's plan, in 1847, and most probably before 1846, the date of the statute making clear what part of the canal and its adjuncts were retained by the Crown.

But apart from that plan I agree with the learned trial judge that the oral evidence given at the trial with respect to the locus and the by-wash of the canal in conjunction with the several written acknowledgments of title made by the defendants and their predecessors in title sufficiently establish the title in the Crown to the locus in question.

After quoting part of the evidence given by John Little a witness in his 84th year, the learned judge concludes, and I agree with him, that "the by-wash" in question is

> no doubt the creek which was referred to by this witness and the cottage in question would be erected on the 60 feet.

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The learned judge, after referring to and quoting the "Ordnance Vesting Act" of 1843, 7 Vict. ch. 11, providing for the restoration to the parties from whom they were taken of the lands taken for the Rideau Canal and afterwards found not to be required and the subsequent statute of 1846, ch. 42, 9 Vict., making clear what was intended by the previous Act of 1843, namely, that its provisions should be construed to apply to all the lands at By-town set out and taken from Nicholas Sparks, except

(1) So much thereof as was actually occupied as the site of the Rideau Canal, as originally excavated at the Sappers' Bridge and of the Basin and By-wash, as they stood at the passing of the Ordnance Vesting Act; excepting also:

(3) A tract of 60 feet around the said Basin and By-wash.

concludes

That the Basin and By-wash and the 200 feet along the canal and the 60 feet along the By-wash were retained by the Crown.

I do not think there can be any reasonable doubt of the correctness of this conclusion.

Once that conclusion of fact is reached there cannot remain any doubt as to the title of the Crown. The statute, 19 Vict. ch. 45, of the late Province of Canada passed in 1856, recites amongst other facts that

the Ordnance lands of this province consist at the time of the passing of this Act of the several lands, estates and property comprised in the two schedules to this Act,

and that Her Majesty had signified Her gracious intention (*inter alia*).

that all such of the lands and other real property comprised in the said part recited Act (7th Victoria) as are comprised in the second schedule to this Act annexed, and all title, estate and interest therein respectively, should be transferred from the said Principal Officers and *become re-invested in the Crown, for the public uses of this Province.*

The enacting clause of this Act carries out specifically the expressed intention of the recital and vests

all the lands, etc., mentioned in the second schedule absolutely in Her Majesty for the benefit, uses and purposes of the province.

Amongst these lands so transferred from the principal officers of Her Majesty's Ordnance and vested in the Crown for the use of the province was the "Rideau and Ottawa Canals" and "adjuncts of the Canals."

I cannot doubt, therefore, that after the passage of this Act the by-wash, so called, of the Canal basin extending as far as Rideau Street and the reservation of 60 feet on each side of it being adjuncts of the canal were vested in the Crown for the use of the Province of Canada and were transferred by the "British North America Act" to the Dominion.

The Crown, therefore, may, under the evidence given and these statutes, be said to have proved title to the land sued for.

But the question at once arises out of the defence of over 60 years continuous possession set up by the defendants in themselves and their predecessors in title.

The fact of such continuous possession seems to have been sufficiently proved and would entitle the defendants to judgment, unless the acknowledgments of title made by them in their letters to the Honourable Hector Langevin, Minister of Public Works in 1871, the Honourable Alexander MacKenzie, Premier and Minister of Public Works in 1874 and to Sir John Macdonald, premier, in 1890, together with the judgment by default obtained by the Government on a writ of intrusion brought by the Crown for the recovery of these lands in 1890, together, or any one or more of them, operated as an interruption of such possession.

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I confess that upon this question I have had many doubts, not indeed as to the meaning and legal effect of these letters as an acknowledgment of title in the Crown, because I have no doubt whatever that they did so operate, but on the question whether such an acknowledgment is sufficient under the "Nullum Tempus Act" to interrupt a possession which the evidence shews was not as a fact interrupted.

The actual possession of the defendants and their predecessor in title was never interrupted. They remained in continuous possession for over the required sixty years and were never ousted nor disturbed by the Crown.

If it can be held that the provisions of the "Real Property Limitations Act" relating to acknowledgments of title and the effect of such acknowledgments extended to the Crown, and that the Crown could avail itself of such acknowledgments as interrupting defendants' possession of the lands, then the case for the Crown is made out, in my opinion, and the appeal should be dismissed.

I cannot, however, reach that conclusion. The "Nullum Tempus Act" does not contain any reference to acknowledgments of title as staying the running of the period of prescription, but it does provide that an interruption by entry and receipt of the rents and profits by the Crown shall stay the running of such period. It would seem a bold step for the Court to add yet another fact or incident to those the Nullum Tempus statute expressly mentions as interrupting possession against the Crown. After a good deal of hesitation I am unable to say that it should do so; and I agree with the argument that this section of the "Real Property Limitations Act" (now section 14 R.S.O. [1914] ch. 75) should not be construed as including adverse posses-

sion of *Crown lands* because that Act had no application to such possession, which is specifically dealt with by the "Nullum Tempus Act."

In the year 1902 the section of the "Real Property Limitations Act" providing for the effect of an acknowledgment in writing of the title of the person entitled to any land or rent by the person in possession was for the first time declared applicable to

rights of entry, distress or action asserted by or on behalf of His Majesty.

The letters of the defendants on which the Crown relies as such acknowledgment, were written years before that statute of 1902 (2 Edw. VII. ch. 1, sec. 18) was passed; and at the time it was passed the prescriptive period of sixty years of uninterrupted and continuous possession by the defendants and their predecessors in title had elapsed.

The statutory title of the defendants under the "Nullum Tempus Act" was therefore complete years before the legislation was passed in 1902, unless, of course, it is held that the provisions of the "Real Property Limitations Act" relating to acknowledgments before they were expressly made applicable to rights of entry or action by the Crown can be invoked by the Crown. As I have already said, I incline to the opinion they cannot be so invoked. Nor can I construe the legislation of 1902 as having a retrospective operation upon possession which had already ripened into and become a statutory title. Whatever may be said in favour of a retrospective operation being given to the legislation of 1902 with respect to the possession of land which had not ripened into a complete statutory title in the possessors or claimants, I cannot yield to the suggestion that it can have such a retro-

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spective operation with respect to a possessory title which had so ripened.

It seems clear under the decided cases of *In re Alison*(1) and *Sanders* v. *Sanders*(2), that where a statutory title has once been acquired under the Statute of Limitations it cannot be defeated by any subsequent acknowledgment or even by any subsequent payments of rent unless these continue for such a period as creates a new statutory title.

The reasoning of the learned judges in these two cases in appeal would indicate that the statutory title so gained was, as stated by Jessel M.R.

a complete title which extinguished the other.

Assuming that to be so, then it would seem most unreasonable to give a retroactive effect to the statute of 1902 which would operate to destroy a complete statutory title gained years before, and resurrect an extinguished one. That certainly goes to destroy the argument that the statute is one relating to procedure only.

Then as to the effect of the recovery of the default judgment by the Crown before the prescriptive period had elapsed but notwithstanding which the defendants continued in possession and were not dispossessed I have also entertained some doubts.

I cannot find any direct authority which gives a different effect to a judgment recovered by the Crown on a writ of intrusion from that recovered in an ordinary ejectment between subject and subject, or which indicates that the former had the effect of interrupting the defendants' possession while the latter admittedly has not. The best consideration I have been able to give the question leads me in the absence of auth-

(1) 11 Ch.D. 284.
(2) 19 Ch.D. 373, at p. 382.

ority to the conclusion that the mere obtaining of a judgment against the defendant on a writ of intrusion without further action dispossessing the defendant does not operate to interrupt the defendant's possession and that to do so there must be an actual dispossession under the judgment, or an attornment or payment of rent by the party in possession.

For these reasons, I concur in allowing the appeal.

IDINGTON J.—The information of intrusion herein is answered by a general denial of all the facts alleged therein and of any title in the Crown or possession by it of any of the lands in question, and by an assertion of title in appellants and possession since the year 1832.

The respondent replies, amongst other things, that an information of intrusion was filed against a number of persons including predecessors in title of the appellants and judgment got by default for the possession of the lands in question and other lands in the year 1890.

The respondent put in evidence a certified copy of the proceedings in said case including the judgment for default of appearance awarding possession to the respondent.

The claim of the respondent is rested thereon and upon an alleged statutory title. His counsel by way of proving the identity of the land in dispute with part of the whole included in said proceedings, called a surveyor who testified, according to certain plans, filed subject to objection, that the lands in question fell within the description therein, and in the information of intrusion, upon which the judgment for recovery of possession had been awarded.

There was no evidence adduced relative to the actual survey on the ground or to the authenticity of

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the said plans so filed, or that any of them were based upon or practically identical with, or in fact formed part of the evidence necessary to maintain the alleged statutory title (if any) of the respondent to the lands in question. That statutory title depends upon statutes which can only operate and be properly made effective by the production or proof of the documents therein referred to and especially the plan as that

of those (lands) marked and described as necessary for the said purposes on a certain plan lodged by the late Lt.-Colonel By of the Royal Engineers, the officer then employed in superintending the construction of the said canal, in the Office of the Surveyor-General of the said late Province and signed by the said Lt.-Col. By, and now filed in the office of Her Majesty's Surveyor-General for this Province.

We have in the record a plan evidently made in 1847, after all the said legislation now relied upon, and after the settlement between one Nicholas Sparks and those acting for the Crown. We are asked to act upon this plan. But why? I am puzzled to understand, for the plan which the Legislature proceeded upon was that of Lt.-Col. By, thus referred to.

There is nothing I can discover identifying this plan in 1847 with said plan certified by Lt.-Col. By, which assuredly should be taken as the guide determining what land respondent might claim herein.

As already pointed out there is nothing in evidence identifying the work on the ground with that of Lt.-Col. By or his plan.

The case was evidently launched by the officers of the Crown in reliance solely upon the force and effect to be given the said judgment, for everything else seems to have been ignored.

Even the acknowledgment upon which the learned trial judge rests his judgment, was evidently considered of as little importance as I attach to it, for reasons to be assigned presently.

The counsel for the Crown at the trial after presenting the certified copy of the judgment, introduced it and other material thus:—

The only other evidence I have is the evidence that was taken on discovery. I do not know whether your lordship has looked at that.

* * * * *

Mr. Hogg:—There are one or two letters or petitions that are attached to this ancient fyle that I would put in, merely to shew the relations that were existing between the government and these people at that time.

The learned trial judge found himself unable to attach the importance counsel for the Crown evidently had attached to the said judgment and the effect thereof.

He therefore accepted as an answer to the claim of continuous possession for sixty years, the following alleged acknowledgment in writing:—

Ottawa City,
17th October, 1871.

Sir,—We the undersigned (being sisters) beg to inform you that having understood that the small property or lot situated on the Southern side of Rideau Street and adjoining the Bywash (leading from the Canal), on the west side of it, on which there is a wooden building, has been applied for by the St. George's Society for the purpose of erecting a Hall thereon. We would hope that the same might not be sold, as we consider our right to it cannot be alienated from the length of time said lot has been possessed by our family, namely, 39 years. Our father, the late James Cousens, in his lifetime settled upon this lot, in 1832, with permission of the Ordnance Department; our mother outlived our father and resided upon this property for a number of years and at her decease bequeathed it to us, and we have continued upon it ever since our father's name was entered upon the books of the department at the time of his settling down here which was then called Bytown, these facts are known to many of the citizens.

The corporation taxes levied from time to time have been duly paid all along to this date, and we most urgently and respectfully solicit that the aforesaid lot be sold to us, as we consider we have the prior right and are willing to pay any reasonable amount for a deed of the same.

We remain,
Your most obedient servants,
SUSAN COUSENS.
SARAH COUSENS.

Hon. H. L. Langevin, C.B.

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Even if the only statute invoked by the appellants had contained a provision excepting its application and operation in the case of such acknowledgments in writing as are given effect to by many statutes of limitation, I should much doubt the efficacy of this writing which clearly points to some agreement or grant conditionally binding the Crown, in honour at least, to give the ancestor of the signers a right to purchase at some price to be fixed, and which has never been fixed, and appeals to a record in the department at the time of "his settling down here" which I take it means, upon the lands in question.

I asked in the course of the argument if any inquiry or search had been made relative to said entry or record of the import thereof, and was answered by counsel on either side that no such search or inquiry had been made.

If respondent ever seriously intended to rely upon this or other letters as acknowledgments falling within any conceivable exception to the operation of the statute we should have been told in evidence what the official relation respectively was, of each of those to whom such letters were addressed, to the land in question so that thereby we might have been enabled to understand how either one of them could be held an agent of respondent to receive such letters of acknowledgment.

I should be loathe to attach much (if any) importance to such a document without the fullest information at least on the part of the Crown relative to the import of what such a claim as made therein implied, and how it could be treated as an acknowledgment taking away the rights acquired by the statute.

There are in the record two other letters from one of the same parties, and a descendant, and others,

addressed respectively in 1874 and 1890 to the Premier of Canada for the time being, upon the question. Strange to say there does not appear according to the record to have been any reply made to any of these letters.

It is to me inconceivable that these several letters should go unanswered and if answered that there is no copy of record of reply thereto.

The only reason I can assign for the non-production of the replies, is that counsel did not think it conceivable at the trial that the Crown could properly rest its case upon either that I have quoted, or the others I refer to.

With the greatest respect for the learned trial judge I am unable to give that effect which he has given to the letter above quoted.

I understand how easy it would be for him and those arguing, accustomed to the consideration of acknowledgments as a usual part of statutes of limitations, to overlook the fact that their utility in the way of answering any statute of limitation is dependent upon whether or not the statute of limitations in question has made any acknowledgment a bar to the operation of the statute or an exception therefrom.

The statute invoked in this case is the "Nullum Tempus Act" of 1769, 9 Geo. III. ch. 16, of which the first part of the first section thereof seems in itself complete, and reads as follows:—

> Whereas an Act of Parliament was made and passed in the Twenty-first year of the Reign of King *James* the First, intituled, *An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever;* and thereby the Right and Title of the King, His Heirs and Successors, in and to all Manors, Lands, Tenements, Tythes, and Hereditaments (except Liberties and Franchises) were limited to Sixty years next before the Beginning of the said Session of Parliament; and other Provisions and Regulations were therein made, for securing to all His Majesty's Subjects the free and quiet enjoyment of all Manors,

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Lands, and Hereditaments, which they, or those under whom they claimed, respectively had held, or enjoyed, or whereof they had taken the Rents, Revenues, Issues, or Profits, for the Space of Sixty Years next before the Beginning of the said Session of Parliament: And whereas the said Act is now by Efflux of Time, become ineffectual to answer the good End and Purpose of securing the general Quiet of the Subject against all Pretences of Concealment whatsoever: Wherefore be it enacted by the King's Most Excellent Majesty, by and with the Assent and Consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, That the King's Majesty, His Heirs, or Successors, shall not at any Time hereafter, sue, impeach, question, or implead, any Person or Persons, Bodies Politick or Corporate, for or in anywise concerning any Manors, Lands, Tenements, Rents, Tythes, or Herditaments whatsoever (other than Liberties or Franchises) or for or in any wise concerning the Revenues, Issues, or Profits thereof, or make any Title, Claim, Challenge, or Demand, of, in, or to the same, or any of them, by reason of any Right or Title which hath not first accrued and grown, or which shall not hereafter first accrue and grow, within the Space of Sixty Years next before the filing, issuing, or commencing, of every such Action, Bill; Plaint, Information, Commission, or other Suit or Proceeding, as shall at any Time or Times hereafter be filed, issued or commenced for recovering the same, or in respect thereof; unless His Majesty, or some of His Progenitors, Predecessors, or Ancestors, Heirs, or Successors, or some other Person or Persons, Bodies Politick or Corporate, under whom His Majesty, His Heirs, or Successors, any Thing hath or lawfully claimeth, or shall have or lawfully claim, have or shall have been answered by Force and Virtue of any uch Right or Title to the same, the Rents, Issues, or Profits thereof, or the Rents, Issues, or Profits of any Honour, Manor, or other Hereditament, whereof the Premises in Question shall be Part or Parcel, within the said Space of Sixty Years; and that the same have or shall have been duly in charge to His Majesty, or some of His Progenitors, Predecessors, or Ancestors, Heirs, or Successors, or have or shall stood *insuper* of Record within the said Space of Sixty Years.

There would seem no exception to this taking away of any right of action except those specified therein of which neither such like acknowledgment as relied upon nor any former action for mere recovery of possession is one.

The judgment in question was merely for possession and nothing else was prayed for except the costs of suit.

It was entered 14th April, 1890, and a writ of *hab. fac. pos.* was issued thereon the same day. Nothing further was done till the 16th January, 1902, when an order was made by the late Mr. Justice Burbidge, then judge of the Exchequer Court, directing that a writ of possession do issue out of said court.

That is followed by a præcipe for a writ of possession. Whether issued or not does not appear.

The record is thus completed so far as we know.

Now assuming the foregoing quotation from the Act to be as it seems self-contained, how can the said judgment and such acts as done thereunder (which in no way interrupted the adverse possession of those under whom the appellants claim) be said to answer the clear and imperative language of the section so far as barring any right to bring an action?

The statute makes no provision for an acknowledgment of any kind save in the way and form expressed in the specified exceptions in the Act.

The "Real Property Limitations Act of Ontario" in force at that time and in all subsequent re-enactments or revisions thereof down to 1902, contained in a section thereof a distinct provision for an acknowledgment in writing being

> deemed according to the meaning of that Act to have been the possession of the person to whom given,

but that cannot be presumed to be available for use under the "Nullum Tempus Act." That section in R.S.O. 1897, was numbered "13."

The whole of the said "Real Property Limitations Act" is clearly intended to apply only to cases as between subject and subject, except some provisions dealing with some easements and profits. Its various editions, as it were, throughout all the time in question

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down to 1902, remained as regards these exceptions, and I think in other respects relative to the effect of acknowledgments in writing, exactly the same. The sections 34 to 39 inclusive in R.S.O. 1897, and what is referred to in the section 42 thereof, shew what these exceptions cover.

These exceptions fail to touch such land as in question herein.

These sections are, moreover, instructive as shewing how the acknowledgments in writing which have been relied on must be conceived and framed. The language which might meet the requirements of section 13 in R.S.O. 1897, might fall far short of being useful under these sections 34 and 35, or section 42.

The language of the Act as to acknowledgments enlarging or preserving the rights of mortgagees or mortgagors is again of a different nature and illustrates the intention to confine such kind of legislation strictly to that being dealt with and the relation between those thus specified.

The fact that it was found thus necessary to define wherein the Crown should and should not be affected seems, if anything needed, to exclude all else having relation to the Crown as beyond the scope of the Act.

I shall revert presently to the later development in legislation and to the question of acknowledgment in this regard.

I, meantime, submit that as the said acknowledgment could have no effect when given, it could not be made effective after the full sixty years had run which gave appellants an absolute bar to this action, we are not much concerned with such development.

The truth is that a statute of limitations is nothing more or less than a definition of circumstances

under which the courts are forbidden to aid him who otherwise would be entitled to seek their assistance to recover for him his money or his property.

And what one Act of that kind may provide is of little help in the case falling under another such Act unless clearly intended to be read together.

There is, as the result of legislative development, now usually added to that negative conception, some provision for vesting in him who has enjoyed possession of land for the time specified, the title thereto which is to be recognized by the courts.

The ideas I am suggesting and seeking to give expression to are perhaps better and certainly more concisely expressed and illustrated by Lightwood in his work on "Time Limit of Actions," chapter 1, as follows:—

> Prior to the year 1833 a right to recover land might be barred either by the Statute of Limitations (32 Hen. 8, c. 2, which barred real actions, such as the writ of right and novel disseisin, and 21 Jac. 1, c. 16, which barred ejectment), or by the operation of the Statute of Fines (4 Hen. 7, c. 24).
>
> The Statute of Fines both barred the remedy and extinguished the right; the Statutes of Limitation only barred the remedy: *Hunt* v. *Burn* (1702), 2 Salk. 422.

Bearing all these considerations in mind and the fact as proven and found by the learned trial judge and indeed not seriously disputed, that the appellants and those under whom they claim have been in undisturbed possession since some time in 1832 the part of section 1 of the "Nullum Tempus Act" which I have quoted above, and the author already referred to at page 143 of his said work aptly calls the negative or limiting clause of the Act, seems a complete bar to the respondent's claim to relief herein.

That bar was complete I take it by the end of 1892. What possible right can the court have to rely on something not expressed in the statute?

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I might let the matter rest there by concluding with the result that the appeal should be allowed with costs. But it is due to the learned trial judge's opinion on the point of acknowledgment that I should present a number of considerations, which have occurred to me, more or less bearing thereupon. I have already pointed out why I think acknowledgments in 1871 could not fall within the "Ontario Real Property Limitations Act."

Ten years after the sixty years in favour of the appellants had run, the Ontario Legislature, by 2 Edw. VII. ch. 1, sec. 2, enacted as follows:—

2. The enactments described in the schedule to this Act are hereby repealed, but as regards the Imperial statutes if, and, so far only as the same are in force and within the legislative authority of this Province.

The "Nullum Tempus Act," 9 Geo. III. ch. 16, is one of those mentioned in the schedule referred to and the note therein is

substituted for this. See sections 17-20 of this Act.

In the sections thus referred to is contained a new code as it were relative to the lands of the Crown and actions to recover same.

In the 4th subsection of section 18 provision is made for an acknowledgment in writing taking lands out of the statute and giving a new point from which time is to run.

That legislation was in turn superseded and repealed. In the process of the revision of the Ontario Statutes sometimes such tentative legislation appears and disappears.

The final result would seem to be that in preparing the "Limitations Act" the revising commissioners in 1910 seem to have incorporated into that Act the substance of that legislation of 1902, by enacting by section 2 the provision that in this Act "action" shall

include an information on behalf of the Crown and in section 4, subsection 2, the section providing for an acknowledgment in writing and many others of the Act are made applicable to the Crown.

I cannot imagine that it ever was intended by any-one that this provincial legislation was intended not only to be retroactive, but also to affect the rights of any one in his relations to the Crown on behalf of the Dominion.

Nor can I think that, even if any one so intended it should affect the said relations, it would be successful unless adopted by Parliament.

Of course so far as the Crown on behalf of the Province of Ontario was concerned, or may now be concerned, and the relations between it and Ontario subjects of the Crown in that behalf, I assume it was quite competent for the Ontario Legislature to repeal the "Nullum Tempus Act" so far as it had any force and effect in Ontario.

I cannot find that the Dominion Parliament in any way ever meddled with the "Nullum Tempus Act" or enacted anything to make that local legislation applicable in the relation between Crown and subject.

Hence I am of the opinion that any Ontario legislation giving the Crown the right to receive acknowledgments in writing, as if efficacious to affect the "Nullum Tempus Act" independently of the Dominion Parliament, would be *ultra vires*.

But it seems to me that all that legislation is by 3 & 4 Geo. V. ch. 2, sections 6, 7, 8 and 9, expressly rendered inoperative so far as it concerns the rights of such parties as these appellants, whose rights to plead in bar herein the sixty years possession, had matured before any such legislation as Ontario's Legislature had in any of these ways enacted.

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The case of *Gauthier* v. *The King*(1), illustrates wherein provincial law is to be administered in the Exchequer Court and when discarded.

Another question of some difficulty to me is the effect of the recovery of the judgment in 1890 in its bearing upon the rights of the appellants when we consider the effect of the affirmative clauses of section 1 of the "Nullum Tempus Act."

Although holding, for the reasons already given, the first clause of said section conclusive as to this action, yet there may be something arguable in the effect of the words

no verdict, judgment, decree, judicial order upon hearing or sentence of Court shall hereafter be had or given, in any action, bill, plaint, or information in any of His Majesty's courts at Westminster,

etc., etc., which appear at the end of the last clause of the whole section, on their bearing upon the validity of the title supposed to have been transferred by the second clause.

The question arises whether these words imply that the title of the Crown must have been tried and found by such court. I submit that no mere default judgment for want of appearance according to modern practice could ever have been in the contemplation of the Parliament which a hundred and fifty years ago framed this enactment.

In the case of *Attorney-General* v. *Parsons*(2) it was objected that the title could not be proved in a case of Information of Intrusion but first found by inquest of office when the defendant had been for twenty years in possession. The court held not, but seems to have assumed that under 21 Jac. 1, ch. 14,

(1) 15 Can. Ex.R. 444. (2) 2 M. & W. 23.

sec. 4 (*c*), the title must be proved in such a case as it was. And Alderson B. referred to Manning's Exch. Prac. 198.

See the case of *Attorney-General* v. *Mitchell*(1) and case on page 88.

The possession is theoretically assumed at common law to be in the Crown as exemplified by the authorities: Co. Litt. 41 b. 57 b.; Vin. Abr. Prerog. 2, 4; Bac. Abr. Prerog. E. 6; *Elvis* v. *Archbishop of York* (2) which were relied upon in argument in the case of *Doe dem. Watt* v. *Morris*(3), and apparently conceded but contended the King is put to his office found, citing Com. Dig. Prerog. D., *Reynel's Case*(4).

The case decided nothing touching what I am concerned with here but its argument and view of the courts is suggestive of much to be borne in mind here.

Brown in "Limitations as to Real Property," page 90, says:—

> On an intrusion upon the Crown the actual possession is acquired by the intruder (Plowd. 546) and after twenty years, continues in him "until the title has been tried, found or adjudged for the King" (21 Jac. 1, c. 14 (E); 15 Car. 1, c. 1 (1)), but in point of law the possession with respect to the nature of the remedy, is still considered to be in the Crown (*Doe d. Watt* v. *Morris*(3) and a grantee from the Crown after the intrusion is in no better or more favourable position than the Crown itself, and must recover such possession by a similar remedy through and in the name of the Crown, and cannot recover by ejectment in his own name (*ib.*).

Lightwood on Time Limitations, wherein is contained almost the sole attempt at any analysis of section 1 which I have found among the many text writers I have consulted, at pp. 147 *et seq.*, says:—

(1) Hayes Ir. Reps. 551.
(2) Hob. 315, at p. 322.
(3) 2 Bing. N.S. 189, at p. 193; 2 Scott 276.
(4) 9 Rep. 95*a*.

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There follows in the English Act a third clause which, like the first two clauses, was copied from 21 Jac. 1, c. 2, and was intended to secure the possessor who had held adversely to the Crown for sixty years against persons claiming under the Crown under grants of pretenced titles, or, to use Lord Coke's words, "against patentees and grantees of concealments, defective titles, or lands not in charge, and all claiming under them." A beneficial law, he calls it, both for the Church and the Commonwealth, in respect of the multitude of letters patent and grants of these natures and qualities, but it had become obsolete before the date of the English Act, in which it was needlessly introduced. It is not found in the corresponding Irish enactment (48 Geo. 3, c. 47).

The first clause of section 1 is negative and exclusive of the right and title of the King; the second is affirmative and establishes the estate of the subject (3 Inst., p. 190). In effect, the second corresponds to sec. 34 of the R.P.L.A., 1833, which extinguishes the title against which the statute has run. "These distinct clauses," said Blackburn, M.R., in *Tuthill* v. *Rogers*(1) "had objects perfectly different.

The first was a limitation to the suit, and barred the remedy of the Crown; the second, by confirming for all time thereafter the estate had *or claimed* by the subject and enjoyed for sixty years, against the Crown's title, barred and extinguished that title and transferred it to the subject.

It seems to me that these and other indications as well as the nature of the proceedings in such an action—and for that matter in any other action—at the time of this enactment—forbid the thought that such a proceeding taken, and ended in the record before us, as result thereof in 1890, was something quite foreign to what is required by the words I have quoted from the third clause of the first section of the "NullumTempus Act."

Indeed the language used in many of the authorities I cite, and to be found suggested by others cited therein, indicates that the use of an information of intrusion for the mere purpose of a recovery of possession would formerly have been considered an improper proceeding and suggests a doubt, if the proceedings leading up to the alleged judgment by default were not entirely misconceived if intended to fulfil

(1) 1 Jo. and Lat. 36 at p. 62.

such a purpose as that now in question, or as having anything to with what was contemplated by said section.

In *Friend* v. *Duke of Richmond* in 1667(1) at page 461, it was said by Hale C.B., that:—

> The judgment in intrusion is not in the nature of a seisin or possession, but only "*quod pars committatur et capiatur pro fine,*" And upon that an injunction issues for the possession against the party himself and all claiming under him. And though a petition of right lies against the King in this case, yet when the King has granted the land over, an entry may be made upon his patentee. * * * Nor does an information of intrusion suppose the King out of possession, for that would be contrary to the purport of the writ, which supposeth that the party intruded upon the King's possession.

See Robertson's "Civil Proceedings by and against the Crown," page 177, under head of "Information of Intrusion" to end of chapter, page 185.

Chitty on Prerogatives also has on page 380, the following:—

> These lands shall be held on the usual tenures, etc. Usual fee-farm rents confirmed. Putting in charge, standing *insuper*, etc., good only when on verdict. Demurrer or hearing, the lands, etc., have been given, adjudged, or decreed to the King.

See also Burton's Exchequer Practice, page 223 of vol. 1; Brown's Ex. Prac., page 10, and cases cited; and the cases of *Greathead* v. *Bromley*(2); *Langmead* v. *Maple* (3), and especially the dictum of Willes, J., p. 270 and top 271, that:

> It is not sufficient to constitute *res judicata* that the matter has been determined on; it must appear that it was controverted as well as determined upon;

and *Thorp* v. *Facey et al.*, in 1866(4), judgments by Erle, C.J., Willes, J., and Smith, J., not as printed in case herein, and see Manning's Practice, pages 98 *et seq.*

(1) Hardres, 460.
(2) 7 T.R. 455.
(3) 18 C.B.N.S. 255.
(4) 1 H. & R. 678.

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I submit that a careful consideration of all implied in the authorities referred to in the said several text writers, and cases I cite, leads to the conclusion that the judgment relied upon does not fall within the meaning of that section.

The judgment therein referred to is one to be recovered in Westminster Hall. Without pressing that unduly, it is to be observed that in the case of *Attorney-General for New South Wales* v. *Love*(1) when the court above held the statute to be in force in New South Wales against the contention that there was no such office as contemplated by the language of the exception, that court said (p. 686) that the only result would be that there is nothing upon which the exception preserving the Crown's right could operate, but certainly would not cut down the enacting part of the statute.

Without pressing that too far it may be held that the judgment contemplated is one resulting from proof, not given in the proceedings in question in 1890, but which would become inevitably necessary before a judgment could have been entered as herein, not only twenty years but fifty-eight years after the statute had begun to run against the Crown.

I think the cases relied upon by Mr. Justice Cassels as to the effect of a judgment in ejectment are conclusive as against a proceeding which was nothing but one for default of appearance in ejectment. Changing the name of a thing has no legal effect or, at least should have none. The information in question was nothing but an ejectment suit.

I desire to make that position clear for an information of intrusion has been, when properly brought for

(1) [1898] A.C. 679.

the recovery of damages, or of rents and profits, aptly compared to an action of trespass *quare clausum fregit*. It may be conceivable that such an action might be proceeded with by such *ex parte* proceedings as to prove the title and bind. Possibly the same might take place in the proceeding to judgment in an information of intrusion and it appearing there had been no adverse possession for twenty years, a judgment by default might stand good.

I gravely doubt the efficacy thereof in face of the dictum of so great a lawyer as Willes J. quoted above, as to the necessity for the issue being controverted.

But in any event if possession had run for over twenty years, I think it should not stand unless some proof adduced of the title even if the proceedings *ex parte*.

It must be understood I am speaking of something that may operate under or as against the "Nullum Tempus Act."

I repeat all this does not touch the right of appellants in this case to have this information dismissed but merely the question of what their rights may be when that has been (if ever) done.

Another question has weighed much upon me by reason of the stress laid both in the court below and before us on the case of *Magee* v. *The Queen*(1) when the late Mr. Justice Burbidge gave judgment for the Crown.

A perusal of that case suggests that we should have had the facts there proven gone into and proven here. Of course we cannot accept or act upon what appears therein as statement of fact, yet when one has been invited to read such a recital of fact it becomes painful to suspect therefrom that if we had been as fully supplied with facts as the court was in that case and a

(1) 3 Can. Ex.R. 304.

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trifle more suggested thereby, we might be induced to conclude that the title if still outstanding in any one but appellants had passed to the Crown on behalf of Ontario.

It does seem a very remarkable thing that though the only reason alleged for this land having (if ever) been acquired on behalf of the Crown, was that it was intended to serve the purposes or uses of a canal, yet no one has ever felt under the necessity of using it for that purpose during all the long period it has been supposed to be the property of the Crown.

It is quite clear that under section 108 of the "British North America Act" all that passed to the Dominion was what could fairly be said to be then part of that in the schedule referred to therein, and described as

canals with land and water power connected therewith,

If lands had been ninety years ago supposed to be needed perhaps for contractors building the canal, but in truth useless for the canal as such, I cannot think they passed to the Dominion.

Indeed I am of the opinion that lands acquired by the Crown on behalf of any of the confederated provinces for purposes of any canal, but which had obviously always been or become useless in that connection, remained at Confederation the property of the Crown on behalf of the province so concerned.

It requires some straining of the imagination to discover how lands that had remained for thirty-three years before the "Confederation Act" in the possession of people who never had anything to do with the canal in question, could then, in 1866, be properly described as lands connected therewith.

And as bearing upon the suggestion that these lands never had any connection in fact with the canal,

it may be observed that the letter treated by the judgment below as an acknowledgment seems to have been prompted by some proposition to acquire them as a site for a St. George's Hall within five years after Confederation. What had happened their use for the purposes of the canal? Is this in a letter so much pressed on us not rather suggestive that those concerned had applied to the wrong Crown?

And when we are told nothing more than we find in evidence herein I am unable to understand how such a claim can be maintained.

I cannot in face of these and many other peculiarities of this case, assent to the proposition that the lands described in the information are part of those belonging to the respondent, or that they ever belonged to the Crown, on behalf of the Dominion, if at all.

We have put forward in the 9th Vict. ch. 42, sec. 1, something to indicate that the lands round the canal basin and by-wash intended to be of use for the canal had been "freely granted by Nicholas Sparks" but when or how has not been shewn.

Time had run in favour of the first adverse possessor of the land in question (under whom appellants claim) at least fifteen years before then.

The words "freely granted" are of very doubtful import and may mean much or little when the story of the surrounding facts and circumstances are forthcoming to give them a clear, vivid meaning.

If Sparks had the fee simple then vested in him when adverse possession first taken by the predecessors of appellants, or thereabout, then there was an adverse title as against him started running which for aught we know may have ripened long before anything done on the part of the Crown to stop its running.

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It is not necessary I should try to follow this further for the necessary material is not before us.

I suggested in the course of the argument that the words

Provided no buildings be erected thereon

in the first section I have just now referred to, might well have been used as words of description and designed for the express purposes of protecting such people as Cousens.

Evidently there were others possessed of buildings on land squatted on, left undisturbed till the growing city needed a new street, and basin and by-wash had long disappeared.

The meagre evidence in the way of historical inquiry falls far short of what I imagine might have been adduced, as it seems to have been, in the case of *Magee* v. *The Queen*(1), and might have lightened up much.

There are some conclusions reached by Mr. Justice Burbidge which on the facts as presented in the report of that case, do not appear to me self-evident.

The suggestion that the acknowledgment in 1870 or the judgment in 1890 might well furnish some evidence of a title independently of their value under the statute, seems to me quite untenable. In regard to the former there is theoretically, in one view, if the evidence had been adduced, no doubt of the title of the Crown, or in the other case of its possession.

They add nothing in either way. The question is simply whether the "Limitations Act" applicable has been stopped running thereby which I say it has not, because neither one of these things which might so operate has been proven.

(1) 3 Ex. C.R, 304.

Mr. Hogg very properly as counsel abstained from entering upon a part of the later history relative to the judgment which does not appear in evidence and possibly, if I understood him correctly, he only surmised a probable explanation.

Yet I cannot understand why we should be asked to permit a recovery upon a judgment (for that is what it comes to) which, for some mysterious reason, if ever worth anything, cannot now be enforced in the ordinary way.

Appellants submit it has in law become spent. I am curious to know if it ever was in law worth anything.

I think the appeal should be allowed with costs throughout.

DUFF J.—I do not think it is necessary to decide the question whether or not there is sufficient evidence that the property in question is within the area acquired by the Crown under the authority of 8 Geo. IV. ch. 1, or vested in the Crown by force of 7 Vict. ch. 11, sec. 29. I shall assume that at the time the appellant's predecessor in title went into possession and erected a log hut upon the lot in 1832, a tract including this lot had been "set out and ascertained" in compliance with the provisions of the first mentioned statute as land required as a site for the Rideau Canal and its accessories. The question of substance is whether the appellants are now entitled to succeed in the litigation on the ground that the suit instituted by the Crown is barred by the "Nullum Tempus Act," 9 Geo. III. ch. 16. In that enactment by the preamble it was recited that certain provisions and regulations had been made by 21 Jac. I. ch. 22:—

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For securing to all His Majesty's subjects the free and quiet enjoyment of all manors, lands, and hereditaments which they or those under whom they claimed respectively had, held, or enjoyed, or whereof they had taken the rents, revenues, issues, or profits for the space of sixty years next before the beginning of the said session of Parliament; And whereas the said Act is now by efflux of time become ineffectual to answer the good end and purpose of securing the general quiet of the subjects against all pretences of concealment whatsoever.

The statute then proceeds to enact that:—The Crown shall not sue any person for or in any wise concerning any lands or hereditaments (other than liberties or franchises), or the rents and profits thereof, by reason of any right or title which has not first accrued within 60 years next before the commencement of the suit, unless the Crown or its predecessors in title have been answered by force of any such right or title, the rents or profits thereof (or the rents or profits of any honour, manor, or other hereditament whereof the premises in question are part) within the said space of 60 years (or that the same have been duly in charge to the Crown or have stood *insuper* of record within such space); and then follows a clause definitely establishing the title of the subject who shall have "held or enjoyed" any lands in respect of which His Majesty claims any title which did not first accrue within the space of 60 years before the commencement of the proceedings.

It is undisputed that the appellants and their predecessors have in fact been in actual occupation and in fact have used and "enjoyed" the land in question since the year 1832. To all appearance they have during that period acted in respect of the land as if they were the owners. They have, for example, made improvement as they have seen fit and have paid all the taxes. *Primâ facie*, therefore, there is a clear case of sixty years' holding and enjoying attracting the benefit of the "Nullum Tempus Act." Certain acts of the appel-

lants and their predecessors are, however, relied upon as shewing that this occupation is not of such a character as to entitle them to the benefit of the statute.

First it is argued that a letter written in 1871 and a petition filed in 1890 constitute acknowledgments of title which are said to interrupt the running of the statute. As to the letter of 1871, with great respect to the learned trial judge, I think it does not amount to an acknowledgment of title in the Crown. The letter contains a declaration that the rights of the writers "cannot be alienated" and in view of that I do not think the letter can be regarded as an acknowledgment of title. The petition of 1890 goes further and if I had considered it necessary to pass upon the question I should have had some difficulty in deciding whether or not that petition read alone contains an acknowledgment of title within the meaning of the "Real Property Limitations Act" (C.S.U.C. ch. 88, sec. 15; R.S.O. 1887, ch. 3, sec. 13). I do not find it necessary to decide this point because first, the petition of 1890 must be read with the letter of 1871, and the petition of 1874, in both of which documents the petitioners asserted they were entitled to possession of the property and, secondly, because, in my opinion, a mere acknowledgment of title was not, at the time these alleged acknowledgments were given, sufficient to interrupt the running of the "Nullum Tempus Act."

The provision of the "Real Property Limitations Act" above mentioned, is a provision enacted in 4 Wm. IV. (ch. 1, sec. 26) with reference to the limitations established by that statute. That statute effected various changes in the older law; for example, the doctrine of "adverse possession" was so much modified that it might almost be said to have been abrogated; and the right to preserve title by "continual

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claim" was abolished. Acknowledgment of title in writing, however, it was explicitly declared should interrupt the running of the limitations thereby established. The limitation created by the "Nullum Tempus Act" was not within the contemplation of the enactment by which this was accomplished, and I do not understand upon what ground it can be held that this provision is available in the present proceedings.

Counsel relied upon sections 17 and 18, ch. 1 of the Ontario Statutes, 1902. Section 17 is in effect a re-enactment of the first section of the "Nullum Tempus Act." Section 18, sub-sec. 4, is a provision the effect of which is to interrupt the running of the statute in the case of acknowledgment of the title of the Crown in writing. The argument is that by force of sec. 18, sub-sec. 4, the so-called acknowledgments are an answer to these proceedings. That argument must be rejected because the effect of the second clause of the first section of the "Nullum Tempus Act" taken together, is to establish the title of the subject on the expiry of the prescribed period, and there is nothing in the Ontario Statute of 1902 to indicate an intention on the part of the legislature that this statute should operate to divest a title acquired before it was passed—the statutory period having in this case expired ten years before, in 1892.

These so-called acknowledgments, however, have some relevancy in relation to another question which must be dealt with, and that is the broad question whether or not the land was "held or enjoyed" by the appellants and their predecessors in such a character as to attract the benefit of the "Nullum Tempus Act." The question is: Have the appellants and their predecessors "held or enjoyed" the land as contemplated by

the statute for a period of 60 years since the right of the Crown to take proceedings by information of intrusion which is now asserted first commenced?

The Crown cannot be disseized by a mere intrusion. The occupation, the holding or enjoying, therefore, contemplated by the statute as attracting the benefit of its provisions cannot be technically possession; but it seems reasonable to read the statute as contemplating such occupation as, if the question arose between subject and subject would constitute civil possession as against the subject-owner. On this assumption two elements are involved in the occupation required, exclusive occupation, in the physical sense, "detention," and the *animus possidendi*, that is the intention to hold for one's own benefit which, be it observed, is presumed to exist from the fact of "detention" alone. Given an occupation possessing these features the statutable conditions are, I think, fulfilled.

The first element is admittedly present. Are there circumstances disclosed by the evidence which rebut the presumption of the existence of the *animus possidendi?* The answer to this last question turns upon the point whether or not the land was "held or enjoyed" in a character inconsistent with the existence of the intention on the part of the occupants to hold for themselves? The circumstances to be considered are chiefly those disclosed by the letters and the petitions of the appellants and their predecessors.

The following relevant facts may be inferred from the statements in these letters which, of course, are properly in evidence as admissions against the appellants. First, that Cousens, under whom the appellants claim, went into possession by the permission of Colonel By, in 1832. Secondly, that a dwelling was

erected by Cousens which he and his family occupied until the time of his death, and afterwards by his descendants, and various improvements were made by him. Thirdly, that applications from time to time were made, whether before or after Cousens's death does not appear, to purchase the property and that the answers were to the effect that the property was required for the purposes of the canal. Fourthly, that in 1871 a letter was written by the appellant Susan Hamilton requesting a deed of the property and explicitly laying claim to a right to retain it on the ground of possession. Fifthly, a petition was presented to the Government on the 10th August, 1874, by the same appellant asking in view of certain contemplated Government improvements that her "right" in the property be protected and that a legal title be granted to her. Sixthly, that in 1890 the Crown having commenced proceedings by an Information of Intrusion, the same appellant presented to the Government another petition throwing herself, as she said, upon the clemency of the Government but making no claim to any right sufficient to afford a legal defence to the proceedings taken by the Crown.

With regard to the circumstances under which possession was taken by Cousens, one must not overlook the fact that the statutes above referred to and particularly the Act of 7 Vict., shew unmistakably that the title to this property, which *ex hypothesi* formed a part of certain land owned by one Nicholas Sparks, was in dispute between Sparks and the officers having charge of the construction of the canal a very short time after possession was taken by Cousens; a dispute which was not settled finally for something like ten years. The bare facts that Cousens went into possession with the permission of Colonel By and that the

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lands subsequently, by force of 7 Vict. became vested in the Crown for the purposes of the canal are not sufficient to shew that Cousens' occupation was an occupation on behalf of the Crown. They are not sufficient in themselves to repel the presumption arising from the character of the occupation as indicated by the conduct of Cousens himself in erecting a house, making improvements and paying taxes. There is the additional circumstance to be considered in connection with this, that section 29 of the Act 7 Vict., in confirming the grant from Sparks of a strip of 60 feet "around the basin and by-wash" explicitly annexed the condition that no building should be erected upon the land so ceded to the canal authorities. I am not now touching the point whether or not this was a condition subsequent by force of which erection of buildings would defeat the grant. The point is that *primâ facie* the continued occupation of this land for the purposes of a residence is not in these circumstances entirely consistent with the assumption that the property was held by the resident on behalf of the public authority which had bound itself and upon which the legislature had imposed the duty to see that no buildings were placed upon it.

The letter and the petitions of 1871, 1874 and 1890, respectively, contain nothing supporting the theory that the land had been held on behalf of the Crown; on the contrary, they are almost demonstrative that in the eyes of the persons who signed those documents they and their predecessors had occupied the property solely for their own behoof.

On the whole I am unable to find anything in all these circumstances which counterbalances the *primâ facie* case established by the evidence touching the nature of the occupation in fact.

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The point is raised, however, that a judgment having been pronounced in proceedings commenced by Information of Intrusion in the year 1890 declaring that the lands in question were in the possession of the King and awarding judgment of *a moveas manus*, stayed the operation of the "Nullum Tempus Act." I am unable to agree with this. The occupation of the appellants' predecessors was not interrupted in fact by that judgment, nor had it the effect of so changing the character of it as to make it an occupation on behalf of the Crown.

ANGLIN J.—In the suit of the Crown to recover possession of a lot of land on the south side of Rideau Street, in the City of Ottawa, claimed as part of the Ordnance lands held with, and for the purposes of, the Rideau Canal, the defendants plead two distinct defences—denial of the Crown's title and the acquisition of an adverse title under the "Nullum Tempus Act," (9 Geo. III. ch. 16, sec. 1).

Probably actually out of possession of the property for eighty-two years before the Information now at bar was filed—from 1832 to the 3rd December, 1914—admittedly out of possession and having had no acknowledgment of its title during more than twenty years, the Crown properly assumed the burden cast upon it by the statute, 21 Jac. I., ch. 14, of proving a subsisting valid title.

Counsel representing the Attorney-General sought to establish that the land in question formed part of a tract of 60 feet "round the Basin and By-wash" of the Rideau Canal at Ottawa reserved to the Crown out of unused lands acquired from Nicholas Sparks and to be returned to him under the statute 7 Vict. ch. 11, as defined by the statute 9 Vict. ch. 42; that these lands

had been transferred to the late Province of Canada and vested in the Dominion of Canada on Confederation; and that the claim of title by possession set up by the defendants was answered by a judgment for possession recovered by the Crown in 1890 against their predecessor in occupation and by written acknowledgments of the Crown title.

In view of the conclusion that I have reached as to the defence under the "Nullum Tempus Act," I shall merely state the result of a somewhat prolonged and critical investigation of the title preferred on behalf of the Crown. The references in the letter of 1871 and the petition of 1874, respectively written and presented by the defendants' predecessors in occupation, and in the testimony of the defence witnesses, Little and Maloney, to the house in question as situated on the west side of the by-wash, establish as against the defendants, at least *primâ facie*, that the by-wash extended past the property in question and that that property was included in the reservation to the Crown under 7 Vict. ch. 11, as explained by 9 Vict. ch. 42, of a 60 foot tract "round the Basin and By-wash." It should be noted, however, that on the plan of 1847, produced from one of the public departments and put in evidence on behalf of the Crown, the western limit of the 60 foot tract reserved appears to pass through the house occupied by Cuzner. It may well be, therefore, that a portion of the land on which the house stood was not within the reserved tract.

I do not question the transfer to the Province of Canada of whatever land was comprised in this 60 foot tract as part, or an "adjunct" of the Rideau Canal (19 Vict. ch. 45, sec. 6, and last item of the second schedule) or that it became the property of the Dominion of Canada under sec. 108 of, and item 1 or

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item 9 of the third schedule to, the "British North America Act" 1867.

It has been stated by very high authority that the purpose of the statute, 21 Jac. I., ch. 14, was to place defendants to informations of intrusion laid by the Crown, in cases to which it applies, on the same footing with regard to proof of title as that held by defendants in ordinary actions of ejectment: *Emmerson* v. *Madison*(1), at page 576. The procedure upon such informations is also assimilated to that in actions of ejectment. Shelford's Real Property Statutes, (9 ed.) p. 111. The judgment obtained by the Crown in 1890 was never executed. Possession of the land was never taken under it. In this respect resembling a judgment in ejectment, as to the effect of which the cases are cited by Mr. Justice Cassels, the judgment on the information of 1890 does not afford any proof of the Crown title now available by way of estoppel, admission or otherwise and does not operate as an interruption of possession such as would defeat the prescriptive claim of the defendants under the "Nullum Tempus Act." It is at the highest evidence that the defendants' predecessor in possession had not at the date of the information laid in 1890 a right to possession good as against the claim of the Crown, as in fact, upon the evidence before us, she probably then had not, the adverse possession having up to that time lasted only fifty-eight years. If an acknowledgment of title in the Crown would suffice to defeat a prescriptive claim under the "Nullum Tempus Act," the judgment of 1890, in my opinion, would not amount to such an acknowledgment. Why this judgment was never executed we are left to surmise. No explanation has

(1) [1906] A.C. 569.

been vouchsafed of this extraordinary feature of a peculiar case.

Though for a time disposed to think that the letters of 1871 and 1890 written by the defendants' predecessors in occupation, one to the Minister of Public Works (see 31 Vict. ch. 12, sec. 10) and the other to the Prime Minister, might be regarded merely as offers to pay for "a paper title" by way of further assurance of a title by length of possession asserted by the writers, on further consideration I am unable to place that construction upon them. They contain admissions of title in the Crown and otherwise satisfy the requirements of acknowledgments under the "Real Property Limitation Act."

But the appellants maintain that acknowledgments of title sufficient for the purposes of the "Real Property Limitations Act" do not interrupt the running of the period of prescription under the "Nullum Tempus Act," because, while the latter Act provides for such an interruption by receipt of rents or profits, etc., it contains no reference to acknowledgments of title written or verbal.

For the respondent it was contended that in answer to the claim of title under the "Nullum Tempus Act" the Crown may avail itself of the provision for acknowledgments made in the "Real Property Limitations Act," to be found in ch. 88 of the C.S.U.C., 1859, sec. 15, and in the subsequent revisions of the same statute. But this section on its proper construction, in my opinion, is limited in its application to cases within the purview of the statute of which it forms part and cannot be extended to cases of adverse possession of Crown lands, to which the "Real Property Limitation Act" has no application. Although the rule under which the Crown is entitled to claim that it is not bound by a

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statute in which it is not named does not prevent its taking advantage of a statute though not named in it, that fact cannot justify extending the application of a provision such as that with which we are dealing, even at the instance of the Crown, to cases that it was never intended to cover.

Apparently to remedy the omission from the "Nullum Tempus Act" of any provision for the interruption of the prescriptive period under it by an acknowledgment of title, the Legislature of Ontario, in 1902, introduced for that province, as an amendment to the "Nullum Tempus Act," a provision similar to the acknowledgment section of the "Real Property Limitation Act" (2 Edw. VII. ch. 1, sec. 18 (iv.)). At that time, however, the prescriptive period under the "Nullum Tempus Act" in regard to the land in question had already been completed for about ten years; and the letters relied upon as acknowledgments had also been written many years before.

Assuming that such an amendment to the "Nullum Tempus Act" enacted by a provincial legislature may be invoked in a proceeding involving the title of the Crown to property claimed in right of the Dominion, it seems to me inconceivable that it can affect the case now before us. There might have been an argument for giving a retrospective operation in this proceeding to the legislation of 1902 had the effect of the "Nullum Tempus Act" been merely to bar the remedy of the Crown, leaving its title and estate in the land untouched. It might then have been deemed an enactment for the regulation of a course of procedure (*The Ydun*) (1), in which there can be no vested right: *Republic of Costá Rica* v. *Erlanger*(2), at page 69. But the

(1) [1899] P. 236.

(2) 3 Ch.D. 62.

"Nullum Tempus Act" does a great deal more. Although the fact that the Crown has been sixty years out of actual possession of land adversely occupied does not establish title in a person who had occupied the land for a period which had begun when the actual occupation of the Crown had ceased but had lasted for less than the sixty years as against a stranger who has subsequently obtained possession; *Goodtitle* v. *Baldwin*(1); sixty years' adverse possession continuously held by one person, or by several persons successively claiming one under the other extinguishes the title of the Crown and as against the Crown establishes the title of the person, or the last of the persons, so in possession (3 Inst. 190). The effect of the several clauses of section 1 of the "Nullum Tempus Act" is that the remedy of the Crown is first barred and then its title is extinguished and transferred to the subject holding adverse possession: *Tuthill* v. *Rogers*(2), at pages 62, 72. To vested rights so acquired it would be contrary to sound construction to apply legislation couched in terms such as those of clause (iv.) of sec. 18 of the statute, 2 Edw. VII. (Ont.), ch. 1, which is not in its form or nature declaratory and does not contain a single word indicative of an intention that it should have a retroactive application. I am, therefore, of the opinion that the attempt to meet the defendants' claim of title as against the Crown under the "Nullum Tempus Act" by invoking the letters of 1871 and 1890 as acknowledgments of title, fails because the "Nullum Tempus Act" prior to 1902 did not provide for an interruption by an acknowledgment of title of the prescription which it enacts.

After counsel for the defendants had called several witnesses to testify to the occupation of the property

(1) 11 East 488. (2) 1 J. & LaT. 36.

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in question by James Cuzner and his wife and their descendants down to the time of the trial, counsel for the Crown admitted the sufficiency of the proof of possession already adduced, as appears by this passage in the record:—

Mr. Fripp:—I think my learned friend will admit—he does not require me to call any more witnesses—as to our possession.
Mr. Hogg:—No, I think not.
HIS LORDSHIP:—Continuous possession foi more than sixty years
Mr. Fripp:—Yes,

The learned trial judge accepted the proof of possession given by the defendants as sufficient. In finding against them on this branch of the case he proceeded solely on the acknowledgment of title contained in the letter of 1871.

I am, for the foregoing reasons, with respect, of the opinion that the defendants are entitled to succeed under the "Nullum Tempus Act." I would, therefore, allow this appeal with costs and would dismiss the information with costs.

BRODEUR J.—I concur in the result.

Appeal allowed with costs.

Solicitors for the appellants: *Fripp & Magee.*
Solicitors for the respondent: *Hogg & Hogg.*

HUGH J. A. MACEWAN, ADMINISTRATOR OF THE ESTATE OF PETER MACEWAN, DECEASED (PLAINTIFF) .. } APPELLANT;

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AND

THE TORONTO GENERAL TRUSTS CORPORATION, EXECUTORS OF J. J. CARTER, DECEASED (DEFENDANTS) .... } RESPONDENTS.

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

Contract—Consideration—Settlement of action—Statute of Frauds—Trade agreement—Restraint of trade—Crim. Code s. 498.

In 1905, M. and his two brothers entered into a contract with R. by which they gave him exclusive control of their salt works with some reservations as to local trade. R. assigned the contract to the Dominion Salt Agency, a partnership consisting of his firm and two salt manufacturing companies, which agency thereafter controlled about ninety per cent. of the output of manufacturers in Canada.

Held, that the contract was not *ex facio* illegal and as the Canadian output was exceeded by the quantity imported which may have competed with it, and the price was not enhanced by reason of this control by the Agency, the Court should not hold that it had the effect of unduly restraining the trade in salt or that it contravened the provisions of section 498 of the Criminal Code.

In 1914, M., as administrator of his father's estate, brought action against the estate of C. who, in his lifetime, had been president of the Dominion Salt Agency and president of and largest shareholder in one of the companies composing it. This action was based on an alleged agreement by C., in connection with the settlement of a prior action against the three partners in the Agency, by which he promised to pay five-sixteenths of the difference between the amount claimed and that paid on settlement. Evidence of the agreement was given by the plaintiff's solicitor in the former action and by defendants' solicitor also.

Held, reversing the judgment of the Appellate Division (36 Ont. L.R. 244), Fitzpatrick C.J. and Duff J. dissenting, that the settlement

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

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of the action was good consideration for C.'s contract; that his agreement was not a promise to answer for the debt of another and did not need to be in writing; that it was sufficiently proved; and that the evidence of the plaintiffs' solicitor in the former action was corroborated (R.S.O. [1914] ch. 76, sec. 12) by that of the solicitor for the defendants.

Per Anglin and Brodeur JJ.—The solicitor was not an interested party and corroboration was not required for that reason; if required for any other it was furnished.

The original agreement transferring the salt business to R. was executed by the three brothers "as representing the estate of M. deceased." The action which was settled was brought by the same three persons. After the settlement letters of administration to M.'s estate were taken out.

Held, that the present action was properly brought in the name of the administrator but, if necessary for defendants' protection, his two brothers might be added as plaintiffs.

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 plaintiffs.

The material facts are stated in the above head-note.

Garrow for the appellant. The settlement of the action was consideration for Carter's contract and fulfilled the condition which made it binding. Halsbury Laws of England, vol. 7, par. 719.

The contract was not a promise to answer for the debt of another. *Harburg India Rubber Comb Co.* v. *Martin*(2); *Brown* v. *Coleman Development Co.*(3); *Conrad* v. *Kaplan*(4).

The plaintiff as administrator had a right to bring this action. *Hill* v. *Curtis*(5), at pages 99 and 100.

There was no proof that the original contract unduly restrained trade. See *Hately* v. *Elliott*(6); *The Queen* v. *American Tobacco Co.*(7).

(1) 36 Ont. L.R. 244.
(2) [1902] 1 K.B. 778.
(3) 34 Ont. L.R. 210.
(4) 18 D.L.R. 37.
(5) L.R. 1 Eq. 90.
(6) 9 Ont. L.R. 185.
(7) 3 Rev. de Jur. 453.

Weir for the respondents. Carter only expressed an intention not understood to be binding. See *Farina* v. *Fickus*(1).

There was no corroboration of Proudfoot's evidence which not only the statute but the circumstances required. See *Hill* v. *Wilson*(2); *In re Hodgson*(3).

The administrator of the MacEwan Estate had no right of action. There was no privity between the estate and Carter. *Dunlop Pneumatic Tyre Co.* v. *Selfridge and Company*(4); *Purchase* v. *Lichfield Brewery Co.*(5); and plaintiff's brothers could not be added as parties to defeat the operation of the Statute of Limitations. *Campbell* v. *Smart*(6); *Clarke* v. *Smith*(7). See also *Walcott* v. *Lyons*(8).

As to the illegality of the contract see *Rex* v. *Elliott* (9); *Mason* v. *Provident Clothing Co.*(10).

THE CHIEF JUSTICE. (dissenting)—I have come to the conclusion that this appeal ought to be dismissed. I do not give much credit to what has been said concerning the late Mr. Carter being desirous as a man of honour and as a matter of business honesty to pay his share of the appellant's claim in the former action. I know nothing of Mr. Carter beyond what appears in the record, but I think it is clear that he was engaged in transactions of a dubious character and being a rich man was not only willing but anxious that they should not be brought into public prominence by being discussed in a court of law. Carter was president and manager of the Empire Salt Company, Ltd., one of the companies banded together in the Dominion Salt Agency of which

(1) [1900] 1 Ch. 331.
(2) 8 Ch. App. 888.
(3) 31 Ch.D. 177.
(4) [1915] A.C. 847.
(5) [1915] 1 K.B. 184.
(6) 5 C.B. 196.
(7) 2 H. & N. 753.
(8) 29 Ch.D. 584.
(9) 9 Ont. L.R. 648.
(10) [1913] A.C. 724.

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he was also president. Whether he had rendered himself liable under section 496 of the Criminal Code might depend upon whether the objects of this concern were *unduly* in restraint of trade, but that they were in restraint of trade there can be no doubt. *Herbert Morris' Limited* v. *Saxelby*(1); *Andrew Miller and Co.* v. *Taylor and Co.*(2).

But though I think Carter had the best of reasons for wishing to have the action settled as he succeeded in doing, there is no reason on the face of things to suppose that he did not get it settled for the amount agreed upon after much negotiation between the solicitors for the parties.

It is suggested that he was willing to pay personally a further sum which would represent his share of the balance of the claim beyond the amount for which it was settled and that he entered into a binding contract with the plaintiff's solicitor to do so. It would, I think, require clear evidence to establish this and it seems to me that not only have we no such evidence but there is a good deal of evidence which would prevent a finding to this effect. That Carter would have been willing to pay whatever was necessary is possible, but that he intended to pay more than he could help is, I think, improbable.

The evidence of any member of the bar is entitled to be received with respect in the courts but it would be invidious to allow any personal considerations to enter into our estimate of such evidence. Whilst therefore accepting Mr. Proudfoot's account of what took place between himself and the late Mr. Carter as being in accordance with his belief, it is necessary to weigh the evidence and remember that he is speaking

(1) 32 Times L.R. 297. (2) 32 Times L.R. 161.

of what took place years ago and that his conclusion is far from being supported by the circumstances.

I agree with the reasons for the judgment of the Appellate Division in holding that the evidence is of too doubtful and uncertain a character to enable the court to find upon it any proof that a binding promise was ever made or intended to be made.

It seems to me most remarkable that Mr. Proudfoot should have omitted to inform his clients of such a promise and the fact that he allowed payment to stand over for years until after the death of Mr. Carter, the only person who could possibly have given any other explanation of the matter, renders it impossible to accept his recollection and understanding of the matter unaided as it is by writing of any sort or description.

Davies J.—A great many questions were raised and debated at bar upon the hearing of this appeal. Some of them related to the binding effect of the promise or contract sued on and alleged to have been made by the deceased, Carter, in his lifetime with Mr. Proudfoot, K.C., the solicitor of the appellant MacEwan, in order to effect a compromise of an action then pending in which Carter was interested, and as to the necessity of corroborative evidence of such promise, and whether if made it was a promise to answer for the debt of another within the Statute of Frauds, and lastly whether there was any consideration for the promise.

On all these questions I concur with the dissenting opinion of Mr. Justice Riddell of the Appellate Division and with the opinion of my brother Anglin J. in this court.

The only question upon which I entertained any doubt was whether the original agreement made between the MacEwans and one Ransford with respect

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to the control of their Salt Works in Goderich and for moneys alleged to be due under which agreement the compromised action had been brought, was an agreement in restraint of trade and contrary to the policy of common law and of the Criminal Code, section 498, and so unenforceable at law.

This question was not referred to by the Appellate Division in their judgment which was determined on the other questions raised.

It was, however, pressed forcibly in this court by Mr. Weir.

Mr. Garrow for the appellant contended that even if the original agreement was unenforceable as being in restraint of trade and contrary to public policy, the contract on which the present action was brought was not affected thereby, as the contract now in question was based upon an entirely distinct agreement or promise made by Carter.

But if I felt obliged to hold the original agreement unenforceable as being in restraint of trade, I would also feel myself compelled to refuse the aid of the court in enforcing the present agreement which, in my opinion, is based upon and depends absolutely upon the existence and enforceability of the original agreement the action with respect to which was compromised.

The substantial ground relied upon by Mr. Garrow was that this original agreement was not void on grounds of public policy and as being contrary to the 498th section of the Criminal Code.

The original agreement was made between the MacEwans representing the estate, and one Ransford, and was put in evidence.

It was to last for a period of five years and in consideration of the annual payment of $2,000 for the said

period, gave the sole and exclusive control of the Salt Works and Plant of the MacEwans at Goderich to Ransford, with a provision allowing the MacEwans to "manufacture salt and sell the same to supply what was known in business as the local retail trade of Goderich" but "at prices which they would be advised of from time to time by Ransford." A further provision was to the effect that the MacEwans agreed not "to be interested directly or indirectly in the manufacture or sale of salt in any other place or places in Canada" while the agreement lasted.

No evidence of any kind was given by the defendants (respondents) that competition had been unreasonably or unduly prevented or that trade had been unreasonably or unduly restrained in the article of salt in any way, or that the agreement was unreasonable in the interest either of the parties or of the public, or that MacEwan had any knowledge that Ransford was acting for a larger combination and not for himself alone, while the evidence of MacEwan and Ransford was in favour of the plaintiffs (appellants) upon these points.

The respondents relied upon the agreement as being sufficient in itself and as being *ex facie* one which the courts would hold to be an undue or unreasonable restraint of trade.

I am not able to accept that argument. The mere fact standing alone and without other evidence that for a consideration which it is not contended was unreasonable the owner of a salt mine or works and plant should agree to give the sole and exclusive control for a limited period to another person of those works and plant retaining only a right to manufacture for the local trade and sell to that trade at prices to be

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fixed by the purchaser of the control of the salt works, would not in my judgment justify the court in holding such an agreement illegal.

I think the question of illegality is one which as a general rule depends upon the surrounding circumstances and that in a case such as this at any rate where no evidence of these surrounding circumstances was given, this contract on the face of it cannot be held so unreasonable as between the parties, or so detrimental to the public, that the court would refuse to enforce it.

The latest authorities on the question fully support this position. They are: *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.*(1), which is a decision of the Judicial Committee of the Privy Council, and *North Western Salt Co.* v. *Electrolytic Alkali Co.*(2), a decision of the House of Lords. The headnote to this last decision states the facts as follows:—

> The plaintiff company was a combination of salt manufacturers formed for the purpose of regulating supply and keeping up prices, and it had the practical control of the inland salt market. The members of the company were entitled to be appointed as its distributors, *i.e.*, agents to sell on behalf of the company the salt which it had purchased from them. The defendants, who had not joined the combination, agreed to sell to the company for four years 18,000 tons of salt per annum, of which a certain proportion was to be table salt, at a fixed uniform price per ton, and undertook not to make any other salt for sale. They were to have the option of buying back the whole or a part of their table salt in each year at the plaintiff company's current selling price and were to be appointed distributors on the same terms as the company's other distributors. The defendants having sold salt in violation of this agreement, the plaintiff company sued them for breach of contract. The defendants did not by their defence raise the issue of illegality, but they sought to rely on certain facts and documents admitted in evidence at the trial upon other issues as shewing that the agreement was illegal as against public policy.

(1) [1913] A.C. 781. (2) [1914] A.C. 461.

The House of Lords, reversing a majority decision of the Court of Appeal, held that the agreement there in question and substantially stated in the headnote was not *ex facie* illegal.

Upon the authority of these two cases determined, one by the Judicial Committee and the other by the House of Lords, I have no hesitation in deciding that *ex facie* the original agreement in question here is not illegal. The speeches of the noble lords who determined the case of the *North Western Salt Company* (1) are most illuminating and instructive upon the question I am discussing. I will content myself with quoting a few extracts only, one from the Lord Chancellor Haldane, at p. 472:—

> In an appeal which recently came before the Judicial Committee of the Privy Council (*Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (2), my noble and learned friend Lord Parker delivered on behalf of the committee a judgment in which the law on these subjects was fully reviewed. Among other statements in that judgment there is one which bears closely on the question before us. After explaining the difference between a monopoly in the strict sense of a restrictive right granted by the Crown, and a monopoly in the popular sense in which what is meant is that a particular business has been placed under the control of some individual or group, he says (p. 796) that it is "clear that the onus of shewing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will be on the party alleging it, and that if once the court is satisfied that the restraint is reasonable as between the parties the onus will be no light one."
>
> My Lords, I desire to adopt this proposition as applicable to the question before us.

Another from Lord Moulton at page 476:—

> It may be shortly put as follows: if the contract and its setting be fully before the court it must pronounce on the legality of the transaction. But it may not do so if the contract be not *ex facie* illegal, and it has before it only a part of the setting which it is not entitled to take, as against the plaintiffs, as fairly representing the whole setting.

(1) [1914[A.C. 461. (2) [1913] A.C. 781).

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The other extract, which I think very applicable to the appeal now under consideration, is from Lord Sumner at page 481. He says:—

> Whatever else can be made of it, if anything, this is certain, that we do not know half of the facts material to the case. For myself I should require to know much more of the conditions of the trade and of the effect of such arrangements as these before I could profitably express any opinion on the practical rights and wrongs of the sale of salt. In such a matter partial information is as bad as none.

For the above reasons and on the above authorities, I concur in allowing the appeal and restoring the judgment of the trial judge, Sutherland J.

DUFF J. dissented from the judgment allowing the appeal.

ANGLIN J.—The facts of this case appear in the judgment in the Ontario courts (1).

Mr. Proudfoot's evidence was accepted by the learned trial judge. While there are, no doubt, circumstances dwelt on by the Chief Justice of the Common Pleas which, as Mr. Justice Riddell puts it,

> would—or might be— suspicious in persons of less high standing than Mr. Proudfoot,

I cannot agree with the learned Chief Justice that they warrant rejecting his testimony or treating the definite promise made by Carter, to which he deposes, as an indefinite expression of mere intention, or as meant to create not a legal contract, but only the moral obligation of "a gentleman's bargain." I concur in Mr. Justice Riddell's interpretation of Mr. Proudfoot's testimony and, unless I should discredit him—which I am certainly not prepared to do—the conclusion seems to me inevitable that the late James I. Carter meant to enter into a legal contract—collateral to the

(1) 36 Ont. L.R. 244.

settlement of the then pending litigation, but for which that settlement and the fact that he would thereby be relieved from what he deemed a humiliating, if not a dishonest position formed the consideration—to pay to the estate of the late Peter MacEwan, represented by the three plaintiffs then before the court, five-sixteenths of the sum of $3,200 or $1,000.

The evidence of Mr. Proudfoot was not that of an opposite or interested party within R.S.O. c. 76, s. 12. Yet if, for any other reason, corroboration of it should be necessary or desirable I agree with Riddell J. that it is supplied by the evidence of Mr. Hanna.

For the reasons assigned by that learned judge and by Mr. Justice Sutherland, I am also of the opinion that the defendants' objections based on the Statute of Frauds and on the fact that the present plaintiff sues alone as administrator of his father's estate are ill-founded. If thought desirable for their protection by the defendants, the plaintiff's two brothers, who were joint plaintiffs with him in the former action, may be added as parties, as Mr. Justice Riddell has suggested.

Another defence, chiefly relied upon by the respondent in this court, which was pleaded and was noticed in the trial judgment, is that the contract on which the former action was brought was illegal and that its illegality so tainted the agreement now sued upon, made in consideration of the compromise and settlement of that action, that it cannot be enforced. The illegality of the original contract has never been determined. The question of its validity might have been settled in the former action, but not without considerable trouble. The rights of the parties could not be known without a judicial decision. For aught that appears the plaintiffs at that time *bonâ fide* forbore

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further litigating a doubtful question. The consideration moving from them was the abandonment not of a right, but of a claim. In relinquishing their right to litigate that claim they gave up something of value. *Miles* v. *New Zealand Alford Estate Co.*(1). Carter on his part escaped from an unpleasant position. There was, therefore, consideration for his promise and that consideration possibly was not illegal. Moreover, as his claim was presented at the trial the plaintiff did not invoke the alleged illegal contract.

On the other hand, what the defendant's testator agreed to do was to make good to the MacEwan estate a part of the moneys which it sought to recover under the very contract alleged to be illegal. Though in a sense collateral, was not Carter's agreement in fact tantamount to a security to the plaintiffs for a partial payment of the fruits of the impugned contract and therefore, if that contract was illegal, itself fatally tainted? *Everingham* v. *Meighan*(2), at pages 360 *et seq.* Did it not spring from, and was it not a creature of, the contract alleged to be illegal? *Fisher* v. *Bridges* (3), at page 649; *Clay* v. *Ray*(4). (But see 1 Smith's L.C. (1915), pp. 435-6; *Armstrong* v. *Toler*(5), at pages 271 *et seq.*).

In order that this defence should succeed, however, the illegality of the original contract must be established. It is attacked as a contravention of section 498 of the Criminal Code, the scope of which was somewhat considered in *Weidman* v. *Shragge*(6). The learned trial judge dealt with this branch of the present case in a single sentence. He said:—

> I am unable to find upon the evidence that the defence of the contract being void as against public policy was made out.

(1) 32 Ch.D. 266.
(2) 55 Wis. 354.
(3) 3 E. & B. 642.
(4) 17 C.B.N.S. 188.
(5) 11 Wheaton, 258.
(6) 46 Can. S.C.R. 1.

It is not adverted to at all in the opinions delivered in the Appellate Division.

The MacEwans by their contract with Ransford, in consideration of an annual payment of $2,000, gave him control of their salt works and plant at Goderich for five years and agreed not to be interested directly or indirectly in the manufacture or sale of salt elsewhere in Canada, to discourage the erection of other salt works at Goderich and to turn over to Ransford all orders or offers for the purchase of salt which they should receive, other than for retail sales, retaining, however, the right to supply "the local trade," but at prices of which Ransford should advise them. I am not prepared to pronounce this contract *ex facie* illegal. Although it was executed after the formation of the Dominion Salt Agency, the MacEwans were unaware that Ransford was making it in the interests of that company, to which he subsequently assigned it. If they knew at all of the existence of the Dominion Salt Agency, they did not know that "there was an attempt being made to round up the salt trade." This evidence given by Hugh J. A. MacEwan is uncontradicted. Moreover it has been shewn that during the period in question, while the Dominion Salt Agency may have controlled 90% of the output of salt by Canadian manufacturers, the importation of salt, duty free, exceeded that output, and for aught that appears to the contrary this imported salt competed with the domestic article. It is also proved that no enhancement in the price of salt resulted from the formation and activities of the Dominion Salt Agency. Under these circumstances I am not prepared to hold, reversing the learned trial judge, that it has been established that in making the agreement with Ransford the MacEwans contravened s. 498 of the Criminal

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Code. The purpose may have been to limit the facilities for producing, manufacturing, supplying and dealing in salt and to lessen competition therein, but that it was to do so "unduly" has not been shewn. *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.*(1), at pages 469, 471. Neither can I say without more evidence than the present record furnishes as to the circumstances under which the agreement was made and the situation of the salt trade at the time that the restriction imposed upon the McEwans' right to manufacture and deal in salt was greater than was reasonably necessary for the protection of Ransford in taking over the control of their Goderich works and agreeing to pay therefor the sum of $2,000 per annum, or that it was clearly injurious to the public interest. *Attorney-General of Australia* v. *Adelaide Steamship Company, Limited*(2), at pages 794-7; *Maxim Nordenfeldt Guns and Amunition Co.* v. *Nordenfeldt* (3); *Collins* v. *Locke* (4); *Dubowski & Sons* v. *Goldstein*(5), at page 484; *Underwood & Son* v. *Barker*(6), at pages 303, 305.

On the whole case I am of the opinion that the appeal should be allowed with costs in this court and in the Appellate Division and the judgment of the learned trial judge restored.

BRODEUR J.—I am of opinion that this appeal should be allowed for the reasons given by my brother Anglin.

Appeal allowed with costs.

Solicitor for the appellant: *Charles Garrow.*
Solicitor for the respondents: *A. Weir.*

(1) [1914] A.C. 461.
(2) [1913] A.C. 781.
(3) [1893] 1 Ch. 630; [1894] A.C. 535.
(4) 4 App. Cas. 674.
(5) [1896] 1 Q.B. 478.
(6) [1899] 1 Ch. 300.

THE TORONTO SUBURBAN RAILWAY COMPANY .... } APPELLANTS;

1916 *Nov. 23, 24.

AND

1917 *Feb. 6.

THOMAS H. EVERSON .... RESPONDENT.

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

Expropriation—Railways—Date for valuation of lands—Deposit of plan—Notice—Benefit to lands not taken—Set-off—Excessive compensation—Appeal—6 Edw. VII. c. 30 (Ont.)—3 & 4 Geo. V. c. 36 (Ont.).

Where the expropriation of land is governed by the provisions of the Ontario "Railway Act" of 1906 the date for valuation is that of the notice required by sec. 68(1). The effect is the same under the Act of 1913 if the land has not been acquired by the railway company within one year from the date of filing the plan, etc.

The compensation for the land expropriated should not be diminished by an allowance for benefit by reason of the railway to the lands not taken, the Ontario "Railway Acts" making no provision therefor.

On appeal in a matter of expropriation the award should be treated as the judgment of a subordinate court subject to re-hearing. The amount awarded should not be interfered with unless the appeal court is satisfied that it is clearly wrong, that it does not represent the honest opinion of the arbitrators, or that their basis of valuation was erroneous.

Where the land expropriated is an important and useful part of one holding and is so connected with the remainder that the owner is hampered in the use or disposal thereof by the severance he is entitled to compensation for the consequential injury to the part not taken: *Holditch* v. *Canadian Northern Railway Co.* (50 Can. S.C.R. 265; [1916] 1 A.C. 536) distinguished.

To estimate the compensation for lands expropriated the arbitrators are justified in basing it on a subdivision of the property if its situation and the evidence respecting it shew that the same is probable.

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

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Held, per Fitzpatrick C.J. and Anglin J. that to prove the value of the lands expropriated evidence of sales between the date of filing the plans and that of the notice to the owner is admissible and also of sales subsequent to the latter date if it is proved that no material change has taken place in the interval.

Brodeur J., dissenting, held that the damages should be reduced; that the arbitrators should have considered only the market value of the lands established by evidence of recent sales in the vicinity.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Ontario affirming the arbitrators' award on an expropriation of respondent's land by the appellant company.

The various questions raised on the appeal are shewn in the above head-note.

R. B. Henderson and *O'Connor* for the appellant. *Holditch* v. *Canadian Northern Railway Co.*(1), shews that compensation should not be allowed for injurious affection.

The benefit to remaining lands should be set off. Nicholls on Eminent Domain, page 330, par. 279.

Tilley K.C. for the respondent referred to *Canadian Northern Railway Co.* v. *Taylor*(2).

THE CHIEF JUSTICE.—I concur in the judgment of Mr. Justice Anglin dismissing this appeal with costs.

DAVIES J.—I assent to the judgment proposed dismissing this appeal, with very great reluctance. That reluctance is occasioned by my belief that the damages awarded are greatly excessive.

If I had been sitting in the first court of appeal, I think I should have voted to set the award aside on the ground that the valuation of the arbitrators was excessive and not justified by the evidence.

But sitting in this final court of appeal, I cannot ignore the fact that the Court of Appeal for Ontario

(1) 50 Can. S.C.R. 265; [1916] 1 A.C. 536.
(2) 15 Can. Ry. Cas. 298.

(2nd Division) has unanimously confirmed that valuation. I have not been able to find that the arbitrators proceeded upon any wrong principle in making up their award.

For some time I wavered considering whether, under the proved facts and the evidence, I should not, even in the face of the approving judgment of the Court of Appeal, allow the appeal on the ground that the valuation was so excessive as almost to shock one.

After reflection and consultation with my colleagues I have decided to assent to the judgment dismissing the appeal.

DUFF J.—The first question is: What is the date with reference to which the value of the land taken and compensation for damages are to be ascertained? The decision upon this question must be the same whether the rights of the parties are ruled by the "Ontario Railway Act" of 1906 or by the "Ontario Railway Act" of 1913.

I think it is the Act of 1906 to which we must look, for the reason that when the Act of 1913 came into force (the 1st July, 1913), the respondent's right to compensation had accrued. This follows from a consideration of certain provisions of the Act of 1906 as amended by an Act of 1908. This last mentioned Act (ch. 44, sec. 5), amending section 68 of the Act of 1906, provides for the service of a notice upon the owner giving a description of the land to be taken, a declaration of readiness to pay a specified sum or rent as compensation giving also the name of the person to be appointed as arbitrator on behalf of the railway company and for the appointment of arbitrators in the case of failure on part of the owner to accept the sum offered and the ascertainment of the proper compensation

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by the arbitrators so appointed. Service of this notice is an election by the railway company to take the lands to which it relates subject to the right of abandonment given by sub-section 17. Notwithstanding this provision for abandonment I think the right of the owner upon the service of notice becomes a right which may be put into effect by the appointment of an arbitrator subject, however, to defeasance by the exercise on part of the railway company of the right of abandonment on the conditions prescribed by sub-section 17. He, therefore, has a status not prejudicially affected by repealing or amending legislation in the absence of some express or necessarily implied enactment that such legislation shall so operate: *Main* v. *Stark*(1). It follows that the right of the respondent was a right to be compensated according to the principles laid down by the Act of 1906 and the amendments which had been passed down to the time the notice was given. Section 68 of the Act of 1906 as amended in 1908 evidently contemplates a valuation as of the date of the notice. But if we are governed by the Act of 1913, by section 89 (2) of that Act the date of the "acquisition" of the property is the decisive date when the property is not acquired within one year after the deposit of the plan and book of reference.

The contention advanced on behalf of the appellant railway company that compensation is to be ascertained by reference to the date of the deposit of the plan, profile and book of reference (sec. 89, sub-sec. 2 of 3 & 4 Geo. V., ch. 36) therefore fails, and compensation must be ascertained by reference to a date not earlier than the date of the service of the notice under section 68 of the Act of 1906 amended as above indicated. The arbitrators have decided that it is im-

(1) 15 App. Cas. 384.

material as affecting the amount of compensation to be awarded whether this date be taken to be that of the notice which was the 3rd of March, 1913, or that of the warrant of possession which was the 2nd of April in the same year. There seems to be no reason to doubt the correctness of this and consequently the view of the arbitrators on the first point is one to which I think no exception can be taken.

The next question to be decided is whether certain provisions of the "Ontario Railway Act" (ch. 207, sec. 20, sub-sec. 9, R.S.O., 1897), are applicable which require that the arbitrators in deciding upon the amount of compensation to be awarded are to ascertain the increased value given to the lands not taken by reason of the

passage of the railway through or over the same or by reason of the construction of the railway where the railway is to pass through such lands

and that such increased value is to be set off against the

inconvenience, loss or damage arising from the taking possession or the using of such lands.

The argument is based upon section 44 of the company's special Act, passed in 1901 (1 Edw. VII., ch. 91), and it is in substance that this section 20, subsection 9, of the Ontario "Railway Act" (ch. 207, R.S.O., 1897), is by the provisions of the special Act made an integral part of that Act and that it continues to apply to the company and company's works by force of the special Act itself quite independently of the "Railway Act," R.S.O., 1897, ch. 207, and that consequently it remained unaffected by any amendment of the last mentioned enactment. The conclusive answer to this argument is found in the last sentence of section 44 of the special Act:—

And the expression "this Act" when used herein shall be understood to include the said clauses of the said "Railway Act" and of every Act in amendment thereof so incorporated with this Act.

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The concluding words "so incorporated with this Act" cannot be read as governing the words "every Act and amendment thereof" without depriving these last mentioned words of all office because the "clauses of the 'Railway Act' of Ontario" (meaning indisputably ch. 207, R.S.O., 1897), specified in the earlier sentence of section 44, are the provisions which have been "so incorporated." That expression "clauses of the 'Railway Act' of Ontario" either does or does not include amendments of those clauses. If it is to be read as including them, then *cadit quæstio;* if it does not, then "every Act and amendment thereof" must be taken to add something to the phrase "the said clauses of the said "Railway Act" and if the phrase add anything, there is no reason for putting any limitation upon the meaning of it which would exclude the amendment by which section 20, sub-sec. 9, of the "Railway Act" became non-operative.

The next question is whether under the "Railway Act" of 1906 itself, which does not include any provision corresponding to section 20, sub-sec. 9, of the "Railway Act" (ch. 207, R.S.O., 1897), the arbitrators are bound to allow a set-off as against the compensation that would otherwise be payable in respect of injurious affection.

Mr. Henderson argues that as the owner is entitled only to compensation for loss it is necessarily involved in this, that in estimating the amount of compensation allowance must be made for any increase in value due to the construction of the railway.

"The principles" said Lord Buckmaster delivering the judgment of the Judicial Committee of the Privy Council in *Fraser* v. *The City of Fraserville*(1), on the 25th January, 1917,

(1) 33 Times L.R. 179.

which regulate the fixing the compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *Lucas* v. *Chesterfield Gas and Water Board*(1), *Cedars Rapids Manufacturing Company* v. *Lacoste*(2), and *Sidney* v. *North-Eastern Railway Company*(3), and the substance of them is that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation, with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired.

To this may be added a reference to Lord Justice Moulton's observations in *Re Lucas and Chesterfield Gas and Water Board*(1), that the owner receives for the lands he gives up their equivalent, that is, that which they are worth to him in money. The property is therefore not diminished in amount but to that extent is "compulsorily changed in form."

A good deal no doubt may be said in favour of the view that a rigorous application of the principle of compensation thus stated excludes from consideration, in estimating the value of the lands taken on the appropriate date, any elements of value due to the existence of the railway scheme and as regards damages would necessitate the taking into account of any augmentation of value in the lands with respect to which damages are claimed that would flow from the construction or operation of the railway.

I think this is not the correct principle for estimating value or damages under either the Act of 1906 or the Act of 1913. By the Act of 1913 a date is given with reference to which the value of the land taken, or damages as the case may be, must be ascertained and it is not denied that where this value can be ascertained by reference to the price which could be obtained

(1) [1909] 1 K.B. 16. (2) 30 Times L.R. 293; [1914] A.C. 569.
(3) [1914] 3 K.B. 629.

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on a sale to others than the railway company, the claimant is entitled to compensation to the full extent of the value so ascertained.

The Act of 1906, it is true, does not explicitly appoint a time with reference to which the value of the lands taken is to be fixed, but having arrived at the conclusion that the statute sufficiently indicates for that purpose the date of the service of the notice the same result follows.

As to damages, it is clear, I think, that the claimant is entitled to demand as compensation the difference between the value of the property affected on the date with reference to which the damages are to be appraised, as it would be if the railway were not to run through part of it and that which it is in fact worth to the owner in money on that date takin, into consideration the fact that it is to be traversed by the railway.

Mr. Henderson's next point is that compensation has been awarded on the assumption that the block of 27 acres would be subdivided and sold in lots; on that assumption the owner would not, he argues on the authority of *Holditch* v. *Canadian Northern Railway*(1), be entitled to compensation for damages in respect of the whole of the block, but only in respect of those lots which the railway actually crosses. The owner, he contends, cannot claim compensation on two inconsistent assumptions; he cannot have compensation for land taken on the assumption that the property is to be subdivided and sold, and compensation for damages in respect of the part not taken on the assumption that it is to remain as it is.

I think the arbitrators have not proceeded upon inconsistent assumptions, they have, I think, considered

(1) [1916] 1 A.C. 536.

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the property as a property capable of subdivision and of producing certain returns for the owner in that state. And as compensation they have allowed the difference between the value of the block as of the appropriate date if it were to remain untouched by the railway and its value on the hypothesis that it is to be traversed by the railway. I think they were right in this. The claimant is entitled to say: "My block of land in its existing condition would now be worth so much in its entirety for the purposes of subdivision without the railway; it is now worth so much less if the railway is to cross it. I claim compensation for the difference."

The final contention of Mr. Henderson is that the amount awarded is demonstrably excessive.

The whole block, of which part (a strip along Dundas Street forty feet wide) was taken, was an area of 27 acres, about ten miles west of the Toronto market, which about three weeks before the notice was served had been bought by Everson for the price of $926 an acre, about $25,000 in the aggregate. The land actually taken had an area of three acres, and for it the arbitrators allowed as compensation a little over $5,000 as well as $3,000 as compensation for injury to the part retained.

The right of appeal from the award of the arbitrators is given by sub-section 15 of section 90 of the Ontario "Railway Act" of 1913 in language not substantially different from that of R.S.C., 1906, ch. 37, sec. 209(1), which language was under consideration in *Atlantic and North West Railway Company* v. *Wood*(1), where Lord Shand delivering judgment for the Judicial Committee stated the effect of the enactment to be the providing for a review of the judgment of the arbitrators as if it were the judgment of a subordinate

(1) [1895] A.C. 257.

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court, it being the duty of the first appellate court to examine the evidence and while not superseding the arbitrators entirely, giving effect to the court's own view if satisfied that the view of the arbitrators is wrong. The fact that the Ontario court of appeal whose duty it was so to review the decision of the arbitrators has unanimously confirmed the award and without comment, is a serious obstacle in the way of the appellants here. In *Johnston* v. *O'Neill*(1) Lord Macnaghten said:—

> The appeal is in reality an appeal from two concurrent findings of fact. In such a case the appellant undertakes a somewhat heavy burden. It lies on him to shew that the order appealed from is clearly wrong. In a Scotch case, *Gray* v. *Turnbull*(2), where there was an appeal from two concurrent findings of fact in a case in which the evidence was taken on commission and neither court saw the witnesses, Lord Westbury, after referring to the practice in courts of equity to allow appeals on matters of fact, makes this observation: "If we open the door to an appeal of this kind, undoubtedly it will be an obligation upon the appellant to prove a case that admits of no doubt whatever." In an English case, *Owners of the P. Caland* v. *Glamorgan Steamship Co.* (3), Lord Watson expressed himself as follows: "In my opinion it is a salutary principle that judges sitting in a court of last resort ought not to disturb concurrent findings of fact by the courts below, unless they can arrive at—I will not say a certain, because in such matters there can be no absolute certainty—but a tolerably clear conviction that these findings are erroneous, and the principle appears to me especially applicable in cases where the conclusion sought to be set aside chiefly rests upon considerations of probability."

The appellants' situation is not improved where the first tribunal has had the advantage of a view and where the controversy relates entirely to the value of land, a subject in most instances full of uncertainty. There is a crowd of recent cases in which this principle had been accepted; *Montgomerie & Co.* v. *Wallace-James*(4); *Greville* v. *Parker*(5); *The Glasgow*(6), are examples.

(1) [1911] A.C. 552, at p. 578.
(2) L.R. 2 H.L. Sc. 53.
(3) [1893] A.C. 207.
(4) [1904] A.C. 73.
(5) [1910] A.C. 335.
(6) 112 L.T. 703.

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Except in regard to the points already discussed and disposed of Mr. Henderson does not argue that the award itself gives evidence of the arbitrators having misdirected themselves; his contention is that the evidence supplied by actual sales of property in the vicinity and of the price paid for this very block only three weeks before the service of the notice, conclusively demonstrates—if the price paid on actual sales is to be accepted as the true test—that the actual selling value of the property taken was much less than the arbitrators found it to be; and that the arbitrators erred in principle by largely disregarding the proper inferences from the facts proved in relation to actual sales and in giving predominant weight to the opinions of real estate experts which could not be supported by reference to actual transactions.

I do not think that there are sufficient grounds for inferring that the arbitrators failed to appreciate the distinction between evidence of this class and evidence of value supplied by actual sales of the very property to be valued within a short space of time before or after the appointed time with reference to which the valuation was to be made. The area taken by the railway was about one-ninth of the total area of the block, and taking the price paid by Everson as a guide, $25,000, and treating all the property as of equal value, the value of the property taken would be about $2,600, while the compensation awarded for this property was $5,300; but this seeming disparity must be considered in light of the fact that in proportion to its size this area was by far the most valuable part of the property. And, moreover, I am not convinced that the arbitrators were wrong in thinking as they evidently did think,

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that Everson's vendor had not appreciated the advantages to be gained by subdividing the property.

I think the appeal should be dismissed with costs.

ANGLIN J.—The majority award on an arbitration under the Ontario "Railway Act" allowed to the landowner as compensation for land taken and injury to his remaining property $8,365. The Appellate Division, after reservation o judgment, but without assigning reasons, unamimously dismissed an appeal by the railway company. From that dismissal the company now appeals on these grounds:—

(*a*) The lands should have been valued as of the date of filing the plan, profile and book of reference—22nd February, 1912—and not as of the date of the notice served on the owner under sec. 68(1) of the "Railway Act 1906"—3rd March, 1913.

(*b*) Enhancement of value of the owner's property not taken, due to the advent of the railway, should have been deducted from the damages awarded.

(*c*) Evidence of sales subsequent to the filing of the plan and even to the order for possession was wrongly received.

(*d*) The compensation allowed was grossly excessive; the value of the lands was fixed arbitrarily, or by compromise or average, and was not based on market value; the lands should have been valued as farm lands on an acreage basis and not as building lots on a frontage basis.

(*e*) If valued as business lots compensation should not have been allowed in respect of lots of which no part was actually taken, there having been as to them no severance entitling the owner to compensation; and nothing should have been allowed for loss of, or interference with, access.

(a) Whether the "Railway Act of 1906" (6 Edw. VII., ch. 30), or the "Railway Act of 1913" (3 & 4 Geo. V., ch. 36), should govern, the valuation was properly made as of the date at which the notice to the owner was given. The order for possession followed this notice within one month and there was no material change in the interval. More than a year having elapsed between the filing of the plan and the actual acquisition of the land, if the Act of 1913 governs, under section 89(2) compensation must be ascertained as of the date of such acquisition. If the Act of 1906 applies, although notice of the deposit of the plan is by section 67 declared to be general notice to all persons owning lands shewn thereon of the lands required for the railway, until the notice to the owner prescribed by section 68 is given, the land to be taken is not fixed, since the company may desist, or may deviate within the limit of one mile from the line as located on the filed plan (sec. 59, sub-sec. 13). Moreover, this notice must be accompanied by a declaration of the company's readiness to pay a sum certain as compensation for the land or damages, which a disinterested Ontario land surveyor must certify to be fair. No other date being mentioned, the compensation here referred to is presumably based upon valuation as of the date of the notice and certificate. There is no provision in the Ontario "Railway Act" of 1906, such as is found in the Dominion "Railway Act" (R.S.C. ch. 37, sec. 192(2); 8 & 9 Edw. VII. ch. 32, sec. 2), and in the Ontario "Railway Act" of 1913 (sec. 89 (2)), making the date of deposit of the plan, profile and book of reference the date with reference to which compensation shall be ascertained if the lands are actually acquired within one year thereafter. Under these circumstances I think the notice to the

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owner, given by the company as directed by section 68 of the Act of 1906, under which it professed to proceed, should be regarded as the equivalent of the notice to treat under the English "Lands Clauses Consolidation Act" of 1845. The compensation was properly ascertained as of the date when it was given.

(*b*) Sec. 53 of the Ontario "Railway Act of 1906" (sec. 59 of the Act of 1913; compare sec. 16 of the English "Railway Clauses Act" of 1845; the "Lands Clauses Consolidation Act" of 1845 has been held to imply the same right of compensation: *The Queen* v. *Vestry of St. Luke's*(1); *Ricket* v. *Metropolitan Rly. Co.*(2)), requires railway companies to

> make full compensation * * * to all parties interested for all damage by them sustained by reason of the exercise of (the companies') powers.

Neither in that Act nor in the Act of 1913 is there any provision, such as is found in the Ontario Municipal Act, directing that the compensation to be allowed shall be confined to damages

> beyond any advantage which the owner may derive from the work,

(R.S.O., 1914, ch. 192, sec. 325(1)), or such as is found in the Dominion "Railway Act" (R.S.C., 1906, ch. 37, sec. 198), that arbitrators in fixing compensation shall take into consideration and shall set off against the inconvenience, loss or damage occasioned the increased value, beyond that common to all lands in the locality, that will be given to any lands of the opposite party (*i.e.*, in a case such as this, of the owner) through or over which the railway will pass by reason of the passage of the railway through or over the same, or of the construction of the railway. In the absence

(1) L.R. 6 Q.B. 572, at p. 576; 7 Q.B. 148, at p. 152.
(2) L.R. 2 H.L. 175, at p. 187.

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of any such provision the authorities under the English "Lands Clauses Consolidation Act" seem to establish that no deduction from or set-off against the full satisfaction * * * for all damage ("Railway Clauses Consolidation Act," sec. 16), which the company is required to pay, may be allowed for any benefit or advantage to the owner's lands—whether common or peculiar—due to the advent of the railway: *Eagle* v. *Charing Cross Railway Co.*(1); *Senior* v. *Metropolitan Railway Co.* (2).

By a former Railway Act of Ontario (R.S.O., 1897, ch. 207) express provision was made in sub-section 9 of section 20 for the set-off of increased value similar to that in the earlier Dominion "Railway Acts" of 1879 and 1888, upon which *In re Ontario and Quebec Railway Company and Taylor*(3), and *James* v. *Ontario and Quebec Railway Co.*(4), were decided. In the Ontario "Railway Act" of 1906, which repeals chapter 207 of the R.S.O., 1897, section 68 replaces section 20 of the Revised Statute, which it amends by omitting sub-section 9 and in lieu thereof inserting, as sub-section 8 (sub-sec. 9 of sec. 90 in the Act of 1913), a clause directing the arbitrators, besides awarding the value of the lands taken, to state the total amount payable for damages. It would therefore seem that, instead of limiting the set-off to benefit peculiar to the owner's lands as distinguished from that common to all lands in the locality, as the Dominion Parliament had done by the "Railway Act" of 1903, section 161, the Ontario Legislature deliberately eliminated consideration by the arbitrators of any benefits or advantages to owners and did away with any deduc-

(1) L.R. 2 C.P. 638.
(2) 2 H. & C. 258.
(3) 6 O.R. 338, 348.
(4) 12 O.R. 624, at p. 630; 15 Ont. App. R. 1.

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tion or set-off on that account in favour of the railway companies.

There appears to be no distinction between section 53 of the Ontario "Railway Act" of 1906 and the proviso to section 16 of the English "Railway Clauses Act" of 1845. The appellants, therefore, cannot escape the application of the decisions in *Eagle's* and *Senior's* cases. But for the line of decisions to which those cases belong, and the peculiar course of the Ontario legislation, to which I have adverted, I should have required to consider very carefully what I conceive may have been the view of the late Mr. Justice Street, that compensation to a landowner, part of whose property has been taken, for the damage he sustains from the execution of a work authorized in the public interest, implies recouping him for his net loss thereby occasioned after credit has been given for such benefit as will accrue from the work to his remaining property: *Re Pryce and City of Toronto*(1); *Re Richardson and City of Toronto*(2). But it may be that in these cases the learned judge was merely expressing his view of the effect of the Ontario "Municipal Act," which provides for deduction of the value of any advantage to be derived by the landowner from the work.

Pierce, in his work on Railroads, says at page 211:—

> The general rule of damages, which covers the part taken and the remaining land, is, that the owner is entitled to the difference between the market value of the whole lot or tract before the taking and the market value of what remains to him after such taking.

This method of adjusting the compensation gives the railway company credit for benefit or advantage derived by the owner. See too *Bauman* v. *Ross*(3), at page 574.

(1) 16 O.R. 726.
(2) 17 O.R. 491, at p. 493.
(3) 167 U.S.R. 548.

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Mr. Henderson argued that because section 20 of ch. 207, R.S.O., 1897, was expressly incorporated in the appellant company's private Act (1 Edw. VII., ch. 91)., sub-section 9 of that section, notwithstanding its repeal, remains in force as to it. But the incorporating section (No. 44), though awkwardly phrased, seems to make it reasonably certain that it was the purpose of the legislature that amendments from time to time made to such provisions of the general "Railway Act" as were incorporated in the appellant company's special Act should be automatically embodied therein. It therefore seems unnecessary in this case to reconsider the effect of the provision of the "Interpretation Act" (now found in ch. 1 of the R.S.O., 1914, as section 16 (*b*)) dealt with in *Kilgour* v. *London Street Railway Co.*, in which the decision of the Appellate Division(1), which also supports the respondent's contention, was affirmed in this court upon an even division of opinion.

(*c*) Evidence of sales between the date of deposit of the plan and that of the giving of notice to the owner was properly received. To whatever objection the evidence of sales subsequent to the latter date may be open, any such evidence admitted would appear not to have affected the result. Evidence of *bonâ fide* sales within a short time after an expropriation accompanied by proof that there had been no material change in value in the interval, would seem to me relevant and admissible.

(*d*) While I incline to the view that the compensation awarded is excessive and that sufficient weight was possibly not given by the arbitrators to the sale of the property in question at a price equivalent to

(1) 30 Ont. L.R. 603.

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$926 an acre made by Wood to Everson only three weeks before the notice to the owner was served, the record undoubtedly contains a substantial body of evidence which supports the view that the value of the property was properly estimated on a basis of subdivision and that at the date of the expropriation there was a market for it as building lots at prices at least as great as those on which the arbitrators proceeded. The reasons for the award given by the majority of the arbitrators shew that they made what they deemed the real value of the property to the owner at the date of expropriation the basis of their valuation. They "tried to look at the matter in the way that would produce the least damage." The amount awarded, while considerably larger than the railway company's estimate of the proper compensation, was very much less than the owner's claim and the estimates of his witnesses. It is true that the precise values on which the arbitrators base their award are not to be found in the testimony of any witness on either side. But it must not be forgotten that they had the advantage of a view of the property. They were not bound to adopt the estimate or opinion of any witness or set of witnesses as to value: *Calgary and Edmonton Railway Co.* v. *MacKinnon*(1). That they did not do so by no means warrants the conclusion that the result at which they arrived was reached by compromise or by averaging the values deposed to by witnesses on either side. Not disregarding the evidence, but giving effect to such of it as they deemed credible and trustworthy, and taking into account the facts disclosed by their view of the property and their knowledge of surrounding conditions, it was the arbitrators' duty to form and

(1) 43 Can. S.C.R. 379.

to express their own opinions as to value and damages and there is nothing to shew that duty was not conscientiously discharged.

The right of appeal is conferred by sub-section 15 of section 90 of the Ontario "Railway Act" of 1913 (R.S.O., 1914, ch. 185, sec. 90, sub-sec. 15) in terms similar to those of the Dominion "Railway Act" (R.S.C., 1906, ch. 37, sec. 209 (1) The court is directed to

> decide any question of fact upon the evidence taken before the arbitrators as in a case of original jurisdiction.

The effect of this provision has been determined by their Lordships of the Judicial Committee to be that the appellate court

> should review the judgment of the arbitrators as they would that of a subordinate court, in a case of original jurisdiction, where review is provided for.

Atlantic and North West Railway Co. v. *Wood*(1), at page 263. Demonstrable error in principle should not be exacted as a condition of interference: *James Bay Railway Co.* v. *Armstrong*(2), at page 631. The appellate court is bound to examine the evidence, not entirely superseding the arbitrators, but correcting any erroneous view of it which it is apparent they have taken. Due regard is to be paid to their findings, and the provision of sub-section 16 of section 90 of the Act of 1913, that

> Upon the appeal the practice and proceedings shall be as nearly as may be the same as upon an appeal from an award under the "Arbitration Act"

is not to be lost sight of. A similar provision of the Dominion "Railway Act" is noticed by Lord Shand in *Atlantic and North West Railway Co.* v. *Wood*(1), at page

(1) [1895] A.C. 257. (2) [1909] A.C. 624.

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263. I shall deal with the award in the manner laid down by these high authorities as I understand them.

While by no means satisfied that if disposing of the matter as a judge of first instance, or if at liberty here

> to entirely disregard the judgment of the arbitrators and the reasoning in support of it

and

> to consider the evidence as if it had been adduced before the court itself,

I should not have allowed a substantially smaller amount for compensation, treating the award as the judgment of a subordinate court subject to re-hearing as outlined in *Coghlan* v. *Cumberland*(1) or as an award appealable under section 17 of the "Arbitration Act" (R.S.O., 1914, ch. 65), and, in either case, affirmed by an intermediate appellate court, *Montgomerie & Co.* v. *Wallace-James*(2), at pages 78, 82; *Greville* v. *Parker*(3), at page 339; *The Glasgow*(4), at pages 707, 709-10, I am not prepared to hold it so unreasonable or so clearly wrong that we would be justified, without having had the advantage of seeing the witnesses or of a view, in setting it aside or in substituting for it an allowance based upon our own estimate of the proper compensation, which might, as Lord Shand put it in *Atlantic and North-West Railway Co.* v. *Wood*(5),

> be liable to criticism equal to that to which the award was open.

I am, therefore, somewhat reluctantly obliged to decline to interfere on the ground that the compensation awarded is excessive. Upon the evidence I cannot say that the amount awarded clearly exceeds the

(1) [1898] 1 Ch. 704.
(2) [1904] A.C. 73.
(3) [1910] A.C. 335.
(4) 112 L.T. 703.
(5) [1895] A.C. 257.

actual loss of the landowner based on the real worth of the property to him, ascertained by taking into account its market value (*Dodge* v. *The King*(1)), any restrictions to which its user and enjoyment in his hands were subject, all its potentialities estimated at their present value (*The King* v. *Trudel*(2)), and the use made of it by him (market price alone not being a conclusive test): *South Eastern Railway Co.* v. *London County Council*(3), at page 258, or that the arbitrators reached their conclusion by process of compromise or average, or that it does not truly represent their honest opinion as to damages, or that their basis of valuation was erroneous.

(*e*) In support of this ground of appeal Mr. Henderson cited the very recent Privy Council decision in *Holditch* v. *Canadian Northern Railway Co.*(4), affirming the decision of this court(5). Their Lordships' disposition of that case would appear to have depended entirely upon their appreciation of its facts as expressed in this passage of Lord Sumner's judgment, at page 543:—

> In the present case the appellant's relation to the property had been definitely fixed before any notice to take land was served at all. He had parcelled out the entirety of his estate and stereotyped the scheme, parted with numerous plots in all parts of it without retaining any hold over the use to be made of them, and converted what had been one large holding into a large number of small and separate holdings with no common connection except that he owned them all. There was one owner of many holdings, but there was no one holding, nor did his unity of ownership conduce to the advantage or protection of them all as one holding.

The facts in the present case differ *toto coelo* from those stated by Lord Sumner. The owner here had parted with none of his "large holding." The subdivision of

(1) 38 Can. S.C.R. 149.
(2) 49 Can. S.C.R. 501.
(3) [1915] 2 Ch. 252.
(4) [1916] 1 A.C. 536.
(5) 50 Can. S.C.R. 265.

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it into building lots is merely a scheme to which he may resort for its profitable exploitation. The land taken was part and parcel of one entire estate held by one owner and of especial value to the whole as its most important and useful frontage—it was, again to quote Lord Sumner,

> so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance.

The appellants' railway is not to be constructed upon a public highway, as was the case in *Grand Trunk Pacific Railway Co.* v. *Fort William Land Investment Co.* (1), referred to by Mr. Henderson. It will occupy a private right of way acquired from the respondent. This will lie between his remaining property and Dundas Street to which, in lieu of the immediate access formerly enjoyed, access can hereafter be had from his remaining land only across the railway tracks of the appellants. Part of his land having been taken he is entitled to compensation for all consequential injuries affecting the remaining land to be occasioned by the exercise of the statutory powers, whether in the construction of the railway or in its subsequent operation: *Cowper-Essex* v. *Local Board for Acton*(2).

BRODEUR J.—This is an appeal from the judgment of the Second Appellate Division dismissing an appeal by the appellant railway company from an award in favour of the respondent, Everson, for $8,365.00.

The lands owned by Everson consisted of 27 acres in the Township of Etobicoke and the part expropriated represents about 1¼ acres. The front of those lands is situate on the main road called Dundas Street.

The expropriation took place under the provisions

(1) [1912] A.C. 224. (2) 14 App. Cas. 153.

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of the Ontario "Railway Act" and the first question which presents itself is whether the property should be valued as of the date of the filing of the plan or of the date of the notice of expropriation or order for possession.

The Ontario "Railway Act" of 1906 (6 Edw. VII. ch. 30), contains no express provision as to which compensation is to be fixed. It differs in that respect from the provisions of the Dominion "Railway Act."

Section 59 deals with the plans and surveys of the railway, and section 67 declares that the deposit of the book of reference and the notice of such deposit shall be deemed a general notice to all persons whose property may be expropriated.

It is declared also (sec. 59) that deviations of not more than one mile from the line assigned on the plan might be made.

The effect of these provisions is that when the plan is certified by the board and deposited, the parties are notified of the proposed route and are entitled to appear and object. So far no question of compensation is dealt with. As a question of fact, the plan might, when deposited affect one part of a piece of land; but in virtue of the power which the company possesses it might locate its lines a mile further and then the property which was first marked on the plan would not be taken at all.

It seems to me clear that the object of the deposit of the plan is to give notice to the parties who might object if they find it advisable to do so.

By section 68 as amended in 1908 it is provided that a notice might be served upon the owner, giving him a description of the land to be taken, the offer of a certain sum of money and the name of the arbitrator of the company and will be accompanied by the certi-

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ficate of the land surveyor to the effect that the land shewn on the map is required for the railway or is within the limits of deviation allowed by the Act. Within ten days of the service of the notice the owner must appoint his arbitrator.

According to these different provisions of the Act and in view of the fact that the deposit of the plan might not specifically contain the land not expropriated, it seems to me that the date at which the amount of compensation should be ascertained would not be the date at which the plan has been deposited; but the date at which the notice has been given to the owner. That was the decision reached by the arbitrators and in which I concur: (*Saskatchewan Land and Homestead Co.* v. *Calgary and Edmonton Railway Co.*(1)).

In 1913, after the notice of expropriation had been served but before the arbitrators began to proceed, an amendment was made to the Ontario "Railway Act" by which it was provided that the date of the deposit shall be the date with reference to which compensation should be ascertained.

I don't think that this new provision of the law would have a retroactive effect with regard to the facts of this case. As I have said the effect of expropriation should be from the date at which compensation is ascertained.

Besides, the company had taken possession of the land before this new law came into force.

Everson, the respondent, acquired the property on the 10th February, 1913, about a month before the service of the notice of expropriation took place. He purchased the 27 acres of land for the sum of $25,000, or about $926 an acre. His witnesses, however,

(1) 51 Can. S.C.R. 1.

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valued it at $103,000, instead of $25,000, the purchase price, and claimed that by the taking of 1¼ acres Everson suffers damage for $35,000, or $10,000 more than he paid for the whole property.

The arbitrators, however, would not accept entirely the evidence of those witnesses but awarded the very large sum of $8,365.

The property is 3¼ miles from the western limits of the City of Toronto and it is pretty evident that it will be many years before this property can be converted into town lots.

The law requires that the market price of the land expropriated should constitute the basis of valuation in awarding compensation. That market price can be determined by the sales of property in the neighbourhood. We have in this case properties similarly situated which, in the same year 1913, were sold at prices varying from $413 an acre to $645 an acre. Some other farms were even sold at a smaller price. But none of them reached the sum of $926, which the respondent Everson paid on the 10th February, 1913.

I consider then that Everson paid a very high price. A month later, on the 3rd of March, the notice of expropriation was given and on the 2nd of April, 1913, an order of possession was granted. Would not that sale of a month or two months previous constitute the best basis for determining the market value of that property? I would not hesitate one moment to answer affirmatively to that question.

There was no user of the land nor any special circumstances to make it worth more than the market value which was established by the price for which it was sold shortly before the expropriation. (*Dodge* v. *The King*(1)).

(1) 38 Can. S.C.R. 149.

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I am, therefore, of opinion that the sum of $926 an acre should have been awarded to the respondent. That would entitle him to get $1,157.50 for the 1¼ acres expropriated. Besides, I would grant him $3,000, the sum found by the arbitrators, for damages caused to the rest of the property.

The appeal should be allowed with costs of this court and the court below and the award reduced to $4,157.50.

Appeal dismissed with costs.

Solicitors for the appellants: *Royce, Henderson & Boyd.*

Solicitors for the respondent: *Millar, Ferguson & Hunter.*

JOHN R. BOOTH (DEFENDANT) .... APPELLANT;

AND

EDWIN D. LOWERY AND ANOTHER (PLAINTIFFS) .... } RESPONDENTS.

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

Negligence—Driving lumber—Rights in navigable waters—River improvements—Contract with Crown—Rights of contractor—Reckless driving—"Rivers and Streams Act" (Ont.)—"B.N.A. Act, 1867," ss. 91 (10), 92 (10).

In 1910, Parliament voted money for "Montreal River Improvements above Latchford" and the Crown, through the Minister of Public Works, gave a contract to H. in connection with the work. In performance of the work L. placed a cofferdam on each side of the river leaving an opening between them some 200 feet wide. In the spring of 1911 the cofferdam on the north side was covered by three feet of water and the logs of B., being driven down through the opening, were allowed to rest against a pier a few hundred feet below and formed a jam the rear of which was over the cofferdam. Either by weight of the jam or increased pressure by breaking it, in the ordinary mode, the destruction of the cofferdam was caused.

Held, Fitzpatrick C.J. and Duff J. dissenting, that B. was responsible for the injury so caused; that with more care in driving the formation of the jam might have been avoided; that, if breaking the jam in the ordinary way was likely to cause damage, another mode should have been adopted even if it would cause delay and greater expense; and that the employees of B. acted with a wilful disregard of the contractors' rights and caused "unnecessary damage."

Held, per Davies, Anglin and Brodeur JJ., that, in the absence of Dominion legislation to the contrary, the rights of lumbermen under the Ontario "Rivers and Streams Act" (pre-Confederation legislation) are not subordinate but equal to those of persons acting for the Dominion Government in matters respecting navigation.

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

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Per Davies and Duff JJ., Anglin J. *dubitante*.—The cofferdam was a "structure" and subject to the provisions of section 4 of the "Rivers and Streams Act."

Per Davies and Anglin JJ.—Even if not a "structure" as it was placed in the river under sanction of Dominion legislation B.'s rights were restricted practically as they would be under section 4.

Held, per Fitzpatrick C.J. and Duff J.—A vote for "River Improvements" does not of itself authorize an interference with the rights of lumbermen under the "Rivers and Streams Act." These rights were exercised in the usual and proper manner and as no breach of duty by B. to avoid "unnecessary damage" was proved he could not be held liable for the damage to the cofferdam.

Judgment of the Appellate Division (37 Ont. L.R. 17) reversing that at the trial (34 Ont. L.R. 204), affirmed.

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 defendant.

The necessary facts are stated in the above headnote.

Tilley K.C. and *Wentworth Greene* for the appellant.

McKay K.C. for the respondents.

THE CHIEF JUSTICE (dissenting).—The appeal is of importance as raising a question of law of far-reaching consequence quite beyond anything involved in the particular case. It is not only the rights of the appellant which are in issue but the result must seriously affect the interests of the large class engaged in the lumber business, the oldest and still one of the principal industries of this country.

I am further of opinion that the jurisdiction in the subject-matter of both the Dominion and the provinces is involved, and that the respective governments should have had opportunity to present their views before the court if they so desired.

(1) 37 Ont. L.R. 17. (2) 34 Ont. L.R. 204.

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Now no authority is shewn or even alleged for interference by the respondents with the right of floating down his logs which the appellant undoubtedly had unless lawfully deprived thereof. It is not enough to produce a contract with any one, even with the Dominion Government, unless there was competent authority for the construction of the work. The judgment appealed from is based, as the Chief Justice of Ontario says,

on the view that the cofferdam was lawfully where it was and was placed there under the authority of the Parliament of Canada in the exercise of its exclusive authority to make laws with respect to navigation.

I know of nothing to warrant this view. The Chief Justice suggests that "it may reasonably be found on the evidence," but I can find nothing upon the subject in the evidence. In the factum of the respondents reference is made to four of the Appropriation Acts in which sums of money are authorized to be expended for Montreal River improvements. There is nothing to connect these with any particular works, they seem to be rather evidence that no works in particular were submitted to or sanctioned by Parliament. It may perhaps be assumed that the vote of those moneys was for purposes within the jurisdiction of Parliament in the exercise of its exclusive legislative authority over the subject of navigation, but I do not think the fact that Parliament has placed at the disposal of the Government certain sums of money for improving the river, can by itself authorize an interference with a public right such as is here in question.

It has been suggested that the necessary authority may be found in the "Public Works Act" (R.S.C., [1906] ch. 39), which in section 9 provides that the Minister of Public Works shall have the management, charge and direction of the properties belonging to

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Canada therein enumerated which include dams and works for improving the navigation of any water, and also works constructed at the expense of Canada.

There is a similar statute to the "Public Works Act" for each of the departments of the Government service. These Acts are purely concerned with administrative arrangements and the division of Government business amongst the members of the Government and their respective departments.

I do not think the "Public Works Act" confers any authority on the Minister of Public Works to undertake works for which the sanction of Parliament is necessary; it only provides that such works when authorized by Parliament shall be under the charge of the Minister of Public Works.

I do not wish to enter on any consideration of possible doubts as to the authority of Parliament in the circumstances; we have not got the facts sufficiently before us. Whether the river is navigable in parts or only capable of being used for floating down logs, does not appear. At the point where the dam was proposed to be erected there are rapids which prevent navigation and there seems to have been no intention of taking any steps to render it possible. The requirements of the river at other points, or even those of the Ottawa River into which the Montreal River flows, may justify the storage of water at the particular point; it is for Parliament to decide whether this is necessary in the interests of navigation. If it has so decided its decision is not to be reviewed in the courts. In this connection it may be noted that the Ottawa River below its confluence with the Montreal River is not navigable throughout, but at the City of Ottawa there are rapids operating large power plants under lease from the Dominion Government. Whether

works for power purposes alone are within the authority of the Dominion Parliament may be doubted.

That the authority of Parliament is necessary is so clear as to call for little consideration. The question may not have come before the courts of this country, but there are numerous cases reported in the United States where the law is practically the same since it has been held that the jurisdiction of Congress over trade and commerce covers the subject of navigation, though not expressly mentioned as in the Canadian Constitution. I will only refer to the case of the *United States* v. *Chandler-Dunbar Water Power Co.*(1). An Act of Congess of March 3, 1909, had declared that a public necessity existed for absolute control of all the water of St. Marys River in the State of Michigan "primarily for the benefit of navigation," and the following propositions (amongst others) were upheld:—

> The judgment of Congress as to whether a construction in or over a navigable river is or is not an obstruction to navigation is an exercise of legislative power and wholly within its control and beyond judicial review; and so *held* as to the determination of Congress that the whole flow of St. Marys River be directed exclusively to the improvement thereof by the erection of new locks therein.
>
> If the primary object is a legitimate taking there is no objection to the usual disposition of what may be a possible surplus of power.

I may point out that the "Navigable Waters Protection Act" (R.S.C. [1906] ch. 115) by the 4th section provides that no dam shall be constructed so as to interfere with navigation without the approval of the site and plans by the Governor in Council.

The appellant is not suing for an interference with his rights but is being sued for damage alleged to have been caused in the exercise of such rights to works interfering with them. There can be no liability if the

(1) 229 U.S.R. 53.

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works were not duly authorized and this is not shewn.

Upon careful consideration of the evidence I am of opinion that the drive of the appellant's logs was carried out in the usual and proper manner and that nothing was done with wilful or careless disregard of injury to the respondents' property. Even, therefore, on the assumption that the respondents' cofferdam was lawfully placed where it was, I fail to see why the duty should be imposed upon the appellant when exercising his rights in the same manner as he had hitherto done of adopting, perhaps at great expense and risk through delay, extraordinary precautions to ensure the safety of the structure. The respondents, of course, knew that logs would be driven down the river in the Spring and should have taken proper measures to safeguard their own property. They themselves recognized this by putting up some measure of protection in a glance-boom which however proved defective and inadequate for its purpose. No actionable negligence on the part of the appellant is shewn and the appeal should be allowed.

DAVIES J.—I concur generally in the reasons and conclusion of my brother Anglin for dismissing this appeal, though I confess I do not share the "grave doubts" he expressed with regard to the applicability of section 4 of the "Rivers and Streams Act" to the circumstances of this case.

On the question of the applicability of that section I am in accord with the opinions of the Chief Justice of Ontario and of Magee and Hodgins JJ. that the injury done to the cofferdam was in the circumstances of this case an "*unnecessary damage*" within that section and being such was not justified or covered by the general authority to drive logs down the river conferred by the statute.

But if I am wrong in my holding of the applicability of that section to this case, I agree with Anglin J. that the presence of the cofferdam

in the river under the sanction of Dominion legislation imposed upon the exercise by the defendant of his driving rights a restriction almost, if not precisely, the same as that to which section 4 would, if applicable, have made them subject. There was, no doubt, a correlative obligation on the part of the plaintiffs not unnecessarily or unreasonably to hamper or interfere with the exercise of the defendant's rights.

DUFF J. (dissenting).—I think the reciprocal obligations of the appellant and the respondents are determined by the application of sections 3 and 4 of the "Ontario Rivers and Streams Act." I think the cofferdam was a "structure" within section 4; and that in order to succeed it was incumbent upon the plaintiffs to shew that "unnecessary damage" within the meaning of that section had been caused by the servants of the defendant, the appellant. "Unnecessary damage," in my opinion, means damage which it was reasonably practicable to avoid under the existing conditions having regard to the nature of the "opening" provided. I agree with Mr. Justice Garrow that the plaintiffs, respondents, failed to show neglect of the duty to avoid "unnecessary damage" in this sense.

It is necessary to consider the view of the Chief Justice of Ontario in which Mr. Justice Magee and Mr. Justice Hodgins concurred that,

the appellant's cofferdam was lawfully constructed and maintained under the authority of the Dominion Parliament for the purpose of improving navigation, either in the Montreal River or below that river, by the creation of a storage dam to conserve the head waters;

and consequently that the,

rights conferred by the "Rivers and Streams Act" were * * * subordinate to the right to maintain the cofferdam and the provisions of section 4 of the "Rivers and Streams Act" as to the dam or other

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structure being provided with a convenient "apron, slide gate, lock or opening for the passage of timber, rafts and crafts" authorized to be floated down the river, cannot cut down or impair the paramount right to maintain the cofferdam.

The "Rivers and Streams Act" was originally enacted by the Legislature of the Old Province of Canada (12 Vict. ch. 87). It may be that it is not within the power of the Parliament of Canada directly to repeal or amend any of the provisions of the Act; *Attorney-General for Canada* v. *Attorneys-General for Ontario, etc.* (1); but its provisions may of course be superseded or overridden by the enactments of Parliament within its jurisdiction, and rights given by these provisions may be completely nullified by the competent enactments of Parliament or made subordinate to other rights created by such enactments.

The view of the Chief Justice of Ontario indicated above assumes, first, that it is competent to Parliament in exercise of its legislative authority derived from section 91 (10) of the "British North America Act" in relation to "navigation and shipping" to authorize the construction and maintenance of the work which the plaintiffs were engaged in constructing in such a manner as to interfere with the exercise of the rights of the defendant under the "Rivers and Streams Act," and secondly, that in virtue of legislation by the Parliament of Canada the plaintiffs were invested with authority so to construct the work.

The power of Parliament to give such authority under section 91 (29) and section 92 (10) of the "British North America Act" is of course unquestionable, but it is not suggested that this work is part of any work which has been declared to be a work for the general

(1) 1898 A.C. 700.

advantage of Canada; and there is nothing before us to shew that it is part of a work or undertaking extending beyond the limits of the province or connecting the province with one of the other provinces.

Moreover, I cannot agree that we are entitled to say that the object of Parliament in authorizing the use of public moneys in the construction of this dam was the improvement of navigation; I know of nothing in the record which justifies that conclusion.

It should be presumed that the Minister of Public Works had acquired on behalf of the Crown the right to occupy the site of the dam; and no question has been raised as to his right representing the Crown as occupier to construct and maintain the dam just as any other riparian proprietor could do so long as public or private rights are not invaded.

But *primâ facie* as an object of legislative jurisdiction the work which the plaintiffs were engaged in constructing was a "local work" within the meaning of section 92 (10) and therefore *primâ facie* subject to the exclusive legislative authority of the province except in so far as rights of navigation or other rights under the exclusive control of the Dominion might be affected by it.

I am not, without further examination of the question, prepared to accede to the proposition that the power of Parliament derived from section 91 (10) in relation to the subject of "navigation and shipping" involves in itself without the aid of the powers conferred by section 91 (29) and section 92 (10) the power to grant authority to construct and maintain works entirely local as to a particular province though connected with navigation and shipping in such a manner as to constitute what otherwise would be an invasion of private or public rights which are not rights of navi-

gation or incidental thereto and which otherwise would be within the exclusive control of a local legislature. It is unnecessary to decide the general question for the purposes of this appeal; but it may safely be affirmed that the assumption that every work designed for the improvement of navigation or to provide facilities for navigation and shipping is necessarily a work within the exclusive authority of Parliament for all purposes in virtue of section 91 (10) cannot be supported consistently with due effect being given to the language of section 92 (10) which plainly shews that the expression "local works and undertakings," as used there, embraces "canals" and "lines of ships."

I think it is clear that in fact the plaintiffs were not invested with any authority by Dominion legislation to interfere with the defendant's rights under the "Rivers and Streams Act." The plaintiffs rely upon clauses in the "Appropriation Act," 9 & 10 Edw. VII. ch. 1 schedule C, and 1 & 2 Geo. V. ch. 2, schedule C, by which moneys were appropriated for "Montreal River improvements above Latchford." The mere appropriation of public moneys would not of course in itself give the sanction of law to acts which would otherwise be an invasion of rights given by statutory enactment or public or private rights under the common law. Sections 9 and 12 of the "Public Works Act," R.S.C. ch. 39, do not profess to empower a Minister of Public Works to do acts of that character; and it would of course be quite contrary to settled principles to imply any such authority from doubtful expressions.

By ch. 143 R.S.C. (the "Expropriation Act"), however, compulsory powers are conferred upon the Minister who is the head of a department charged with the construction and maintenance of a "public work;" the "public work" (it must be implied) being of

such a character that Parliament has authority to confer these powers for the construction and maintenance of it. The work in question (which I assume at this point to be a work of that character) being a work in respect of which public moneys were appropriated by Parliament, it is by section 2 a "public work" within the meaning of that statute. By section 3 large compulsory powers are given to the Minister and it is arguable that these powers are extensive enough to authorize interference with a river or stream in such a manner as to interrupt the exercise of rights arising from the provisions of the "Rivers and Streams Act;" although it should be observed that by force of section 35 authority to interfere with "navigation" in the construction or maintenance of a public work can only be acquired from the Governor in Council.

But however extensive the powers of the Minister may be under the "Expropriation Act" in relation to the construction of "public works" in streams, it is made plain by the contract executed by the Minister under which the work now in question was being constructed, that no authority to interfere with rights such as those given by the "Rivers and Streams Act" was vested in the contractors by that contract. Paragraph 20 is conclusive upon this point, providing that the contractors

shall and will, at their own expense, make such temporary provision as may be necessary for the protection of persons or lands, buildings, or other property, or for the uninterrupted enjoyment of all rights of persons or corporations, in and during the performance of said works.

For these reasons I think the appeal should be allowed and the action dismissed with costs.

ANGLIN J.—The plaintiffs sue to recover damages for injuries to a cofferdam erected by them in the

Montreal River caused by the defendant in driving pulpwood logs during the Spring freshet of the year 1911.

On evidence warranting that conclusion, Middleton J. found that the destruction of the cofferdam "was brought about by the defendant's logs," but absolved him from liability on the grounds that in driving the river he was exercising a statutory right conferred by the "Rivers and Streams Act" (now ch. 130 of the R.S.O. 1914), with due caution and in a usual and reasonable manner and that the damage sustained by the plaintiffs was therefore not "unnecessary damage" within the meaning of sec. 4 of that statute, which the defendant had apparently invoked (though he now contends that it does not apply) and the learned judge regarded as applicable.

In the Appellate Division the majority of the court (Meredith C.J.O. and Magee and Hodgins JJ.A.) held the defendant liable on the ground that the plaintiffs in carrying out their contract with the Government of Canada had a paramount right to construct and maintain the cofferdam which the defendant in the exercise of his right of driving was bound to respect, at least to the extent of taking all practicable precautions to avoid doing injury to the structure—even such as would involve expense, delay and risk of partial failure of the drive—and that the injuries sustained being ascribable to failure to take such precautions amounted to "unnecessary damage" within sec. 4 of the "Rivers and Streams Act," and apparently would be actionable apart from that statutory provision.

Garrow and Maclaren JJ.A. dissented on the grounds that the rights conferred by the "Rivers and Streams Act" as pre-Confederation legislation,

which Parliament has not qualified or modified, are not subordinate to, but are co-ordinate with, the rights of persons acting under Dominion legislation for the improvement of navigation; that, although the building of the cofferdam by the plaintiffs had the sanction of Parliament as incidental to the construction of the works for the improvement of navigation which they had undertaken, the exigency of their contract did not justify or require that the cofferdam should remain in the river during the Spring freshet; and that, while the defendant would be liable for wilful injury to it, and might be answerable for injury due to negligence, the evidence shews neither the one nor the other.

It becomes necessary, therefore, to determine the status of the plaintiffs in regard to the work in question and to consider to what restriction, if any, the exercise by the defendant of his statutory right of driving was subject.

That the jurisdiction of the Dominion Parliament to legislate in respect of matters affecting navigation is paramount ("British North America Act," ch. 91 (10)), and that the authorization of works for the improvement of navigation falls within that power is unquestioned. By the "Public Works Act" (R.S.C. ch. 39, sec. 9), the Minister of Public Works is given the management, charge and direction *inter alia* of "works for improving the navigation of any water." By sec. 12, he is required to direct the construction of public works (to be) constructed at the expense of Canada, and by sec. 13, it is declared that, except for necessary repairs and alterations, nothing in the Act shall authorize him to cause expenditure not previously sanctioned by Parliament. By implication Parliament in this legislation has authorized and empowered the Minister of Public Works to direct and cause the con-

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struction of "works for improving navigation" for which it may provide that public moneys of Canada shall be expended. By 9 & 10 Edw. VII. (D.), ch. 1, sch. C, and 1 & 2 Geo. V. (D.), ch. 2, sch. C, public moneys were appropriated by Parliament for

Montreal River improvements above Latchford.

Upon the evidence in the record I agree with the learned Chief Justice of Ontario that the erection of the conservation or regulation dam, for which Messrs. Lowery and Goring had contracted with the Government of Canada, through the Minister of Public Works, was part of the Montreal River improvements above Latchford, for the construction of which the expenditure of public moneys of Canada had been authorized by Parliament, and, as such, had been undertaken by the Minister under the sanction of Dominion legislation. The construction of a cofferdam as a proper means for the carrying out of that work was within the authorization and I am, with respect, unable to agree with the view of Garrow and Maclaren JJ.A. that its maintenance from one working season to another in order to complete the work was not likewise authorized.

If the driving rights of lumbermen had been derived from post-Confederation provincial legislation, or if the Dominion Parliament had declared them to be subject to the rights of persons engaged in carrying out works sanctioned by it for the improvement of navigation, I should agree with the learned Chief Justice of Ontario that they were subordinate to the plaintiffs' right to maintain their cofferdam and must be so exercised as not to infringe that paramount right.

But since, as Garrow J.A. points out, the privileges asserted by the defendant were declared or conferred

by a pre-confederation statute, and have been left unmodified by the Dominion Parliament, I think they are on an equal footing with those possessed by the plaintiffs in carrying out their contract with the Minister of Public Works. Sanctioned respectively by legislatures each endowed with plenary and exclusive authority over the subject-matter with which it dealt, derived from the same source—the Imperial Parliament,—the several rights of each of the parties litigant are on the same plane, and, in my opinion, must be exercised with due regard to those of the other.

If the 200-foot channel left between the plaintiffs' cofferdam and the nearest of the south side piers was

a convenient opening in a dam or other structure

within the meaning of sec. 4 of the "Rivers and Streams Act" even after the waters of the river had entirely submerged the cofferdam, I would agree with the learned Chief Justice of Ontario and Magee and Hodgins JJ.A. that the injury done to the cofferdam was "unnecessary damage" within that section and, as such, not within the authority to drive conferred by the statute on the defendant. With the latter learned judge I think that,

> the statute * * * includes both damage unnecessarily caused during the normal and usual process of driving as well as that which arises, though inevitably, from a method of operation, originally improper, unnecessary or negligent.
>
> The respondent (defendant) may have followed the practice generally adopted in these and similar rapids. But it is no answer that the damage thereby caused was inevitable if that method should have been modified in view of the circumstances of the particular case, and because the rights of others intervened.

I gravely doubt the applicability of sec. 4 of the "Rivers and Streams Act," however, to the circumstances of the case at bar. Yet, although the plaintiffs' cofferdam may not have been a "structure"

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within the protection of that section, its presence in the river under the sanction of Dominion legislation in my opinion imposed upon the exercise by the defendant of his driving rights a restriction almost, if not precisely, the same as that to which sec. 4 would, if applicable, have made them subject. There was, no doubt, a correlative obligation on the part of the plaintiffs not unnecessarily or unreasonably to hamper or interfere with the exercise of the defendant's rights: *Hewlett* v. *Great Central Railway Co.*(1).

A perusal of the evidence has satisfied me that the defendant's employees acted with reckless indifference to, and an entire disregard of, the plaintiffs' rights. They proceeded on the assumption that they had an absolute and unqualified right to drive their logs, using whatever means they might find most convenient and best adapted to accomplish that purpose regardless of the effect of employing such means upon the plaintiffs' rights or of the damage to their property which might ensue. I am convinced that the men in charge of the defendant's drive knew that the cofferdam was in the river and knew or should have known that the method of driving which they adopted would imperil its existence. I am also satisfied that, although to do so would have entailed delay and expense and possibly the detention of a portion of his logs until the following season, it was not impracticable for the defendant's men to have driven the river in such a manner that the plaintiffs would have sustained no injury.

If the formation of a side jam extending from the piers of the railway bridge 600 feet up the river over the cofferdam and on to MacNeill's Point was not deliberately brought about by the defendant's men, as

(1) 32 Times L.R. 373.

I incline to think it was, they certainly made no attempt to prevent it. Upon the evidence I think it was practicable to have prevented it. A perfectly proper and reasonable method to employ under ordinary conditions to facilitate the driving of rapids such as those above Latchford, the presence of the plaintiffs' cofferdam rendered the formation of this side jam improper and unreasonable because it involved unnecessary danger to the cofferdam. Again, when breaking the side jam in the sweeping process, instead of first removing the logs above and over the cofferdam, which probably might have been done, though at greater expense, the defendant's men followed the usual, and, in ordinary circumstances, not improper course of breaking the jam from below, thus allowing the mass of logs above the cofferdam to press down upon it with great force and violence. The damage complained of was due either to the formation of the side jam over and above the cofferdam, or to the pressure upon it occasioned by the method pursued in breaking it. In both these operations there was, in my opinion, an unjustifiable disregard of the plaintiffs' rights. To quote Mr. Justice Hodgins again:—

> The respondent (defendant) may have followed the practice generally adopted in these and similar rapids. But it is no answer that the damage thereby caused was inevitable if that method should have been modified in view of the circumstances of the particular case, and because the rights of others intervened.

But it is said that the plaintiffs should have protected the cofferdam with an adequate glance-boom, whereas the glance-boom which they hung from MacNeill's Point, apparently for the protection of a green cement pier, was insufficient to safeguard the cofferdam. There was nothing to indicate to the plaintiffs that the river would be driven in a manner that would

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render such protection of the cofferdam necessary. Before the defendant's drive of comparatively small pulpwood began, Gillies's drive of 40,000 large logs had all gone down without the formation of a side jam or any other inconvenience or detriment to the plaintiffs. If the defendant's men proposed to drive his pulpwood so as to bring about the formation of a side jam and thus endanger the cofferdam it was at least their duty to have notified the plaintiffs in order that they might have an opportunity, if possible, to provide an adequate glance-boom to protect the cofferdam. Moreover, I am not satisfied on the evidence that even a glance-boom such as the defendant's witnesses describe would have saved the cofferdam.

On the whole case I think the proper conclusion is that in the management of their drive the defendant's men utterly disregarded the plaintiffs' rights, ignoring the golden rule expressed in the maxim *sic utere tuo ut alienum non lœdas.* For the consequences, which should have been anticipated, the defendant should be held accountable.

I would dismiss the appeal with costs.

BRODEUR J.—The Dominion Parliament voted in 1910 a sum of $25,000 "for Montreal River improvements above Latchford." Those works consisted in the construction of dams for which a contract was made by the Department of Public Works with the plaintiff-respondent. In the carrying on of the work the contractors had put in two cofferdams, one on the south side of the river and the other on the north. No question arises as to the cofferdam on the south, the claim being entirely in respect of damages to the cofferdam on the north.

During the Fall and the Winter of 1910, one of the

three piers which were to be erected in the place where the cofferdam on the north side was put was built. The two others were to be built in the Spring.

During the Spring of 1911, the level of the water rose above the cofferdam, which became entirely covered. In the Fall previous, however, the superintendent of the defendant-appellant had visited the works and knew of the existence of that cofferdam and of the one pier which had been built. He must have known also that two other piers were to be built in the space covered by that cofferdam.

The defendant-appellant had a very large quantity of logs to drive in that river. Those logs were in sixteen booms of fifty thousand each.

The logs reached the place about the 18th of May and the water was then running between three and four feet over the cofferdam. The logs stuck on the pier of a railway bridge which was a few hundred feet below and piled back and formed a jam on both sides of the river. There was left in the centre of the stream a channel of about twenty-five feet wide through which all the logs ran. When all the logs were removed, it was found that the cofferdam had been destroyed.

I do not think there is any doubt as to the jam being the cause of that destruction. It remains to be seen, however, who should stand the loss which has been incurred.

It is claimed by the plaintiffs that the driving of the logs was negligently done and the damage could have been avoided by reasonable care either in stationing men at the bridge so as to keep the jam from forming, or by ceasing to open new booms until after they had cleared below and thus avoiding the formation of side jams.

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The six judges in the courts below who heard the case were equally divided. The action was dismissed by the trial judge but that judgment was reversed by the Appellate Division by a majority of three to two.

The main ground of the Court of Appeal is that the cofferdam having been placed under the authority of the Parliament of Canada, the rights exercised by the defendant under the "Rivers and Streams Act" to drive his logs were subordinate to the right of the Dominion contractors, the Parliament of Canada having exclusive authority to make laws with respect to navigation.

I am unable to agree with that proposition.

The "Rivers and Streams Act," which is to be found in the Revised Statutes of Ontario, contains provisions which were in the law long before Confederation.

It provided that the lumbermen would have the right to float and transmit timber down all rivers, and that no person could place any obstruction in those rivers in order to prevent the passage of timber.

It was provided also that if it became necessary to construct any dam in order to facilitate the floating of timber, any person was authorized to construct those dams without doing any unnecessary damage to the river or to its banks.

The lumbermen were also given the right to go along the banks of the river for the purpose of assisting the passage of the timber without doing any unnecessary damage to the banks of the river and it was also provided that where there was a convenient opening in a dam for the passage of timber, no person should injure or destroy that dam or do unnecessary damage to it.

Those rights of the lumbermen existed at the time of Confederation and could not be considered as in-

ferior to the rights which the federal authorities possess to deal with navigation or with the improvement of navigation.

The question then in this case resolves itself, according to my view, as to whether the defendant-appellant has done unnecessary damage.

It appears that the jam on the two sides of the river was created by the logs which were contained in the first three or four booms, and at one time even the middle channel was closed. Efforts then were made by the appellant to open that middle channel and those efforts were successful and instead of removing the logs which were jammed on both sides of the river he opened the other booms and let the logs of those booms go down. That necessitated, of course, a stronger pressure on the cofferdam and was, according to my view, the cause of damage which was not necessary.

If immediately after the middle channel had been opened the appellant had driven the logs which were in the jam on the two sides of the river, the damage done to the cofferdam could have been avoided or the damage would have been less. But that would have required some more work and some more expense which the appellant did not feel inclined to do and incur.

The plaintiffs and the defendant were both having rights and duties with regard to the use of that river. The plaintiffs, as builders of the dam, were bound to see that the construction of that dam would not interfere to any unreasonable extent with the driving of the logs. The defendant had the right to drive his logs into that river, but he should have done it in such a way that unnecessary damage should not be caused to the builders of the dam.

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He does not seem to have discharged that duty which the law imposed upon him and should then be liable for the damage which he unnecessarily imposed upon the plaintiffs.

It was urged by Mr. Tilley that the clause of the contract between the Government and the contractors providing that the contractors

> shall and will at their expense make such temporary provisions as may be necessary for the protection of persons or lands, buildings or other property or for the uninterrupted enjoyment of all rights of persons or corporations in and during the performance of the said works

has not been carried out.

I am unable to agree with that proposition.

A glance-boom had been erected, which perhaps it was not necessary for the constructors to do, but was put up all the same in order to prevent the logs from passing over the cofferdam. It was not to be expected that a jam would take place below the cofferdam and would reach it and if such jam has taken place, as I have said, it is only due to the negligence of the appellant. The plaintiffs had done what they had contracted to do.

For these reasons, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Greene, Hill & Hill.*
Solicitors for the respondents: *Griffiths & Upper.*

CHARLES M. JAMIESON (PLAINTIFF) .. APPELLANT;

AND

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

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*Oct. 18, 19.
*Dec. 11.

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

Municipal corporation—Maintenance of highways—Improper use of sidewalk—Damage by trespasser—Notice of disrepair—Nuisance—Negligence—Injury to pedestrian—Liability for damages.

The municipal corporation was obliged, and given power, to maintain its highways in a reasonable state of repair, having regard to the character of the streets and the locality in which they were situated, and regulations had been enacted to prohibit vehicular traffic over the sidewalks except at crossings specially constructed in a manner to sustain such traffic. At a place where no such crossing had been provided vehicles had been, for over a year, habitually driven across a wooden sidewalk and no action to prevent such trespasses had been taken by the municipal authorities. During the afternoon of the day before the accident, a plank was broken by a heavy vehicle crossing the sidewalk and it continued in this condition until the evening of the following day when a pedestrian tripped in the hole and sustained injuries for which he brought action to recover damages.

Held, reversing the judgment appealed from (9 West. W.R. 1287; 33 West. L.R. 851), Davies J. dissenting, that, in these circumstances, the municipal corporation was charged with notice of the condition of disrepair of its public sidewalk and, having failed to remedy the nuisance within a reasonable time, it was guilty of negligence involving liability in damages.

Per Duff J.—Section 507 of the charter of the City of Edmonton does not impose upon the municipality an absolute responsibility for harm suffered by individuals in consequence of a street being in a state of disrepair constituting a dangerous nuisance; but the municipality is responsible for the consequences of such a state of disrepair if, through the observance of proper precautions, it could have prevented the nuisance coming into existence: *Hammond* v.

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

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Vestry of St. Pancras (L.R. 9 C.P. 316), and *Bateman* v. *Poplar District Board of Works* (37 Ch.D. 272), applied. Proof of the existence of such a nuisance and resulting damage is, in itself, sufficient to create a *primâ facie* cause of action against the municipality under section 507 of the charter.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), which reversed the judgment of McCarthy J. at the trial, and dismissed the plaintiff's action with costs.

The material circumstances of the case are stated in the head-note and the questions in issue on the present appeal will appear from the judgments now reported.

Chrysler K.C. for the appellant.
Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—This is an action brought by the appellant to recover damages for injuries caused by the defective condition of a sidewalk built by the corporation respondent for the use of the public.

The charter of the City of Edmonton (sec. 507) in express terms imposes upon the corporation the legal duty to keep the sidewalk in a reasonable state of repair and at the same time gives it authority to take all necessary measures to prevent the sidewalk becoming a danger to the public making use of it in the exercise of their right (sec. 237).

It is not disputed that the sidewalk was out of repair, that the appellant was making a proper use of it under the belief that it was in good condition and that as a result he was injured as alleged in his statement of claim.

There is in consequence no doubt that the appel-

(1) 9 West. W.R. 1287; 33 West. L.R. 851.

lant had a civil action against the respondent to recover compensation in damages for his injuries unless we are prepared to overrule the decision of this court in *City of Vancouver* v. *McPhalen*(1).

An action is given for breach of a statutory duty irrespective of whether the act done would be a wrong apart from the statute.

In *Dawson* v. *Bingley Urban District Council*(2), Farwell and Kennedy L.JJ. put the matter in this way: That where a person is one of a class for whose benefit a statutory duty is imposed, he is on breach of that duty entitled to maintain an action for damages occasioned to him by the breach unless the statute has indicated an intention to exclude that remedy.

In the case of *Maguire* v. *Liverpool Corporation*(3), Vaughan-Williams L.J. asserts the same general rule as do Farwell and Kennedy L.JJ. in the *Bingley Case*(2), and treats the immunity of the authority in respect to the non-repair of highways as an exception due to the particular history of the highways. But in *City of Vancouver* v. *McPhalen*(1), the distinction is very clearly made between those English cases in which the duty imposed is, as Sir Louis Davies says, one transferred from a body or authority on or with whom it previously rested and which body or authority was not itself liable in civil actions for nonfeasance (page 196) and cases in which the duty is created and imposed in the charter calling the corporation into existence. The general rule is that every public duty presumably gives rise to a private action in favour of a person injured by its breach and I know of nothing in the history of the highways in Edmonton

(1) 45 Can. S.C.R. 194. (2) [1911] 2 K.B. 149.
(3) [1905], 1 K.B. 767.

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which would justify creating an exception to that general rule in the case of breach by nonfeasance in respect to their repair.

But it is said that there is no proof of notice to the City of Edmonton of the existence of the hole in the sidewalk which caused the appellant's injury and that in consequence no liability attached. In *City of Vancouver* v. *Cummings*(1), Mr. Justice Idington speaking for the majority of this court said (p. 466):—

I am, despite dicta to the contrary, prepared to hold that, unless in some such case as I have suggested, the question of notice or knowledge does not arise, and that in all cases where the accident has arisen from the mere wearing out or apparent wearing out, or imperfect repair of the road, there arises upon evidence of accident caused thereby, a presumption without evidence of notice that the duty relative to repair has been neglected.

My brother Anglin describes the circumstances under which the sidewalk became dangerous to the public using it and it is unnecessary for me to add anything to what he says beyond this. As a necessary consequence of the improper use to which it was put, to the knowledge of the corporation, the sidewalk became out of repair and a danger to those obliged to pass over it. The hole actually made in the sidewalk as a result of that improper use and which was the direct cause of the accident was allowed to remain unrepaired for over twenty-four hours, and the city police whose duty it was to report such conditions passed the place frequently. In these circumstances I am bound to hold, in view of the opinion expressed in *City of Vancouver* v. *Cummings*(1), that there arises a presumption without proof of notice that the duty relative to repair has been neglected. On the authority of *Mersey Docks Trustees* v. *Gibbs*(2), I would add,

(1) 46 Can. S.C.R. 457.
(2) L.R. 1 H.L. 93, at p. 121.

it must be taken as an established fact that the respondent had, by its servants, the means of knowing the dangerous state of the sidewalk, but was negligently ignorant of it. If the knowledge of the defect would make it responsible for the consequence of not having it repaired, it must be equally responsible if it was only through its culpable negligence that its existence was not known to them.

The appeal should be allowed with costs.

DAVIES J. (dissenting).—After much consideration of the facts in this case I have reached the conclusion that the judgment of the Supreme Court of Alberta was right and that this appeal should be dismissed.

I am satisfied with the statement of the facts and of the law as applicable to them made by the learned judges who formed the majority in the court below.

All the judges in that court held that as the city had not any actual notice of the break in the sidewalk which led to plaintiff's injuries sufficient time had not elapsed between such breakage and the accident to impute notice to them.

The evidence shews beyond doubt that the city had kept the sidewalk, which was for pedestrians only, in suitable repair for the purposes intended.

I do not think there was any obligation upon the city to make the sidewalk stronger in order to accommodate trespassers who desired to cross it with loaded trucks or drays. Nor can I find any obligation existing on the part of the city to make a crossing at the place in question.

The liability of the city must therefore depend on their alleged negligence in enforcing the by-law, and it seems to me that the limit of the city's obligation

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in that regard was to prevent trespasses by prosecuting offenders.

Before liability can attach to the city for non-enforcement of a by-law an existing nuisance must be shewn to exist of which it had notice or be held to have had notice in law. Nothing of the kind existed here.

Mr. Justice Beck sets out in his judgment the provisions of the by-law relied on as casting a duty upon the city and shews that they do not support the statement of the trial judge that the city could require an owner to put and keep a sidewalk abutting on his property in repair but merely prohibits him or any one else from crossing the sidewalk without taking steps to avoid injuring it. The learned judge adds that the most that might be expected of the city in the present case was that they should have prosecuted under the provisions of the by-law and he concludes (citing as authorities 14 Cyc. title "Municipal Corporations," p. 1356, under the sub-title "Failure to prevent improper use of streets" and Dillon on Municipal Corporations, vol. 4, p. 1627) that no action can lie against the city for failure to enforce such by-law except in cases amounting to a public nuisance.

In this opinion I agree and would dismiss the appeal.

IDINGTON J.—The appellant recovered judgment against the respondent, a municipal corporation, for damages suffered by reason of his leg getting broken in consequence of the negligence of the respondent in failing to keep in a reasonable state of repair its sidewalk whereon he was walking.

The court of appeal for Alberta reversed that judgment and hence this appeal.

The duty of the respondent in the premises is de-

fined by section 507 of its charter, which is as follows:—

507. The city shall keep every highway, including all crossings, sewers, culverts and approaches, grades, sidewalks and other works made or done therein or thereon by the city or by any person with the permission of the city, in a reasonable state of repair, having regard to the character of the highway and the locality in which the same is situated or through which it passes.

The respondent had constructed the sidewalk, some six or seven years before the accident in question, of spruce planks, laid, I infer from the evidence, transversely to the line of the street, and supported by light scantling fit only to support pedestrian travel.

At the place in question there was a lane running at right angles to the sidewalk to serve the houses abutting thereon.

It turned out that teamsters who might have entered at the other end of this lane, with loads of any kind, got into the habit of using for their entrance or exit the end of the lane fronting on the sidewalk in question.

If the respondent had either protected the end of the lane next the sidewalk from any entrance, or built or caused to be built a proper crossing, by usual structure for such use, the sidewalk would have been in no danger of being broken as it was, and thus producing such accidents as this.

Instead of doing so the respondent tolerated the use that was made continuously, for at least a year or more, next preceding the accident, of that means of entrance into the lane in question and thereby endangered the maintenance of the sidewalk, and consequently the safety of pedestrians.

Indeed earth excavation, resulting from the execution of other work on the street at that point, was left lying as thrown there, while doing the work, long

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after such work was completed, and till some neighbour levelled it off and piled some of it up against the sidewalk so as to give it the appearance of a proper entrance to the lane and thereby invite just such traffic across the sidewalk as was sure to destroy it, and did destroy it twenty-eight hours before the accident in question.

Planks of the sidewalk had been worn out or destroyed by such use and the want of repair thus created was attended to more than once by the respondent's servants.

Even when repaired there remained a breaking or chipping off of the ends of the planks in the sidewalk, so apparent to everyone, that no man, qualified for his job, when looking after the sidewalks could fail to recognize the notorious fact that this crossing use was being made of it, and was liable any day to break planks never intended to bear such traffic, and hence unfitted to meet the needs of pedestrian travel which demands safety.

That open and notorious use of the sidewalk and condition of things resultant therefrom, having existed by the negligence of the respondent for a year or more, it has the temerity to suggest that this case falls within that class of cases where courts have had to consider whether or not when an unavoidable, unexpected and improbable accident has put the highway out of repair, or wrong done by others had obstructed its use in a way of which the municipal authorities had no knowledge or notice, should be held to constitute negligence.

No court could properly find on the facts in question, in most of these cases, where the municipality was excused that there was negligence. Some of them may be very questionable.

The usual statute in question in each of such cases made no provision for actual notice, indeed notice of any kind, but has been so interpreted as to render the question merely one of negligence in the discharge of a statutory duty, and in short the application of common sense.

In defining the law in such cases the term "want of notice" has been used sometimes when it was only intended to signify that the defendant might or might not, or should or should not have known, if all reasonable means had been taken to observe and discharge the duty which the statute had imposed.

The short method of expressing the duty has led some people to imagine and loosely to assert that notice is actually necessary.

It has been time and again explained that the same degree of vigilance and the same condition of repair or maintenance could not be reasonably insisted upon in every case.

The highway that only serves a remote and sparsely settled district would not be tolerated in the centre of a large city, or serve its needs. The inspection demanded in the latter could not reasonably be required in the former. It comes to this that the section of respondent's charter quoted above expressly provides by the word "reasonably" what the law had already been determined by the courts to mean in cases where the statute merely imposed the duty of keeping in repair.

If a municipality persists in using a mode of construction and material fit only for pedestrian traffic, when its officers know that it is used also for loaded teams to cross, it has not discharged its obligations but laid a trap for its citizens getting their legs broken.

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All that has been urged about liability for non-observance of its own by-laws is quite beside the question involved.

It matters not whether there was a by-law enacted or not, or enacted only to be broken. No man could seriously consider the sidewalk as constructed at the point in question as fit for the use that it was being put to or a safe place over which to induce daily travel by pedestrians in a thickly inhabited part of the city. As well invite men to rely for crossing, by night and by day, a brook, upon a bridge which everyone concerned to know should, if thinking for an instant, realize will be swept away by the first storm that comes that way.

It is idle to point to the by-law forbidding such use when the breach thereof from week to week is tolerated. As well pass a by-law against storms in the illustration I put.

It is the maintenance of an insufficient sidewalk in a place notoriously needing something more substantial, or more rigorous means of warding off its destruction, than merely passing a by-law which nobody but its authors ever reads.

The powers the respondent had for enforcing the construction of a proper crossing at the point in question at the expense of those concerned in its use render the negligence of the respondent the less excusable.

The appeal should be allowed with costs here and in the court below and the judgment of the learned trial judge be restored.

DUFF J.—The appellant one evening in November, 1914, after dark, stepped into a hole in a wooden sidewalk on Fifth Avenue, a street in Edmonton, with the result that his leg was broken. He sued the municipality for damages, basing his claim upon section

507 of the Edmonton City Charter, which is in the following words:—

> The city shall keep every highway, including all crossings, sewers, culverts and approaches, grades, sidewalks and other works made or done therein or thereon by the city or by any person with the permission of the city, in a reasonable state of repair, having regard to the character of the highway and the locality in which the same is situate or through which it passes.

At the trial before Mr. Justice McCarthy he succeeded; but the judgment given in his favour at the trial was reversed on appeal with the dissent of Mr. Justice Stuart.

In the immediate neighbourhood of the place where the accident happened there were some residences which had a lane or back area in the rear and for many months before the accident—at least a year—it was the practice for delivery vehicles entering this lane to pass over the place where the plaintiff met his injury; and the day before the date of the accident the sidewalk had collapsed under the weight of one of these vehicles.

Some facts are admitted or so clear as not to be open to dispute. The sidewalk was not of sufficient strength to support traffic of the kind to which it was thus subjected. For the convenience of vehicles passing over this sidewalk an approach had been made by banking with earth the street side of the sidewalk opposite the lane and the sidewalk itself there shewed unmistakable evidence of the passage of wheels—unmistakable, that is to say, to competent persons performing the duty of observing the condition of the sidewalk.

It was not disputed, I think, that in the condition in which the sidewalk was when the accident occurred the street was not in a "reasonable state of repair" having regard to "the character of the streets and the locality in which it was situated" within the meaning of sec-

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tion 507; and I have no difficulty in holding that if due diligence had been used by the municipality and those entrusted by the municipality with the care of the streets, that is to say, if diligence had been exercised of such a degree as to bring it into conformity with the standard supplied by the ordinary notions of sensible people, the sidewalk would not have been allowed to fall into that condition. Proper diligence would have led to the knowledge, by the persons responsible, of the fact that this sidewalk was being subjected to the burden of an extraordinary traffic—a usage under which it was certain eventually to collapse; actuated by a reasonable respect for their duty, such persons on discovering the state of affairs, would have addressed themselves to finding means for the prevention of that which might be expected to happen in the absence of precautions, and which did in fact happen. They could have attained this object by stopping the traffic; or they could have attained it by strengthening the sidewalk.

The question to be decided on this appeal is whether in the circumstances the municipality is responsible in damages for the consequences of the neglect to take proper measures to prevent this sidewalk, under the effects of this traffic, falling into such condition as to amount to a nuisance. Section 507 is capable of being read as creating an absolute duty to prevent the highways of the city falling into a state of disrepair. There is, however, much to be said and there is a long line of authorities beginning with *Hammond* v. *Vestry of St. Pancras*(1), in support of the view that where duties of maintenance are, by enactments similar to section 507, cast upon a municipal body, the responsibility is not an absolute responsibility making the municipality in

(1) L.R. 9 C.P. 316.

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all circumstances answerable in damages for the existence of a state of things which the statute aims to prevent, *e.g.*, a nuisance arising from the disrepair of a sewer; but that the public authority charged with such responsibility is not answerable if the state of things out of which the complaint arises is one which could not have been prevented or made innocuous by the observance on its part, and on the part of such agencies as it employed, or ought to have employed, of proper care and diligence. A highway may become a dangerous nuisance through a sudden operation of nature not reasonably forseeable, or from the mischievous act of some person for whom the authority charged with the care of the highway is not responsible and which it could not reasonably be held to be negligent or incompetent in not anticipating. In such cases and generally speaking in cases in which the state of things complained of can be shewn to have been something which the public authority could not reasonably have been expected to know or to provide against, it has been held that there is a good answer to any claim for reparation: *Bateman* v. *Poplar District Board of Works*(1); *Brown* v. *Sargent*(2); *Blyth* v. *Company of Proprietors of Birmingham Waterworks*(3); *Whitehouse* v. *Birmingham Canal Co.*(4). Under an enactment in the "Ontario Municipal Act," to much the same effect as section 507, municipalities have uniformly been held to be exonerated in the absence of negligence. It may properly be assumed that section 507 was not enacted without reference to this course of decision and therefore, in construing that section, one is not without weighty sanction when giving effect to the considerations upon which these decisions rest.

(1) 37 Ch.D. 272.
(2) 1 F. & F. 112.
(3) 11 Ex. 781.
(4) 27 L.J. (Ex.) 25.

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Strictly no question of burden of proof is here material. By the pleadings the onus of establishing an actionable breach of duty, is of course, on the plaintiff in the first instance. I express no opinion upon the question whether the effect of the statute itself is that where a nuisance is shewn to have existed in fact the onus is thereby cast upon the municipality to establish that the nuisance was not due to any cause for which it is responsible; in other words, whether or not there is a presumption of law arising from the existence of a nuisance—in the condition of a highway—that the municipality is responsible for it; a presumption that the municipality can only meet by establishing the negative of the issue. It is also strictly unnecessary to pass upon the question whether or not the plaintiff by proving the existence of the nuisance thereby establishes a *primâ facie* case; although, as it is quite evident that the legislature in passing the enactment has assumed that in the ordinary course highways can be kept in a reasonable state of repair by the exercise of such diligence as may properly be expected from the municipality, there seems to be sufficient ground for holding that proof of the existence of a nuisance does in itself constitute a *primâ facie* case throwing upon the municipality the burden at least of going forward with evidence. (See *Blamires* v. *Lancashire & Yorkshire Railway Co.*(1).)

The evidence before us in this case is quite sufficient, as I have already indicated, to shew failure to discharge the duty arising under section 507 for which the municipality is responsible.

It is argued that the municipality cannot be held responsible for the non-enforcement of its by-laws.

(1) L.R. 8 Ex. 283.

In truth the municipality in the view expressed above is held responsible for allowing a nuisance to come into existence which could and ought to have been prevented. It was incumbent upon the municipality to use its powers of control on the highway to that end; and if the enforcement of the by-law had been its only means of effectively executing its duty, the municipality was bound to resort to that means. There is a passage in Lord Blackburn's judgment in *Geddis* v. *Proprietors of Bann Reservoir*(1), at page 456, that may be usefully quoted. It gives the principle which affords another answer to this argument:—

> And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, "negligence" not to make such reasonable exercise of their powers.

ANGLIN J.—The plaintiff was injured through stepping into a hole in a sidewalk constructed by the defendant corporation on a city street where the traffic was considerable. The accident occurred at half-past seven o'clock on a November evening. The sidewalk had been broken down by a heavy load of coal driven over it on the afternoon of the previous day about four o'clock. The evidence shewed that the sidewalk had been constructed as an ordinary plank walk intended for use by pedestrians only, and that no provision had been made for the crossing of it by vehicular traffic at the point in question. A by-law of the city prohibited the crossing of sidewalks by horses and vehicles where protective timbering had not been provided for that purpose. Notwithstanding this by-law the place in question had been used throughout the whole of the year preceding the accident without

(1) 3 App. Cas. 430.

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any such protection as a crossing to a yard or private lane. The user had been of such a character and to such an extent that the learned judge found, properly in my opinion, that the city had notice of it. No charge of contributory negligence is pressed against the plaintiff. At the trial before McCarthy J. the city was held liable on the ground that there had been a breach on its part of a duty

to have put and kept *the crossing* in a state of repair or to have required that the private owners of the property adjoining who used the crossing should put the same in a proper state of repair.

The Appellate Division of the Supreme Court reversed this judgment, holding that there was no obligation on the part of the city to provide a crossing, that its only duty in respect of the sidewalk was to repair it within a reasonable time after notice that it was out of repair and that notice actual or imputed of the existence of disrepair was not established. Mr. Justice Stuart, dissenting, held that because the municipal corporation knew that the sidewalk was being crossed continually by vehicles the place in question had the combined character of a sidewalk and crossing of a highway and should have been kept in a state of repair suitable to that character. He found that such a state of repair was not maintained. He also held that, having regard to such user and the character of the construction of the sidewalk, the city was called upon, if it did not desire to reconstruct so as to make the place suitable for a crossing for vehicles, to exercise greater vigilance in discovering breakages.

By its charter (sec. 507) the City of Edmonton is required to keep sidewalks constructed by it in a reasonable state of repair having regard to the character of the highway and the locality. This duty is imposed to ensure the safety of persons lawfully using the sidewalk

and a breach of it entails liability in damages to such persons when injured in consequence: *City of Vancouver* v. *McPhalen*(1). It must have been obvious to anybody giving the matter a moment's consideration that the user of a crossing over a sidewalk constructed as was that in question might result in its breaking down at any time. The user was certain sooner or later to put the sidewalk into a state of disrepair. I think it is not imposing upon the municipality an obligation greater than the legislature intended to hold that the duty to keep in a reasonable state of repair involves the duty to prevent, as far as reasonably possible, the continuance of known conditions which will bring about a state of disrepair, and, if the continued existence of such conditions is not prevented, to take precautions in the nature of extra inspection commensurate with the likelihood of a dangerous state of disrepair arising. Probably the safest and least expensive method of discharging its duty to keep in repair would have been to construct a proper crossing at the place in question. But, without holding that the municipality was under an obligation to construct such a crossing, or that failure to institute prosecutions for breaches of its by-law forbidding the crossing of unprotected sidewalks rendered it liable for damages, having knowingly permitted the continuance of forbidden and dangerous vehicular traffic involving risk of a break in the sidewalk at any moment, I think it cannot escape liability for injury sustained in consequence of a break occasioned by such traffic, after it had been allowed to remain unrepaired for more than a day. Whether such liability would arise in the case of an accident happening immediately, or very shortly, after the occurrence of a

(1) 45 Can. S.C.R. 194.

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break it is not necessary now to determine. It may be said that this implies an obligation of at least daily inspection of a place such as that in question which would be too onerous to impose upon the municipality. But the necessity for such an inspection could have been so easily avoided, either by putting in a comparatively cheap crossing, which the city might have done on its own initiative, or by taking steps to prevent vehicular traffic crossing the sidewalk, which need have entailed no great trouble or expense, that the municipality can scarcely be heard to complain of the burden so imposed. Because, in my opinion, under the special circumstances in evidence it failed to take adequate measures for the fulfilment of its statutory duty to keep the sidewalk in a reasonable state of repair as a sidewalk, I would hold the defendant corporation liable.

The appeal should be allowed with costs in this court and in the court appealed from and the judgment of the learned trial judge should be restored.

Appeal allowed with costs.

Solicitors for the appellant: *A. G. MacKay & Co.*
Solicitor for the respondent: *J. C. Bown.*

THE LAKE CHAMPLAIN AND ST. LAWRENCE SHIP CANAL COMPANY (SUPPLIANTS) .... } APPELLANTS;

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*Nov. 2.
*Dec. 30.

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Public work—Incorporation of company—Construction of canal—Governor-in-Council—Approval of plans—Discretion—Refusal to Approve—Right of action.

The statute 61 Vict. ch. 107 (D.) incorporated a company for the purpose of constructing and operating a canal between the St. Lawrence and Richelieu Rivers. Section 22 provided that before the work of constructing the canal was begun, the plans, etc., were to be approved by the Governor-in-Council.

Held, affirming the judgment appealed from (16 Ex. C.R. 125), Fitzpatrick C.J. and Brodeur J. dissenting, that the refusal of the Governor in Council to approve plans submitted did not give the company a claim for damages which could be enforced against the Crown.

Per Duff J. that the refusal to consider the plans did not give birth to a claim for which a petition of right lies.

Held, per Fitzpatrick C.J. and Anglin and Brodeur JJ. that the Governor in Council had no discretionary power to refuse approval of the plans on the ground that the undertaking authorized by Parliament was opposed to public policy.

APPEAL from a judgment of the Exchequer Court of Canada(1), dismissing the suppliant's petition of right,

By the petition of right the appellant company claimed damages for failure of the enterprise authorized by the Act of Parliament, 61 Vict., ch. 107.

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

(1) 16 Ex. C.R. 125.

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owing to the refusal or omission of the Governor in Council to approve the plans submitted. The only question dealt with by the Exchequer Court was whether or not such refusal entitled the company to claim damages and, holding that it did not, the court dismissed the petition. The suppliants appealed to the Supreme Court of Canada from that judgment.

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

Newcombe K.C., Deputy Minister of Justice, for the respondent.

THE CHIEF JUSTICE (dissenting).—From the reasons for judgment of Mr. Justice Cassels it appears that counsel for the suppliant and for the Crown came to an understanding that "the question of law" should be first argued. If there was any written consent to this course it is not in the record and I suppose the learned judge was therefore right in saying that the question was as to whether or not on the allegations in the petition the suppliant was entitled to succeed. It is a demurrer to the Petition of Right.

Now I entertain no doubt that the statute 61 Vict., ch. 107, made a good and valid grant to the suppliant of the rights in respect of which the claim is advanced. The condition that the approval of the plans by the Governor in Council should be obtained before the works were commenced was a purely administrative matter. By this I mean that there was committed to the Governor in Council no power to consider the policy or advisability of the grant, that being a question which Parliament had undertaken to decide for itself. Parliament did not, as it often does, authorize the Governor in Council to take such

action as he might think fit, leaving it to him to consider the matter and decide whether to make the grant or not. He has therefore no power to nullify the grant or in effect repeal the statute by an arbitrary refusal to exercise the power of approving the plans which for the proper carrying out of the works Parliament in the public interest has vested in him. It is said in the statement of defence that His Majesty did not refuse to approve the plans

> and if His Majesty did refuse such approval, the refusal proceeded upon high political grounds of public policy which were committed to the consideration of the responsible advisers of His Majesty.

I do not think the statute committed anything of the sort to His Majesty's advisers.

I cannot doubt that the grant made by the statute is in the nature of a contract and it is one of the highest order, His Majesty, in the words of the statute, granting by and with the advice and consent of the Senate and House of Commons.

The provision for approval of the plans is a common one in such cases; it has reference only to the way in which the rights granted are exercised; the works proposed to be carried out must be reasonably suitable and proper and not opposed to public interests.

It is scarcely necessary to refer to cases in which such a provision as this is to be found. The approval is sometimes confided to the Governor in Council and at others to the heads of government departments especially concerned or others. The general railway Act is an instance. By sections 157-159 the company have first to submit to the Minister of Railways and Canals a map and information as therein mentioned for his approval, and after that has been obtained to deposit with the Board of Railway Commissioners

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a plan, profile and book of reference for their sanction; in section 168 there is the like provision that the company shall not commence the construction of the railway until such sanction has been obtained as in the statute with which we are here concerned.

The Minister of Railways or the Board may be of opinion that the railway is not wanted, is even objectionable, it may parallel another railway so as to render it impossible for either to be successfully operated, but they cannot by refusing their approval of the plans prevent the construction of the railway which Parliament has authorized.

We may usefully compare the provision in this case with sec. 7 of the Navigable Waters Protection Act, R.S.C., 1906, ch. 115, which provides that

the local authority, company or person proposing to construct any work in navigable waters, for which no sufficient sanction otherwise exists, may deposit the plans thereof * * * and may apply to the Governor in Council for approval thereof.

Under this section the Governor in Council might be in a different position with regard to giving or withholding his approval of the plans according as he might think the proposed work desirable or not.

Counsel for the respondent has urged that the Crown is not mentioned in the statute and therefore by section 16 of the "Interpretation Act" is not bound. I do not think this section of the "Interpretation Act" has any application in such case; the section deals solely with the *rights* of His Majesty which, it provides, shall not be affected by any Act unless it is expressly stated therein that His Majesty shall be bound thereby. In the respondent's factum the Governor in Council is spoken of as the responsible adviser of His Majesty's Government for the Dominion of Canada, but I think this is rather absurd. The Gover-

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nor in Council is the Governor-General acting with the advice of the Privy Council for Canada. This is the only Government of Canada I know of and it would therefore seem that the Governor in Council must be his own responsible adviser, I do not know who else he can be said to advise. I certainly think that the Governor in Council must here be considered as meaning the same thing as the Crown. The Governor-General carries on the Government of Canada on behalf of and in the name of the Sovereign (the "Interpretation Act," sec. 34, paragraphs (6) and (7)). If this were an English statute, we should have a grant by the King in Parliament subject to the approval of the plans by the King in Council.

Then I think that the King in Parliament having made this contract was bound to carry it out and to act with reference to the condition in accordance with the purpose thereof which certainly was not to destroy the grant; the advisers of the Governor in Council should rather in good faith have facilitated than opposed the undertaking.

This court could not undertake to review any decision at which the Governor in Council in the exercise of his discretion might arrive or weigh the reasons for the same. It is, however, another thing, that he should neglect or refuse to exercise the power of control reserved to him.

In the statement of defence the Attorney-General has pleaded a number of inconsistent defences as of course he was entitled to do, but in the 9th paragraph he alleges that

The suppliant did not submit to the Governor in Council for approval any plans, locations, dimensions or necessary particulars of the canals and works described or authorized to be constructed by the said statute, ch. 107 of 1898, nor were any such plans, locations, dimen-

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sions or particulars submitted for the approval of the Governor in Council.

Now this, assuming the facts alleged in the petition, is quite incompatible with there having been any exercise by the Governor in Council of the discretionary power reserved to him by Parliament.

For the purposes of the present proceedings, however, we can only look for the facts to the allegations in the Petition of Right and it is in the 14th paragraph alleged that the Crown without any reason has refused approval. It may be as the judge of the Exchequer Court says that this may mean without any reasons furnished to the suppliant, but I do not think this makes any difference. It may be that any defect in or objection to the plans could easily have been remedied or overcome and the suppliants were certainly entitled to have an opportunity of making such alterations.

If it was not to the mode of carrying out the works but to the undertaking being proceeded with at all, that there was objection, that, as I have said, was not a matter within the power of the Governor in Council at all.

The judge of the Exchequer Court says:—

> The Crown certainly would not be liable for the tort or wrong of the Governor in Council. It is too clear for argument that the Crown is not liable for damages in tort.

Whilst there is no question that in England the Crown is not liable, I am not sure that the doctrine is applicable so strictly in this country. We have the authority of the Judicial Committee in the case of *Farnell* v. *Bowman*(1), for saying that if the maxim "The King can do no wrong" were always applied to colonial

(1) 12 App. Cas. 643.

governments, it would work much greater hardship than it does in England. It was said in the judgment:—

> Justice requires that the subject should have relief against the Colonial Governments for torts as well as in cases of breach of contract or the detention of property wrongfully seized into the hands of the Crown.

In such a case as the present I think the courts may well be disposed to lean in favour of affording relief to the suppliant.

That the claim is a meritorious one, seems clear. It would surely be an injustice if the suppliants after incurring large expenditures on the faith of a Parliamentary grant were to be deprived of all their rights not through any defect in their plans but because the Government did not approve of the undertaking and dissenting from the decision of Parliament could by withholding approval of the plans prevent altogether the carrying out of the works.

If necessary I should be prepared to hold that the suppliant is entitled to claim under sec. 20, paragraph (*d*), of the Exchequer Court Act which gives to the court jurisdiction over

> every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council.

I am of opinion that the allegations in the petition disclose a good ground of action and the appeal should be allowed.

IDINGTON J.—The appellant was incorporated by Parliament but so far from giving its creature any right to complain it only gave a right to prosecute its proposed undertaking as the Governor in Council might, as a matter of public policy, see fit to approve

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of either as to location or dimensions or plans of construction.

Section 22 of the "Incorporation Act," which is clear and explicit in these regards, is as follows:—

Before the company shall break ground or commence the construction of any of the canals or works hereby authorized, the plans, locations, dimensions, and all necessary particulars of such canals and works shall be submitted to and approved by the Governor in Council.

It seems idle to contend that such a conditional proposal as Parliament has sanctioned thereby constitutes a contract. And it seems equally absurd to contend that the Governor in Council entrusted by Parliament with such a duty can be said to have committed a tort of any kind, much less a tort for or in respect of which a petition of right would lie, in discharging the duty thus assigned by withholding the approval sought by appellant.

The case thus presented falls very far short of coming within the scope of any of the decisions relied upon by appellant or the principles upon which any of them proceeded.

The appeal should be dismissed with costs.

DUFF J.—The suppliant company was incorporated in 1898 (61 Vict. ch. 107) with authority to construct a ship canal between the St. Lawrence and the Richelieu Rivers and by section 22 of its special Act it was enacted:—

Before the company shall break ground or commence the construction of any of the canals or works hereby authorized, the plans, locations, dimensions and all necessary particulars of all such canals and works shall be submitted to and approved by the Governor in Council.

The relevant allegations of the petition are those numbered 10 to 14 inclusively; they are as follows:—

10. That on or about the 30th of May, 1911, the plans, locations, dimensions and all necessary particulars of such canals and works were

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submitted to be approved by the Governor in Council, and duplicates of the same were deposited with the Department of Railways and Canals and the Department of Public Works in Ottawa.

11. That since the 30th of May, 1911, your suppliant has repeatedly requested the approval of the plans by the Governor in Council.

12. That all informations requested by the Department of Railways and Canals and the Department of Public Works in Ottawa have been duly furnished.

13. That in granting a charter to your suppliant for the construction of said canal, the Crown took the engagement and obligation to approve the plans made in conformity with the charter.

14. That the plans, locations, dimension and all necessary particulars for such canals and works were made in conformity with the requirements of the Secretary of War of the United States, and, notwithstanding the repeated and incessant request of your suppliant for approval, the Crown without any reason has refused to do so.

By the statement of the defence in paragraph 12 an objection was taken that the alleged refusal of the Governor in Council to approve the suppliant's plans

does not constitute a cause of action for which a petition of right will lie against His Majesty.

The point of law raised by this objection was argued on the first day of the trial and being decided adversely to the suppliant by the learned judge of the Exchequer Court, no evidence was given.

The allegations of the petition are ambiguous; and strictly, in accordance with the settled rule for the construction of pleadings, they should be construed against the suppliant. The suppliant's case must be taken on the pleadings so construed to rest upon an allegation that the Governor in Council has refused to approve plans submitted which ought to have been approved because they were sufficient and satisfactory. It requires no argument to shew that such an allegation if well founded would afford no ground of action against either His Majesty or the Governor in Council; it could not be argued that a decision of the Governor in Council not to approve plans submitted under section 22 is open to review in the courts.

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The decision in the Privy Council in *McLean* v. *The King*, 10th July, 1908, is a sufficient authority for holding that the question of the sufficiency of the allegations in a petition of right to disclose a cause of action, ought not to be disposed of as a preliminary question of law on a narrowly technical construction of a badly framed pleading but that for the purpose of such a question the suppliant should be held to be entitled to prove any cause of action disclosed upon any reasonable construction of the pleading. This appeal ought, I think, to be decided on the assumption that the pleading contains an allegation that the suppliant duly submitted its plans for the approval of the Governor in Council, but that the Governor in Council refused and refuses to exercise its authority under section 22 to consider such plans. The question to be determined therefore is whether such an allegation is sufficient to support the suppliant's claim by petition of right against His Majesty.

The question of substance argued before us was whether it can be affirmed that the enactment under consideration gives rise to a duty to the suppliant which (in the language of Cockburn C.J. in *The Queen* v. *The Lords Commissioners of the Treasury*(1):—

has to be performed by the Crown;

but assuming such a duty to be created the first point which naturally occurs to one is, does a petition of right lie against His Majesty for the recovery of unliquidated damages arising from the non-performance of that duty? I do not intend to decide the point because I do not understand the objection to be taken by counsel for the Crown who with fairness and can-

(1) L.R. 7 Q.B. 388.

dour, when the difficulty was mentioned, referred to section 20, sub-section (*d*), of the "Exchequer Court Act;" I do not think it is within the province of the court to insist in such proceedings upon technical objections which counsel representing the Crown does not (and quite properly) consider it to be his duty to raise. (*Dyson* v. *Attorney-General*(1)).

Does section 22 then give rise to a duty that

has to be performed by the Crown,

which is a duty to the suppliant of such a nature as to be capable of vindication in His Majesty's courts? The suppliant's argument might in outline be stated in this way. The special Act is a contract between Parliament (the King in Parliament) and the promoters; section 22 imposes a condition with which the appellant is bound to comply in order to avail itself effectively of the rights assured to it by this legislative contract and the performance of that condition (getting its plans approved by the Governor in Council) being impossible without concurrent action by the Crown represented by the Governor in Council in considering the plans submitted for approval, the obligation is, on a familiar principle (*Mackay* v. *Dick*(2), at page 263, undertaken by the Crown to do that which is necessary to be done in order to enable the suppliant to fulfil the condition upon which its rights depend.

It should be observed that His Majesty is not mentioned *eo nomine* in the 22nd section, the provision upon which this argument rests; and it is sometimes not easy to ascertain where powers are by statute vested in a minister of the Crown whether the depositary of the powers is thereby constituted the

(1) [1911] 1 K.B. 410. (2) 6 App. Cas. 251.

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"agent" of the Legislature (see the argument of Sir George Jessel, L.R. 7 Q.B. at page 389) to exercise those powers, an instance of that being *Re Massey Manufacturing Co.*(1); see also *Irwin* v. *Gray*(2) and *Fulton* v. *Norton*(3); or whether the powers are vested in the Crown to be exercised through the instrumentality of the minister, in other words, whether or not the Legislature has named the donee of the power in his capacity of servant of the Crown. (See an interesting discussion in Maitland's Constitutional History, page 415 *et seq.* and Lowell Government of England vol. 1 pages 48 and 49.) So here there might no doubt be room for an entertaining argument upon the point whether the authority to examine and approve under section 22 is an authority vested in His Majesty to be exercised by the Governor in Council, or an authority vested in the Governor in Council as "agent" of Parliament. The reasons which have led me to a conclusion adverse to the appellant's contention would apply with equal force in either view; and I shall assume in favour of the appellant that the authority given by section 22 is given to His Majesty, the Governor-General being the representative of His Majesty for exercising the powers conferred on the advice of His Majesty's Privy Council for Canada.

Now I am far from saying (where a contract between the Crown and a subject conditionally confers upon the subject rights which become absolute only upon the performance of some act on the part of the Crown) that the principle of *MacKay* v. *Dick*(4) and *Pordage* v. *Cole*(5), may not in a proper case come into

(1) 13 Ont. App. R. 446.
(2) 3 F. & F. 635.
(3) [1908] A.C. 451.
(4) 6 App. Cas. 251.
(5) 1 Wms. Saun. 548.

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play; but in considering whether an implied obligation is laid upon the Crown under a written contract the constitutional relation between the Crown and Parliament and the exigencies of the public service may be the determining elements of the controversy (see *Churchward* v. *The Queen*(1), at pages 199 and 200). Although it is a common practice for some purposes to read the provisions of Acts of Parliament such as that before us as if they were stipulations in a contract between the promoters on the one hand and Parliament as representing the public and particular individuals who may be affected, on the other hand, it is necessary sometimes, nevertheless, for the sake of accuracy to insist upon the fact that such statutes are not contracts. As Lord Watson said in *Davis* v. *Taff Vale Rly. Co.*(2), at page 552,

> Such statutes differ from private stipulations in this essential respect that they derive their existence and their force not from agreement of the parties, but from the will of the Legislature.

Though speaking broadly the promoters may be deemed to undertake in effect that "they shall do and submit to whatever the Legislature empowers and compels them to do;" Lord Eldon in *Blakemore* v. *Glamorganshire Canal Navigation*(3), at page 162; still

> though commonly so spoken of Railway Acts are not contracts and ought not to be construed as such.

(Court of Exchequer Chamber, *York and North Midland Railway Co. v. The Queen*(4), at page 864); Parke and Creswell JJ. were members of the court of nine who delivered the judgment in which this sentence occurs. The statute before us confers, conditionally of course,

(1) L.R. 1 Q.B. 173.
(2) [1895] A.C. 542.
(3) 1 My. & K. 154.
(4) 1 E. & B. 858.

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upon the suppliant company wide powers which in their exercise must necessarily in some instances affect the rights of all His Majesty's subjects, and in others the rights of particular individuals. The statute imposes upon the promoters no obligation to go on with the undertaking and no contract on their part to exercise the powers which are given to them in words that are permissive only, ought to be implied. *York and North Midland Railway Co.* v. *The Queen*(1). I think there is no authority which goes the length of requiring me to hold and I know of no principle that would justify me in holding in these circumstances that section 22 ought to be given exactly the same construction and effect as if it were a term of a contract between the Crown and the promoters.

Regarding then the relevant provisions of the statute as legislative enactments simply from the point of view of the Crown, is there anything in section 22 when read either alone or with the other provisions of the statute, that has the effect of creating a juridical obligation which inheres in the suppliant and the incidence of which rests upon either His Majesty or the Governor in Council? Section 22, as I have already said, involves no doubt a grant of power to examine and either to approve or to reject; but is a duty to the suppliant to exercise the power also created cognizable by His Majesty's courts? In *Julius* v. *Bishop of Oxford*(2), there was much discussion by the great lawyers who decided the appeal upon the subject of the indicia which may be considered to point to the conclusion that a grant of authority by the Legislature is coupled with a duty to exercise that authority. We need not, for the purposes of this appeal, follow

(1) 1 E. & B. 858.
(2) 5 App. Cas. 214.

the discussion closely. At page 235 Lord Selborne observes with regard to the question before the House—whether there was an enforceable duty to exercise a power admittedly conferred—that

> in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power.

And he adds:—

> The present question is, whether it can be shewn, from any particular words or provisions of the "*Church Discipline Act*," or from the general scope and objects of that statute

that such a duty had in fact been created. The observations of Lord Cairns at pages 225 and 227, and of Lord Penzance at pages 229, 230, 231 and 232, shew that the question of duty or no duty was considered to be governed and determined by the answer to the question thus put by Lord Selborne. So the question to be answered on this appeal is whether from the language, scope and objects of this enactment an intention to create a duty in the sense above indicated can properly be inferred.

It may be noted that legislation investing the Governor in Council with special powers ought to be considered with reference to the well-known practice in this country, that is to say, that the council by whose advice in the passing of orders in council the Governor-General acts invariably, is composed exclusively of members of the Government for the time being, the Governor in Council being therefore *de facto* the responsible executive.

My conclusion is, that the body in whom the power is reposed being the executive directly responsible to Parliament, and there being such remedy for grievances of persons alleging non-execution of powers by the executive as the existence of this responsibility

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entails, one cannot from the fact itself of the power being given legitimately infer that a legal obligation is imposed on the Governor in Council (either as representing His Majesty or otherwise) in favour of the persons interested in having the powers exercised. I am unable to convince myself, apart altogether from anything to be found in the "Interpretation Act," that such an inference could be said to be necessary, and it appears to me that such an obligation ought not to be held to be imposed upon either His Majesty or the Governor in Council unless either one finds express words creating it, or the intention to do so is necessarily implied in the provisions of the enactment to be construed.

The appeal should be dismissed with costs.

ANGLIN J.—The facts of this case and the grounds of the suppliant's claim sufficiently appear in the judgment of the learned judge of the Exchequer Court. With him I am unable to find in the appellant company's "Act of Incorporation" (61 Vict., ch. 107) a contract by the Crown, for breach of which it would be liable in damages, that the Governor in Council would approve of plans of its projected works prepared in conformity with the powers conferred on it. The company's privilege or franchise is granted subject to the condition that before exercising its power it shall obtain the approval of the plans for its works by the Governor in Council. With that condition it has been unable to comply—by reason, as it alleges, of the refusal of the Governor in Council to approve plans submitted by it. It complains that the powers conferred by its "charter" have consequently lapsed entailing a loss of five million dollars, which it seeks to recover from the Crown by a Petition of Right.

If there was such a refusal of approval, according to the statement of defence of the Attorney-General, it was based not upon a consideration of the plans disclosing that the projected works were not within the authorization of the statute or that the method of construction proposed was either defective or otherwise objectionable, but

> upon high political grounds of public policy which were committed to the consideration of the responsible advisers of His Majesty.

The Attorney-General submits that the Exchequer Court

> has no jurisdiction to adjudicate upon the quality of the decision of the Governor in Council in the execution of a statutory power conferred in the public interest.

If the statement that any refusal of approval of plans that there may have been

> proceeded upon high political grounds of public policy

means that in so refusing approval the Governor in Council assumed to exercise a discretionary power to determine that it was not in the public interest that the appellants' undertaking, authorized by Parliament, should be proceeded with, I can only say that I have failed to find in the statute anything which confers such a discretion upon the Governor in Council or which warrants withholding on such a ground approval of plans duly submitted. Section 22, invoked by the respondent, in my opinion, does not bear the construction which counsel representing the Attorney-General sought to give to it. The company's right to exercise certain special powers conferred on it, such as improving, widening, deepening and straightening the Richelieu River and the Chambly Canal (sec. 20), and the taking of the Chambly Canal, or any lock, dam, slide, boom, bridge or other works, the property of the Government of Canada (sec. 22), is expressly made

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subject to the consent of the Governor in Council, and, in the case of an appropriation of any such public works, to terms to be agreed upon between the company and the Government. It is alleged in paragraph 16 of the statement of defence that the company's plans as submitted involved the exercise of these special powers. But this is denied in the suppliant's reply and in dealing with the question of law now before us the truth of that denial must be assumed. If it were not abundantly clear from the terms in which sec. 22 itself is couched, as I think it is, that it was not meant thereby to vest in the Governor in Council a discretionary power entirely to prevent the prosecution of the suppliants' undertaking by refusing on grounds of public policy to approve of plans duly submitted by them, which had been prepared in conformity with the statute and in compliance with all proper requirements, any possible doubt on that point would be removed by a comparison of those terms with the explicit provision made by Parliament in sections 20 and 21 in regard to matters as to which it was intended that the Governor in Council should exercise such control over the exercise of the company's powers.

But assuming that by sec. 22 Parliament meant to impose on the Governor in Council the duty of approving plans submitted to it for works authorized by the statute, prepared in conformity with any pertinent regulations or requirements of the Department of Railways and Canals or of the Governor in Council and such that any public interest in regard to the location of the works and the mode of their construction would be fully protected, it does not at all follow that it was intended that, upon failure to discharge that duty, the Governor in Council should be amenable to process in the Exchequer Court, still less that the Crown

should be answerable to the company in damages. Assuming both the duty and its breach, the Governor in Council is, in my opinion, answerable therefor only to Parliament, which can afford an adequate and effective remedy to the suppliants should "the high grounds of public policy" upon which the Governor in Council may have proceeded not commend themselves to it and should it find that its will has been thwarted by the refusal or failure to approve of the suppliants' plans. It seems to me to be contrary to our conception of responsible government that the action of the executive department in such a matter as this should be subject directly or indirectly to the control of the courts.

BRODEUR J. (dissenting).—I am of opinion that this appeal should be allowed for the reasons given by the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellants: *Brosseau & Brosseau.*
Solicitor for the respondent: *E. L. Newcombe.*

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*Nov. 8.
*Dec. 30.

ISIDORE HOCHBERGER AND OTHERS (PLAINTIFFS) .... APPELLANTS;

AND

MOSES RITTENBERG (DEFENDANT). RESPONDENT.

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

Debtor and creditor—Agreement for extension of time—Preference—Public order—Advantage to creditor—Security for debt—Conflict of laws—Lex loci.

Where a debtor obtains the assent in writing of his creditors to an extension of time for payment of their respective debts, upon an undertaking the he will not "give a preference" without their consent, a prior secret arrangement by which one of such creditors obtains security and more favourable terms of payment than that provided in the agreement is void as a fraud against the other creditors and as against public order.

The debtor carried on his business in Toronto where the deed granting the extension of time was drawn and executed. H., a New York creditor, obtained security by means of the debtor's promissory notes, drawn up and made payable in Toronto and indorsed by the defendant, residing in Montreal. The action on the notes was brought, in Quebec, against the indorser.

Held, per Idington and Anglin JJ., that the case should be decided according to the law of Ontario if there is any difference between it and the Quebec law on the subject-matter.

Judgment appealed from (Q.R. 25 K.B. 421), affirmed.

APPEAL from a decision of the Court of King's Bench, Appeal Side, for the Province of Quebec(1), affirming the judgment at the trial in favour of the defendant.

In the spring of 1913, one Grossman, a jeweller of the City of Toronto and brother-in-law of respondent, having become financially embarrassed in his business,

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

(1) Q.R. 25 K.B. 421.

called a meeting of his principal creditors, with a view of obtaining from them an extension of time.

After some *pourparlers* with representatives of creditors present they all agreed to an extension of delay and a memorandum of extension of time was drafted and was submitted to the above-mentioned creditors and signed by Grossman, and his creditors, with the exception of appellants whose representative was not authorized to sign.

Shortly afterwards, Julius Hochberger, one of the appellants, came to Toronto, for the purpose of ascertaining the financial standing of their debtor, with special instructions as regards settlement to be made with him. During the course of the discussion, which took place with Grossman alone at Toronto, Julius Hochberger refused to consent to the proposed extension unless appellants' claim was secured and the promissory notes then offered in settlement be made at shorter dates.

The promissory notes sued upon in this case having been prepared by Julius Hochberger, Grossman sent them to respondent, at Montreal, with a request to indorse them. Respondent returned the notes to Grossman refusing to indorse unless he got more particulars about them.

Having been informed by Grossman that plaintiffs, appellants, would not consent to the extension unless their claim was secured, and knowing that Max D. Eisen, the representative of plaintiffs, in Toronto, had previously promised Grossman that Hochberber would supply him with certain goods to carry him along, and replenish his stock, he then and there consented to indorse the notes, not being told that appellants were to sign the memorandum of agreement for extension.

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Defendant, respondent, having returned the promissory notes to Grossman, at Toronto, never heard anything further about them until the following January (1914), when Grossman, being incapable of meeting his payments, had to make an abandonment of his property for the benefit of his creditors. An action was then brought against respondent as indorser.

Lafleur K.C. and *Lamothe K.C.* for the appellants.

R. G. deLorimier K.C. and *Amie Geoffrion K.C.* for the respondent.

THE CHIEF JUSTICE.—This appeal should be dismissed with costs.

The promissory notes sued on were obtained in execution of an agreement between the appellants and their insolvent debtor.

The defendant, indorser of the notes, was a brother-in-law of the maker, Grossman, a jeweller, of the City of Toronto, and the appellants were amongst the latter's creditors. The notes were given to induce the appellants to sign Grossman's deed of composition.

As Best C.J. said in *Knight* v. *Hunt*(1), at page 433, these agreements for composition with creditors require the strictest good faith. The principle to be drawn from all the cases on this subject is

that a man who enters into an engagement of this kind is not to be deceived.

It has been argued that here the debtor is not injured, nor the funds for the other creditors rendered less available, because the indorsation given and sued on was that of a third party who took no interest in the estate, but as the Chief Justice said in *Brigham* v. *Banque Jacques Cartier*(2), at page 436:—

(1) 5 Bing. 432. (2) 30 Can. S.C.R. 429.

Upon a principle well established by the English courts such a payment by a third person is just as much a fraud on the general body of creditors as a payment or an agreement to pay by the insolvent debtor himself: *Wells* v. *Girling*(1); *Knight* v. *Hunt*(2); *Bradshaw* v. *Bradshaw* (3); *McKewan* v. *Sanderson*(4); *Re Milner*(5).

Pollock on Contracts (7 ed.), 293.

The one question which always remains is whether the judgment of the creditors has been influenced by the supposition "that they are treating on terms of equality as to each and all." This is not a case of a gratuitous gift made after composition. Here there was a previous secret understanding that the appellants should receive security for their debt and a direct advantage over all the others who were contracting on the assumption that all were being treated alike. The notes sued on were given in pursuance of an agreement which was void as made in fraud of the other creditors of Grossman: Art. 990 C.C.; see also *Ex parte Milner*(5).

IDINGTON J.—The appellants sued the respondent as indorser of six or seven promissory notes, remainder of ten or a dozen such, made by one Grossman and indorsed by respondent in order to satisfy the demands of appellants upon said Grossman, who had asked them to join in an agreement he was trying to obtain from a half dozen of his chief creditors for an extension of time. The agreement, as drawn up, had named one Eisen as one of the creditors intended to execute the agreement.

Eisen it turned out had no authority to sign being only an agent of the appellants.

This circumstance tends to confuse matters and the most has been made thereof.

(1) 1 Brod. & Bing. 447.
(2) 5 Bing. 432.
(3) 9 M. & W. 29.
(4) L.R. 20 Eq. 65.
(5) 15 Q.B.D. 605.

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But as appellants signed the agreement and Eisen did not and there can be doubt of what was intended to have been accomplished by the substitution of appellants for Eisen in the way of signing and in fact I think was accomplished, the agreement should be treated as one of the ordinary kind for an extension by creditors of time to a debtor, who otherwise might be forced to make an assignment as an insolvent.

On such basis I agree with the late Mr. Justice Dunlop's construction of the clause in said agreement which reads as follows:—

> The first party agrees that he will not during the currency of this extension and until these liabilities are paid off give any preference or security on any of his assets no matter where situate without the consent of the second parties.

What was done was clearly a preference, and none the less obnoxious because an ingenious method was resorted to of extracting something from the assets without the assent of other creditors.

It was circuitous but partially effective.

The notes given on the basis of the extension were to have been, and I think in fact were, for three, six, nine and twelve months.

The appellants got, in substitution thereof, notes spread over some twelve months, indorsed by respondent, divided into equal sums but payable monthly. Thereby, unless (which is not pretended) the money could be conceivably got elsewhere than out of the debtor's assets mentioned in above clause, the appellants got an improper advantage over others they held themselves out as joining.

Then apart from the interpretation of the agreement the giving these notes was illegal.

It may be worth while to let those people, and others inclined to do the like, know what Vice-Chan-

cellor Malins, an able English judge, thought was the law. He, in the case of *McKewan* v. *Sanderson*(1), at page 234, spoke thus:—

I give no opinion as to whether this is a proper case for law or equity, and I give no opinion as to the law or the equity. That will have to be considered hereafter; but the ground of this plea is that there was an improper arrangement between the debtor and his creditor to the detriment of the other creditors, and the doctrine of this court is appealed to which was laid down so repeatedly by *Lord Eldon*, and finally in the case always referred to, of *Jackman* v. *Mitchell*(2). It is a doctrine founded on the soundest principles, namely, that whenever there are proceedings in bankruptcy or insolvency, or any arrangement between a debtor and his creditors generally, and one of the creditors stipulates either for the payment of a greater dividend to him than is paid to the other creditors, or for any collateral advantage whatever, even such as giving the right to purchase a horse, or any advantage whatever not common to the creditors, any payment made will be ordered to be repaid, any security given will be ordered to be given up, and this court will treat the whole thing as fraudulent against the other creditors; and anything done in favour of the creditor who obtains this advantage will be set aside by this court. That principle has been frequently acted upon. I refer to *Jackman* v. *Mitchell*(2), because it has been cited, but *Geere* v. *Mare*(3), is a case on the point at law; and finally, it was very much considered by Vice-Chancellor Stuart in *Mare* v. *Sandford*(4), which, as well as some other cases, arose under the same bankruptcy as *Geere* v. *Mare*(3).

The case is adopted, and cited with many others, by Sir Frederick Pollock at page 238 of his work on contracts, when dealing therein with the subject of fraudulent or illegal contracts of this character.

"Against public policy" is, I think, in this connection but another name for fraud. I agree with the law as laid down in what I quote from Malins V.-C. and hold the promissory notes sued upon herein are of the kind he describes and subject to the legal consequences he suggests.

They furnish no security upon which any one can recover or should as part of public policy be permitted to recover.

(1) L.R. 15 Eq. 229.
(2) 13 Ves. 581.
(3) 2 H. & C. 339.
(4) 1 Giff. 288.

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I cannot distinguish in principle any difference between a deed of composition and anything else of the like nature, jointly agreed upon by creditors, or a number of them, in case of a common debtor.

The Quebec law I imagine is the same despite the nice distinction said to have been made in France. I also think as the debtor gave the notes in Toronto and all else was done there except possibly the mere signing by respondent, and as it is the indorsement of a promissory note delivered there that is in question, the Ontario law is what should govern, if there is any difference.

The appeal should be dismissed with costs.

DUFF J.—The controversy which has led to this appeal arose out of an agreement, the terms of which are embodied in a memorandum dated the 4th April, 1913, between one Grossman and certain creditors of Grossman who included the appellants.

Grossman being in difficulties arranged with these creditors for an extension of time; there were other creditors whose claims were not included in the arrangement, these claims not being considered of sufficient importance to embarrass Grossman after obtaining the extension arranged for. The memorandum embodying the arrangement was executed on its date by all the parties except the appellants and one Ward. The absence of Ward's signature appears to have been accidental, since he carried out the arrangement in accordance with the understanding that he was a party to it. The appellants executed the document in the following month; and the execution of it by them was procured through an arrangement between themselves and Grossman, that Grossman was to obtain the guarantee of his brother-in-law, the respondent Ritten-

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berg, that the appellants' claim would be paid. The guarantee was given in the form of an indorsement of each of the promissory notes sued upon; and was given and accepted on the understanding that the existence of the guarantee was not to be disclosed—as in point of fact it was not—to the creditors who were parties to the extension agreement.

The respondent's defence is that the agreement to give this guarantee behind the backs of the other creditors participating in the extension arrangement being a fraud on these creditors—the fraud vitiates the agreement and deprives of all legal effect the indorsements given in execution of it.

The memorandum signed by the creditors contains a recital to the effect that the creditors named as parties have executed it; and there can be no doubt that this recital embodies an essential term of the extension agreement which was made on the understanding that the claims of all the creditors named in the instrument as drawn were to be affected by the extension. It is true that the appellants are not mentioned *eo nomine* as parties but their agent is named and it was no doubt the appellants' claim that the parties had in view. It is clearly made out in point of fact, that Grossman, the appellants and the respondent all understood that the appellants' claim was to be brought within the arrangement for giving time and that involved, as it has been many times held, the assumption that they were to stand on an equal footing with all the other parties to the extension. Any advantage, therefore, obtained by them as the price of their participation, which was not made known to the other parties, must be an advantage which they could not retain without departing from the line of conduct marked out in such circumstances by the dictates of good faith. Yet this,

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in view of the agreement between the respondent and Grossman and the appellants, must be held to have been precisely what it was intended the appellants should do. In *Ex parte Milner*(1), it was decided by the Court of Appeal that the essence of a composition arrangement between a debtor and his creditors is equality among the creditors; and that any departure from the course pointed out by this principle by which one creditor seeks to obtain an unconscionable advantage over the others must fail of its object because any arrangement having that as its object is unenforceable as being a fraud upon the other parties to the composition.

It was not suggested that the principle is any less a principle of law in the Province of Quebec than in places where the common law obtains. But it was argued by Mr. Lafleur that the principle has no application in the case of a mere agreement for extension. That is a view I cannot accept, for the core of the matter is that the inculpated transaction is a fraud upon persons to whom in the circumstances the creditor owes a duty of disclosing any such transaction. I cannot concede that the principle of equality or that this duty of disclosure is any less imperative where the creditors give merely an extension of time, than where they give up a proportionate part of their claims; and such being the case the sterility which affects a bargain for a secret advantage where a composition is in question is equally the consequence of a secret bargain having reference to an arrangement for giving time only.

An argument which at first gave me some concern arising out of the last paragraph of the memorandum requires notice. The paragraph is in the following words:—

(1) 15 Q.B.D. 605.

The First Party agrees that he will not during the currency of this extension and until these liabilities are paid off give any preference or security on any of his assets no matter where situate without the consent of the Second Parties.

It was contended by Mr. Lafleur that the preposition "on" connects "preference" as well as "security" with the succeeding phrase "any of his assets" and that consequently the respondent's guarantee is not within the contemplation of this clause. I do not find it necessary to express any opinion upon the point of construction. Assuming Mr. Lafleur's reading to be the right reading, I think, after reflection, that the respondents' rights are not in any way prejudiced by the presence of this clause. The clause, it should be noted, is not primarily directed to securing the observance of good faith among the persons executing the memorandum; it imposes primarily a duty upon the debtor who is a party to the agreement and the result of it is to disable him from giving any preference or security to any of his creditors including, of course, those who were parties to the extension agreement, but including also those who were not parties to it. The clause itself would no doubt, apart from any general principle of law, involve the persons executing the memorandum in an obligation not to concur with the debtor in any conduct which would be in violation of the letter or spirit of it. But the clause is not aptly framed to displace, and the duties and rights expressly created by, or arising by implication out of the clause, do not necessarily displace, the reciprocal obligations of good faith which the law imposes *ab extra* upon the creditors who are parties to the transaction *inter se;* and it would not be right to infer an intention to displace them for the reason already mentioned, namely, that primarily the clause is framed *alio intuito*, namely, to impose an obligation on

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Anglin J.

the debtor; and extends to the claims of all creditors whether parties to the arrangement or not.

I think the appeal should be dismissed with costs.

ANGLIN J.—By executing the agreement made between the debtor Grossman and a number of his principal creditors the appellants represented to the other creditors who were parties to it that they were giving to the debtor an extension upon the terms contained in that agreement, to which the other creditors had bound themselves, and without obtaining any preference or advantage over them. The agreement contained a recital that the creditors named in it had agreed to grant the debtor an extension only on the condition that all of them should join therein. In that agreement the appellants were first represented by their agent Eisen. Eventually they executed it in their own name. But whereas the other parties who executed the agreement accepted from the debtor, without other security, his notes at three, six, nine and twelve months the appellants insisted on their claim being liquidated in monthly instalments and upon payment thereof being secured by the indorsement of the debtor's brother-in-law. When making this arrangement they impressed upon the debtor the necessity of keeping it from the knowledge of the other creditors.

I can see no distinction in principle between an agreement for extension given by his creditors to a debtor and an agreement whereby they forego proportionate parts of their claims. Equality as between themselves and a strict adherence to the terms of the common arrangement with the debtor is an essential element in both cases. On grounds of public policy a secret bargain violating that equality is unlawful

and additional security obtained under it is unenforceable: *Clark* v. *Ritchie*(1); *McKewan* v. *Sanderson*(2). No authority has been cited which upholds a security obtained in distinct violation of the express terms of an agreement made with other creditors such as we have before us. The present case is clearly distinguishable from *Langley* v. *Van Allen*(3), relied on by the appellant. That was a case of seeking to recover for the estate money given by the debtor to a creditor who had insisted on being paid off sooner than the other creditors. This is a case of resisting the enforcement of a security unlawfully taken.

This action was brought in Montreal, no doubt because the defendant resides there. But the notes sued upon were made at Toronto and are payable there. The extension agreement was also made at Toronto where the debtor resided and carried on business. It would therefore seem that the legality of the transaction whereby Rittenberg became an indorser must be tested according to the law of that province, which was duly proved at the trial. It may be observed, however, that a French decision cited by the appellants, reported in D. 69.1.92 and noted in Fuzier-Herman, Rep. Vo. "Atermoiement" No. 106, is there significantly referred to as having been "commandée par l'espèce," and not in conflict with the rule of equality.

The appellant's case, in my opinion, is wholly devoid of merit. The appeal should be dismissed with costs.

BRODEUR J.—Par un acte d'atermoîment daté du 14 avril 1913 entre le débiteur Grossman et certains

(1) 11 Gr. 499. (2) L.R. 20 Eq., 65.
(3) 32 Can. S.C.R. 174.

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de ses créanciers parmi lesquels se trouvaient les appelants il avait été convenu qu'une extension de temps serait accordée au débiteur pour payer ses différents créanciers; et l'une des clauses de ce contrat comportait que le débiteur ne pourrait pas pendant le cours de cette extension

give any preference or security on any of his assets, no matter where situate,

sans le consentement de ses créanciers.

Les appelants malgré cette convention formelle, ont obtenu de leur débiteur des billets endossés par l'intimé. La question est de savoir si cet endossement est légal et ne constitue pas une préférence contraire à l'ordre public.

Les appelants prétendent qu'en vertu de la convention le débiteur ne pouvait pas donner de préférence ou de garantie sur aucun de ses biens mais que le fait pour eux d'avoir obtenu ce consentement ne constituait pas une violation de cette convention.

Cette clause formelle qui se trouve dans l'acte ne pouvait pas permettre aux différents créanciers d'obtenir de leur débiteur des avantages spéciaux. Cette clause, suivant moi, avait pour but d'empêcher le débiteur, pendent l'existence de l'atermoiement, de donner à aucun autre créancier des privilèges ou des garanties sur ses biens. Alors on ne voulait pas que le débiteur qui aurait contracté de nouvelles dettes put donner à ses nouveaux créanciers des faveurs particulières sur les biens qui étaient le gage de ses créanciers antérieurs.

Mais cette disposition particulière du contrat pouvait-elle empêcher les créanciers qui la signaient d'obtenir à leur tour de leur débiteur des avantages particuliers?

Je dis que non.

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La loi exige que tous les créanciers dans les concordats ou dans les atermoiments soient tous mis sur le même pied. Elle proscrit tout avantage consenti à l'égard d'un seul créancier. Fuzier-Herman, verbo "Atermoiement" No. 96. Il est d'ordre public, il est dans l'interêt de la bonne foi des contrats, que ces actes soient faits sans qu'aucun créancier soit plus avantagé que l'autre. C'est là un principe bien établi dans notre droit et qui a été reconnu par la jurisprudence dans la cause de *Brigham* v. *La Banque Jacques-Cartier*(1) où il a été décidé qu'un billet promissoire donné pour garantir le montant d'une préférence est absolument nul.

Les appelants ont tenté de démontrer que les règles concernant le concordat et l'atermoiement étaient différentes et ils ont cité à cette fin une cause rapportée dans Fuzier-Herman, Répertoire, vo. atermoiement, No. 106.

La décision qui est invoquée par les appelants doit être considérée comme décision d'espèce, vu que Fuzier-Herman déclare lui-même qu'il ne faudrait pas la considérer comme contraire à la doctrine qui exige que les avantages consentis à l'égard d'un créancier soient prohibés.

En supposant que la prétention des appelants serait bien fondée sous ce rapport, il ne faudrait pas s'appuyer trop fortement sur les autorités françaises, vu que les dispositions de leur code de commerce diffèrent quelque peu d'avec les dispositions de notre droit. En principe général, les concordats comme les atermoiements doivent être faits avec la meilleure foi du monde entre les différents créanciers qui les signent. Le débiteur alors ne doit pas avantager aucun de ces créanciers; mais ils doivent toujours être maintenus

(1) 30 Can. S.C.R. 429.

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sur le même pied. Il ne doit pas donner à l'un des garanties qu'il ne donnerait pas aux autres, à moins que ces derniers ne soient mis au courant de ces avantages particuliers; et alors tout acte ou endossement qui serait fait par le débiteur et qui serait de nature à détruire cette égalité qui doit exister entre tous les créanciers est suivant moi illégal, contraire à l'ordre public et doit être mis de côté.

Les cours inférieures en sont venues à cette conclusion et les jugements qu'elles ont rendus doivent être confirmés avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *Lamothe, Gadbois & Nantel.*

Solicitor for the respondent: *R. G. deLorimier.*

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*Nov. 9.
*Dec. 30.

ANDREW STUART JOHNSON (DEFENDANT) ... APPELLANT;

AND

FRANCOIS-XAVIER LAFLAMME (PLAINTIFF) ... RESPONDENT.

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

Sale of land—Vente à réméré—Redemption—Term—Judicial proceedings —Art. 1550 C.C.

Article 1550 of the Civil Code does not oblige the vendor, in a *vente à réméré*, to take judicial proceedings for redemption within the time stipulated in the deed. It is sufficient that, within such time, he signifies to the vendee his intention to redeem. Duff and Anglin JJ. dissented.

Judgment appealed from (Q.R. 25 K.B. 464), affirmed.

APPEAL from a decision of the Court of King's Bench, Appeal Side, for the Province of Quebec(1), affirming the judgment at the trial in favour of the plaintiff.

By the respondent's action it was contended that the right to redeem the farm became extinguished on the 20th October, 1914, owing to failure to bring suit to enforce the right of redemption within the term stipulated in the deed of sale.

The Superior Court held that the notification, within the stipulated term, by the respondent of his intention to redeem, prevented his right of redemption from lapsing, even after the expiration of the time. This judgment was affirmed by the Court of King's Bench.

On the 20th October, 1904, one Onésime Laflamme sold to the appellant a farm with the buildings thereon,

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

(1) Q.R. 25 K.B. 464.

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for $600.00 cash, the seller reserving his right to redeem it within ten years, viz.: until the 20th October, 1914, upon repayment of the above sum to the purchaser. The reserve clause reads thus:—

"The said vendor doth hereby reserve in his favour the right to redeem the property above described and sold, any time within ten years from this day, by reimbursing to the said purchaser the said sum of six hundred dollars, together with interest at five per centum per annum, payable yearly up to the full reimbursement of the said sum of six hundred dollars."

The respondent alleged that on 7th November, 1907, Onésime Laflamme conveyed to him his right of redemption of the said farm about which nothing was done until the 19th October, 1914, when the respondent caused to be served on the appellant a protest mentioning the original deed by Onésime Laflamme to him and adding that he had acquired from Onésime Laflamme his right to redeem the farm and calling upon the appellant to accept and receive the sum of $630.00 "en bonne espèce et valeur ayant cours en cette province," under pain of all damages and costs.

The appellant having failed to comply with this request, the respondent, on the 8th January, 1915, brought action against him for the enforcement of the right.

Mignault K.C. and *P. H. Coté K.C.* for the appellant. Effect must be given to the provisions of art. 1550 C.C. according to the plain meaning of the language used without regard to the prior state of the law or opinions of commentators, *Vagliano* v. *Bank of England*(1), at pages 144-5; *Herse* v. *Dufaux*(2); *Abbott* v. *Fraser*(3).

(1) [1891] A.C. 107.
(2) 9 Moo. P.C. (N.S.). 281.
(3) L.R. 6 P.C. 96.

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The action should be returned into court before expiration of the delay and accompanied by *offres réelles*. *Walker* v. *Sheppard*(1). See also *Trudel* v. *Bouchard*(2).

Girouard K.C. and *Méthot K.C.* for the respondent referred to Pothier, Vente, vol. 3, No. 436, Laurent, vol. 24, No. 397, and Mignault, Droit Civil Canadien, vol. 7, page 163.

THE CHIEF JUSTICE.—This is an action brought by the plaintiff, respondent, as assignee of the rights of his brother, Olivier Laflamme, to enforce an agreement entered into between the latter and the defendant, appellant, on the 20th October, 1904.

By that agreement Olivier Laflamme sold to the appellant a lot of land for the price of $600 subject to a stipulation that the vendor reserved to himself the right to take back the property upon restoring the price of it with interest. The stipulation is expressed in these words:—

> The said vendor doth hereby reserve in his favour the right to redeem the property above described and sold, any time within ten years from this day, by reimbursing to the said purchaser the said sum of six hundred dollars, together with interest at five per centum per annum, payable yearly up to the full reimbursement of the said sum of six hundred dollars.

On the 30th November, 1907, the plaintiff bought for the sum of $800 his brother's right to redeem the land, and he has ever since been in possession, paying taxes, interest, insurance and fulfilling all the other obligations of an owner.

On the 18th October, 1914, the plaintiff deposited the amount due under the deed of sale ($600), with interest, in the bank to the credit of the defendant

(1) 19 L.C. Jur. 103.
(2) 27 L.C. Jur. 218.

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and notified him that the money was there at his disposal. On the next day, 19th October, 1914, within the stipulated term a regular tender of the purchase price was made in notarial form. The defendant did not categorically refuse to accept the redemption money but suggested that the offer required further consideration; the words used were, according to the notarial deed: "*Je refuse présentement.*" It would appear as if the intention was to throw the plaintiff off his guard. Not having heard further from the defendant, this suit was brought in January, 1915.

The plea to the action is in substance (*a*) that Ol. Laflamme failed to fulfil the conditions subject to which the right of redemption might be exercised; (*b*) that the tender was irregular and the plaintiff did not represent Ol. Laflamme; (*c*) that the tender did not include the amounts paid by the defendant for insurance, taxes, etc.

Issue was joined on these pleadings. No evidence was given of any failure to comply with the conditions of the deed; the plaintiff himself was the only witness examined; and the case was disposed of by the trial judge in the plaintiff's favour on the written documents.

This would seem to be a very simple case on the pleadings and exhibits and the trial judge decided it on the assumption that the contract, the subject-matter of the action, was an ordinary enforceable agreement. The obligation of the defendant purchaser under that contract was to perform his promise according to its term which was to retrocede the property to his vendor upon payment by the latter of the purchase price within ten years from the date of the sale. Within that period the plaintiff, cessionnaire of the vendor's

rights, offered, in compliance with this undertaking, to pay the purchase price, which the defendant refused to accept. There is no doubt as to those facts. The plaintiff therefore did all that he was bound to do when he tendered payment of the amount due within the stipulated term. But it is said the right of the plaintiff to repurchase must be determined not by the letter of his agreement but by the provisions of article 1550 C.C. which means that the obligation of the vendor is not that set out in the words of his agreement, to reimburse the purchaser the sum of six hundred dollars any time within ten years from the date of the sale, but to bring a suit for the enforcement of his right of redemption within that period. As was said in a very recent case in the Court of Appeal at Renne, France,

> Cette règle (c'est-à-dire la règle de l'article 1662 C.N.-1550 C.C.) n'est pas d'ordre public et s'il est stipulé que dans le délai il faudra payer le prix réel et les accessoires, cette clause doit être observée,

Gaz. Trib. 1914, 1er sem. 2, 254. The clear obligation of the vendor was to reimburse the purchase price with interest at any time within ten years from the date of the sale. Is such a stipulation contrary to public policy, and if not, on what principle can it be said that the obligation created is not that clearly expressed in the agreement, but an entirely different and far more onerous one? When the defendant refused to accept the purchase price as tendered he was guilty of a breach of his obligation. And the plaintiff's right to a retrocession of the property only arose thereafter. It was the plaintiff's right under the agreement to redeem *at any time within ten years*. He had therefore until the last minute of the stipulated term to fulfil his obligation under his agreement which had the force of law over those who were parties to it; *modus*

et conventio vincunt legem. Frank v. *Frank*(1); *Barrett* v. *Duke of Bedford*(2); Brown Legal Maxims 522. Toullier states the rule in these terms:—

> Pour se prononcer sur de telles questions, le juge devra consulter d'abord les termes du contrat et suivre la loi que se sont faite les parties.

De la vente, vol. 2, No. 722.

I can see no reason why we should be concerned with the very learned discussion which we had as to the meaning of article 1550 C.C. But to avoid possibility of doubt that the views of the majority here are entirely in accord with what the Chief Justice below clearly establishes to be the settled jurisprudence of the Province of Quebec, I will deal with the difficulty which is said to arise out of the fact that the action to enforce the plaintiff's right under the agreement was not brought within the ten years. Article 1550 C.C. is relied upon to support the contention that as a result he has lost his rights under the deed of sale and the defendant remains absolute owner of the property.

That article in the French text reads as follows:—

> 1550. Faute par le vendeur d'avoir exercé son action de réméré dans le temps prescrit, l'acheteur demeure propriétaire irrévocable de la chose vendue (C.N. 1662).

It reproduces *ipsissimis verbis* article 1662 of the Code Napoléon. At the time this article 1662 C.N. was incorporated in the Quebec Code to amend the then existing law, the words "son action," *i.e.*, "action de réméré" had been by the French courts and the most eminent text-writers construed to mean that the vendor may use the right of redemption, and do not imply that an action for redemption is necessary (Laurent, vol. 24, para. 397). This was decided by

(1) 1 Chan. Cas. 84. (2) 8 T.R. 602, 605.

the Cour de Cassation as far back as 25th April, 1812. All the cases and references to the text-writers will be found collected in Fuzier-Herman, Code Civil Annoté, under article 1662 C.N. and Revue Trimestrielle de Droit Civil, 1915, at page 181.

Planiol with his usual lucidity explains the effect of 1662 C.N. in two paragraphs which are worth quoting (vol. 2, 1583):—

La déchéance qui frappe le vendeur à l'expiration du délai donne un très grand intérêt à la question de savoir ce que le vendeur doit faire dans le délai qui lui est accordé pour être considéré comme ayant exercé son droit. Des difficultés nombreuses s'élèvent sur cette question, parce que le plus souvent le vendeur attend au dernier moment, et l'acheteur prétend qu'il s'y est pris trop tard. Que faut-il qu'il fasse pour éviter la déchéance?

L'article 1662 ne précise rien: "Faute par le vendeur d'avoir exercé son action de réméré. * * *" Ce *n'est pas d'une action* qu'il s'agit: le vendeur est tenu de faire un *remboursement.* Dans la doctrine on admet en général que le paiement, ou tout au moins des *offres réelles,* sont nécessaires pour qu'il soit bien établi que le vendeur était en mesure d'opérer le rachat, et que l'acheteur seul l'en a empêche. Mais la jurisprudence se montre beaucoup plus facile pour les vendeurs à réméré. Elle se contente d'une simple manifestation de volonté de leur part; le vendeur signifie à l'acheteur par acte extra-judiciaire sa volonté d'user de son droit de rachat. Cela suffit, dit la Cour de Cassation, parce qu'aucune disposition de la loi ne prescrit au vendeur de faire dans le délai fixé soit un paiement soit des offres.

In their Report to the Legislature the Codifiers of the Quebec Code give in article 64 the *time* and *mode* of exercising the right of redemption according to the existing law and then say:—

L'article 64 énonce le temps et la manière d'exercer cette faculté de réméré suivant la loi actuelle. Les commissaires croient que le changement fait par le Code Napoléon dans les règles sur ce sujet les simplifie considérablement et les rend plus convenables dans leur application et leur effet. *Ils ont en conséquence adopté quatre articles du Code qu'ils soumettent comme amendement à la loi actuelle. Ils sont marqués 64a, 64b, 64c, 64d.* Ils limitent l'exercice du droit à dix ans et *astreignent strictement les parties à leurs conventions sans permettre aux tribunaux de les étendre, et sans exiger l'intervention d'un jugement pour déclarer le droit éteint.*

It is impossible to more clearly express the intention

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to adopt the rule of the French Code with respect to the *mode* and *time* of exercising the right of redemption. Article 64*c* is now article 1550 C.C. It is of some importance to note that among the French Commentators referred to by the Codifiers are Dalloz, Vente, ch. 1, section 4; Troplong, Vente, No. 716; 5 Boileux, art. 1662; 16 Duranton, No. 401; all of whom agree in saying that it is not necessary to bring an action within the delay. The reference to Boileux is specially interesting because he discusses the very question we are now called upon to decide. Boileux says:—

> Mais au moyen de quels actes le réméré doit-il avoir lieu? Une action en justice est-elle nécessaire? Il suffit au vendeur de manifester par acte extra-judiciaire, dans le délai prescrit, l'intention d'user du pacte de rachat avec soumission de rembourser tout ce qui peut être légalement dû. La loi voit avec faveur l'exercice du réméré. Ainsi les mots: *faute d'avoir exercé son action en réméré* sont synonimes de deux ci: *faute d'avoir usé du pacte de réméré.*

With that quotation before them (*vide* Bibliothèque du Code Civil, vol. 12, page 383), the Codifiers adopt the language of the French Code. The fair inference, therefore, is that if the expression "son action" was ambiguous when first used in the Code Napoléon, that ambiguity was removed and the term had acquired a fixed definite meaning in the French law when it was incorporated in the Quebec Code in 1866. Since the promulgation of that Code, as pointed out by the Chief Justice of the Court of Appeal, the courts of Quebec have invariably construed article 1550 in the same way as article 1662 C.N. had been and still is construed. *Walker* v. *Sheppard*(1), is referred to as an exception, but here are the words of the "considérant" in that case:—

> D'ailleurs la présente action a été intentée trop tard, vu qu'elle a été rapportée postérieurement à l'expiration du délai fixé pour l'exercice du réméré et *sans offres réelles au défendeur du prix et loyaux coûts.*

(1) 19 L.C. Jur. 103.

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Throughout the case seems to turn on the failure to reimburse the price.

If the courts below had not followed the "doctrine" and "jurisprudence" to which the Codifiers refer they would have set at defiance, in prinicple at least, the salutary advice given by the Privy Council to the Australian Court in *Trimble* v. *Hill*(1). See also *Casgrain* v. *Atlantic and North-West Railway Co.*(2), at p. 300; Taschereau J. in *Canadian Pacific Railway Co.* v. *Robinson*(3), at page 316.

If the question was at large one would feel bound by the decisions in the French courts because, as Laurent says:

> "Il est de principe qu'il faut interpréter le code par la tradition à laquelle il se rattache quand il la consacre."

(Laurent, vol. 2, 608). *Vide* also *Kieffer* v. *Le Séminaire de Québec*(4), at page 96. Dealing with the question at issue in that case, their Lordships say:—

> The answer to this question must depend on the requirements of the French law, upon which the Quebec Code is founded.

Girouard J. citing a number of recent French authorities says in *Connolly* v. *Consumers Cordage Co.*(5), at page 310:—

> I feel that I cannot disregard the opinions of those great jurists who are generally considered in Quebec as the best exponents of our Code. Nor can I ignore the numerous decisions of the Cour de Cassation and other French tribunals.

Vide also *Renaud* v. *Lamothe*(6), at page 366; *Parent* v. *Daigle*(7), at page 175.

It was argued by Mr. Mignault to explain the course of decisions in France and the opinions of the

(1) 5 App. Cas. 342.
(2) [1895] A.C. 282.
(3) 19 Can. S.C.R. 292.
(4) [1903] A.C. 85.
(5) 31 Can. S.C.R. 244.
(6) 32 Can. S.C.R. 357.
(7) 4 Q.L.R. 154.

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commentators that in article 1662 C.N. the word "action" is used interchangeably with the word "faculté" or "droit," whereas in the Quebec Code the word "faculté" is used in contradistinction to the word "action." I have carefully examined the articles of the Quebec Code and compared them with the corresponding articles of the Code Napoléon but without being able to reach any such conclusion. On the contrary, I find, as the Codifiers say in their report, that the articles to which Mr. Mignault refers are taken from the French Code with slight verbal changes, but the words "action" and "faculté" are used in the same connection in both Codes. In article 1650 C.C. it is said:—

Faute par le vendeur d'avoir *exercé son action de réméré* * * *,

and then in article 1552 the words used are:—

Le vendeur peut exercer *cette faculté de réméré* * * *,

referring clearly to the "action de réméré" in article 1550. Again article 1553 C.C. says:—

L'acheteur d'une chose sujette à la *faculté de réméré* * * *

Article 1555:—

L'acheteur d'un héritage sujet *au droit de réméré* * * *,

and in article 1556 "*faculté de réméré*" is used in the same sense as "droit de réméré" in article 1557. The conclusion that the words "droit" and "faculté" are used interchangeably in the whole group of articles concerned seems irresistible.

The real difficulty in this case as it was argued here arises out of the English translation of article 1550 C.C. I use the term English translation advisedly. It is said that the word "*action*" in the French text is ambiguous and that the language of the English version which removed the ambiguity should be

adopted. I understand this to mean necessarily that the English version of article 1550 is not to be treated as a mistranslation, which it is, of the French text, but as an aid to interpret that text. For a correct translation of art. 1662 C.N. *vide* French Code Annotated by Blackwood Wright. *Vide* also: Civil Code of Louisiana, art. 2548.

It may be that for those who choose to consider article 1550 C.C. in the French text without reference either to the "doctrine" or "jurisprudence" which prevailed in France when that article was adopted from the Code Napoléon some ambiguity arises out of the use of the word "*action,*" but the Codifiers had that so called ambiguity present to their minds, as appears by the quotation from Boileux, and the simple way to remove the ambiguity, if it existed, was to alter the language of the French text and not to adopt the extraordinary method of removing the ambiguity in the French text by making the English version serve as a key to the true sense of that text. That the Codifiers had no such intention is made clear by their report. When speaking of articles 65-73 of the report, which are articles 1552-1560 of the Civil Code, after saying they adopt 64*a*, 64*b*, 64*c*, 64*d*, from the Code Napoléon, they add:—

> Quelques changements de mots ont été faits dans les *autres articles* (65-73) pour rendre l'exposition des règles plus complète et éviter les ambiguités signalées par les commentateurs.

Why, if there was an ambiguity in their minds as to the meaning of article 64*c* did they not adopt the same method and make the necessary verbal changes? Speaking with proper deference I would venture to add that it is not by any means so clear, as Mr. Justice Cross finds, that under the provisions of the English version the suit must be brought within the stipulated

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term. Grammatically the words "within the stipulated term" may perfectly be read as qualifying the words "his right to redemption" which immediately precede them; there is no stop between them such as we should expect to find if "within the stipulated term" had reference to the bringing of the suit; indeed if this was the meaning, the proper reading would be:—

If the seller fail within the stipulated term to bring a suit for the enforcement of his right of redemption.

Moreover, the theory that is now suggested, while it has the charm of novelty, ignores completely the rule laid down by the Code itself in articles 2615 and 12 C.C. for the solution of the very difficulty that has arisen here. Article 2615 provides that if there be a difference between the English and the French texts that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded and *if there be any such difference in an article changing the existing laws*, as in this case, that version shall prevail which is more consistent with the intention of the article. Which version is more consistent with the intention of the article if we take into consideration the language of the Codifiers who say that their intention was to adopt the article of the Code Napoléon, referring at the same time to the Commentators who interpret and fix the meaning of the language used: *Freedman* v. *Caldwell*(1); *Naud* v. *Marcotte*(2); *Meloche* v. *Simpson*(3), at page 385 *et seq.*; *Gosselin* v. *The King*(4), at p. 268; *Wardle* v. *Bethune*(5), at page 52; *Symes* v. *Cuvillier*(6), at page 158?

(1) Q.R. 3 Q.B. 200.
(2) Q.R. 9 Q.B. 123.
(3) 29 Can. S.C.R. 375.
(4) 33 Can. S.C.R. 255.
(5) L.R. 4 P.C. 33.
(6) 5 App. Cas. 138.

In *Exchange Bank* v. *The Queen*(1), at page 167, their Lordships say, speaking of article 1994 C.C.:—

If there be any difference between the French and English versions, their Lordships think that in a matter which is evidently one of French law, the French version using a French technical term should be the leading one.

See also *Harrington* v. *Corse*(2), at pages 108-9.

This case affords an apt illustration of the injustice that naturally follows from the strained interpretation which the appellant seeks to put on article 1550 C.C. The parties live at a considerable distance from the chef-lieu of the judicial district. To bring an action within the ten years the offer to reimburse must be made a sufficient time before the expiration of the redemption period, in this case at least four days, to allow the vendor in case of refusal to proceed to the court, consult a lawyer, take out a writ and have it served. Why should the vendor lose the benefit of this period when his contract gave him the full ten years within which to exercise his right to redeem?

On the other points raised I agree with the majority below.

The appeal should be dismissed with costs.

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

DUFF J. (dissenting).—The fate of this appeal depends, in my view of it, upon the decision of a single point which is a dry point of law and can be stated and discussed without reference to the facts of the particular case before us. The question relates to the construction and effect of article 1550 C.C. which is expressed in the following words:—

(1) 11 App. Cas. 157. (2) 26 L.C. Jur. 79.

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1550. Faute par le vendeur d'avoir exercé son action de réméré dans le terme prescrit, l'acheteur demeure propriétaire irrevocable de la chose vendue.	1550. If the seller fail to bring a suit for the enforcement of his right of redemption within the stipulated term, the buyer remains absolute owner of the thing sold.

And the point to be determined is this—does this article require as a condition of the effective exercise of the vendor's "right of redemption" the commencement of appropriate judicial proceedings for the vindication of that right within the "redemption" term stipulated by the contract of sale?

Reading the two versions together without reference to any context, the construction and effect of them seem not to be open to controversy, although the words in the French version

d'avoir exercé son action de réméré,

are not so precise as to be altogether incapable of more than one necessarily exclusive meaning. This cannot be affirmed of the words of the English version

If the seller *fail to bring a suit for the enforcement* of his right of redemption, etc.,

words both apt and precise and their one necessary meaning being that which they convey on the first view, namely, that the taking of legal proceedings by the seller in a court of justice to vindicate his *droit de réméré* within the stipulated time is a condition of the enforcement of that right in the sense that default in doing so makes the title of the purchaser absolute. This, moreover, though not the only possible reading is the primary and natural reading of the French version; and the slight ambiguity presented by the terms of that version, being removed by the precise and apt words in which the condition is defined by the English version all possibly imputable lack of exacti-

tude in the words — considered in themselves apart from the context and history of the article—disappears.

Is there in the cognate articles, the articles dealing with the same subject—*vente à réméré*—anything which supplies a qualifying context? The answer must be in the negative. Arts. 1545 to 1560 inclusive, speak of *la faculté de réméré, le droit de réméré,* and the "right of redemption" but there are no words in any of these articles which could properly be read as controlling the effect of the words of art. 1550.

Is there anything in this construction of art. 1550 so repugnant to the nature of the *droit de réméré* or to the provisions of the cognate articles which requires us to search for some construction more in consonance with general legal principle or with these correlative provisions of the code? According to the construction indicated, the article may, no doubt, have this effect —the *droit de réméré* must be exercised in such fashion as to enable the vendor to bring his suit within the agreed term; and the consequence (it may be) follows that the vendor must, in order to enable him to do this effectively, at least, manifest his intention to exercise his right at a date earlier by an appreciable time than that at which he would otherwise have been required to do so; in other words, it may be that the effect of art. 1550, read according to the natural construction of the language employed, is necessarily to curtail in some degree the stipulated term and possibly, in rare cases, to curtail it substantially. I do not say that under that construction this is in truth the effect of the article. The just view may be that by force of these articles themselves appropriate legal proceedings can validly be taken simultaneously with the tender, offer or expression of consent necessary to constitute an effective exercise of the *faculté de réméré.*

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Assuming, however, the former to be the consequence of the construction indicated; that, it seems to me, presents no sound reason for refusing to leave to its proper operation the unequivocal language of art. 1550.

Is there anything in the judicial history of that article in the Province of Quebec to create doubts as to its proper construction? Here again the answer must be in the negative. Our attention has been called to three decisions in which the point has been touched upon: *Walker* v. *Shepherd*(1); *Trudel* v. *Bouchard*(2); *Dorion* v. *St. Germain*(3). In the first of these an opinion was expressed favourable to the view now advanced by the appellant. In *Trudel* v. *Bouchard*(2), nothing is said explicitly by Mr. Justice Jetté upon the point before us, but from the circumstances of the case and the nature of the judgment the proper inference appears to be that his opinion would not have been unfavourable to the contention of the present appellant. The last of the above mentioned cases does not, so far as one can see, deal with or involve the point although there is a reference to it in the reporter's head-note. There are some observations in the argument of the distinguished counsel who appeared for the appellant unsuccessfully to which one of course cannot attribute the weight attaching to judicial dicta.

There being neither ambiguity in the article itself when read as a whole, nor qualifying context nor anything in the judicial application of the article in the Province of Quebec to create a difficulty, the court of appeal has found itself constrained to reject or disregard the English version and to give to the French version which is a literal transcription of art. 1662

(1) 19 L.C. Jur. 103.
(2) 27 L.C. Jur. 218.
(3) 15 L.C. Jur. 316.

C.N. the construction and effect which the last mentioned article has unanimously received in France in both *la doctrine* and *la jurisprudence.*

I will state the twofold reason which compels me to hold this course to be inadmissible. First: In France they have proceeded upon the ground that the expression

exerçer l'action en *réméré*

is capable of more than one meaning.

> L'expression exerçer l'action en réméré peut avoir un autre sens, celui d'agir c'est-à-dire de faire ce que le vendeur doit faire pour exerçer son droit,

says Laurent (Vol. 24 Principes de Droit Civil Français, p. 287). And although admittedly it is more natural to read the words "*l'action en réméré*" quoted from article 1662 as a processual phrase in the sense according to which they are equivalent to "*action en justice,*" it has been held nevertheless than the other less natural but admissible reading indicated by Laurent is more in consonance with the general effect of the provisions of the Code Napoléon dealing with *vente à réméré* (4 Aubry & Rau, 4th ed., p. 409, art. 357, note).

The courts of Quebec, it is evident, are called upon to decide a very different question from that which confronted the tribunals and the authors in France under art. 1662. In order to parallel in the question presented by art. 1662 the postulates of the question presented here it would be necessary to interpolate in art. 1662 words making that article read "*d'avoir exerçé son action en justice.*"

Secondly: It is not within the authority of the courts in construing art. 1550 to reject or disregard the English version. The Code as an authoritative exposition of the civil law of the Province of Quebec is

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founded upon statute. There was first an Act of the Province of Canada (20 Vict. ch. 43) authorizing the appointment of commissioners and directing that they should embody in the code to be framed by them, to be called the Civil Code of Lower Canada, such provisions as they should hold to be then actually in force giving the authorities on which their views should be based, but stating separately any proposed amendments. Then (the Commissioners having in due course framed their report and laid it before Parliament), there was another Act (29 Vict. ch. 41) declaring a certain roll attested in the manner described in the Act to be the original of the Civil Code reported by the Commissioners as containing the existing law without amendments; directing the Commissioners to incorporate in this roll certain amendments specified in a schedule; and eliminating and altering the provisions of the Code only so far as should be necessary to give effect to these amendments; and providing that the Code so altered should, on proclamation by the Governor, have the force of law.

The Code thus produced must be read, of course, in view of the fact that it is what it is, namely, a statement made under legislative authority of a system of civil law, a statement speaking broadly, explicit as to specific rules but in some measure as to underlying principles taking effect by implication and influence; particular rules and principles which may no doubt be misconceived or misapplied if considered in isolation from the general system of which they are elements. But the rule we are now called upon to put into effect, art. 1550, was one of those incorporated at the suggestion of the Commissioners as a new provision in amendment of the existing law, and as an amendment of the existing law it was ex-

plicitly adopted by the enactment of the legislature which gave it legal force; and in such cases the Code itself by art. 2615 (which is as follows):—

> If in any article of this Code founded on the laws existing at the time of its promulgation, there be a difference between the English and the French texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded; and if there be any such difference in an article changing the existing law, *that version shall prevail which is most consistent with the intention of the article, and the ordinary rules of legal interpretation shall apply in determining* such intention,

indicates the rule by which we are to be guided although art. 1550 is not one of those in which when properly construed there is any "difference between the English and the French texts." How, following the ordinary rules of interpretation, is "the intention" to be ascertained? Primarily, of course, from the language employed interpreted by light of the requisite technical knowledge; and where—in such cases—that language construed of course in its entirety is quite without ambiguity and there is no qualifying context, there would appear to be only one course for a judicial tribunal to pursue: (*Robinson* v. *Canadian Pacific Railway Co.*(1), at pages 487-8). The "ordinary rules of interpretation" would hardly sanction the elimination of one version unequivocal in itself and harmonious with the natural reading of the other version in order to give to the article an operation resulting from a rather strained and less natural reading of the second version with which the rejected text could not by any process of interpretation be reconciled.

Two arguments have been addressed to us which deserve to be noticed. First, it is said that since the French version of art. 1550 is a literal transcription of an article of the Code Napoléon, the French version must

(1) [1892] A.C. 481.

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be regarded as the original, and the English version as a translation. On the point of fact, I should say that was self-evident. But the English version no less than the French version is expressed in the language of the legislature or in language adopted by the legislature. Secondly, it is said that the Commissioners must be assumed to have known the course of the interpretation in France and that the report of the Commissioners shews their intention to adopt the law laid down in the Code Napoléon (art. 1662) as construed in France. The report of the Commissioners can be prayed in aid on the ground that it may be supposed to have been present to the mind of the legislature: *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents*(1), at pages 575 and 576; and the Commissioners must no doubt be assumed to have been acquainted with the course of *la doctrine* and *la jurisprudence* in France. But in the last analysis we come to this: the Commissioners and the legislature, whatever presumptions are to be made with regard to other matters, must be presumed to have known the meaning of the words they used. Assuming then, that they had the general intention to adopt the law of the Code Napoléon—nevertheless the final and decisive statement of the effect of the concrete provision they did adopt, as they conceived it to be, is to be found in the unambiguous words of the English version. The French version reproduces the Code Napoléon; but the English version supplies a legislative interpretation which the courts are not at liberty to ignore. In this view the appeal must be allowed and the action dismissed.

Two other grounds of appeal of considerable importance are raised by the appellant. It is not neces-

(1) [1898] A.C. 571.

sary to pass any opinion on these and the only observation I make is this. Having regard to the opinion of Pothier given to the world in the 18th century and the opinion of a very eminent authority (Aubry & Rau) published before the adoption of the Quebec Code, as well as to the unbroken uniformity of *la jurisprudence* in France to the effect that the "right of redemption" reserved to the vendor under a contract of *vente à réméré* is *jus ad rem* only and not *jus in re*, I think it a very disputable question whether the opposite view, though held by almost all the reputable authors in France, including Laurent, ought to be given effect to.

ANGLIN J. (dissenting).—The question presented in this case is whether a vendor subject to right of redemption in order to exercise that right effectually is bound not only to signify to the purchaser his intention to redeem the property, accompanying the signification by a tender of the amount due, but, in the event of refusal by the purchaser to accept, is further bound to bring action to enforce his right of redemption within the period stipulated for its exercise. That the right of redemption absolutely terminates upon the expiry of the stipulated term unless it has been effectually exercised within the term and that it cannot be extended by the court is admittedly the effect of art. 1549. Indeed so strict is the law in this regard that the term runs against all persons including minors and those otherwise incapable in law, reserving to the latter such recourse as they may be entitled to: Art. 1551 C.C.

In the present case the stipulated term for redemption was ten years, the maximum term permitted by law: Art. 1548 C.C. Shortly before the expiry of the ten years the vendor notified the purchaser of his intention to redeem and tendered to him the amount

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to which he was entitled. Payment not having been accepted, he caused a notarial protest to be made before the expiry of the ten years. He did not commence his action to enforce his right of redemption, however, until several months after the expiry of the stipulated term.

Art. 1550 of the Civil Code, in the French and English versions, reads as follows:—

> 1550. Faute par le vendeur d'avoir exercé son action de réméré, dans le terme prescrit, l'acheteur demeure propriétaire irrévocable de la chose vendue.
>
> 1550. If the seller fail to bring a suit for the enforcement of his right of redemption within the stipulated term, the buyer remains absolute owner of the thing sold.

In the Court of Appeal it was pointed out that this article in the French version is an exact reproduction of art. 1662 of the Code Napoléon. The French authorities have held that the word *action* in the Napoléonic article should be read as meaning *faculté* or *droit*, and that a notification within the term of intention to redeem accompanied by tender is a valid and effectual exercise of the right which may be enforced by action brought after the expiry of the term. No doubt the jurisprudence of the Province of Quebec, with the exception possibly of the case of *Walker* v. *Sheppard*(1), supports the same view of art. 1550 of the Civil Code, and my lord the Chief Justice and my brother Brodeur also adopt it. It is therefore with the utmost diffidence that I venture to express the contrary opinion.

As Mr. Mignault pointed out, however, in his able argument, the construction placed by the French authorities on art. 1662 of the Code Napoléon depends largely upon the use of the term *action* interchangeably with the words *faculté* or *droit* in arts. 1664, 1668

(1) 19 L.C. Jur. 103.

and 1669 C.N. (See Beaudry-Lacantinerie, No. 615, 24 Laurent, No. 397) which form the context of art. 1662. On the other hand in the corresponding provisions of the Quebec Civil Code, arts. 1552, 1556 and 1557, which form the context of art. 1550, we find the words *faculté* and *droit* apparently used in contradistinction to the word *action* used in art. 1550. Thus for the word *action* used in art. 1664 of the Code Napoléon the Quebec Code in art. 1552 substitutes the word *faculté*. Likewise for the word *action* in art. 1668 of the Code Napoléon we find in art. 1556 of the Quebec Civil Code the word *faculté*. In art. 1669 of the C.N. the word *faculté* is used obviously in the same sense in which the word *action* had been used in art. 1689, whereas the Quebec Civil Code in art. 1557 employs the word *droit* as the equivalent of the word *faculté* used in art. 1556. The Quebec Code in arts. 1559 and 1560 likewise replaces the phrase *l'action en réméré* of articles 1671 and 1672 of the Code Napoléon by the phrase *faculté de réméré*. Articles 1546 and 1547, the provisions of the Quebec Code corresponding to article 1673 C.N. (which Laurent, vol. 24, No. 397, relies on as conclusive of the interpretation of the phrase *exercer l'action de réméré* in the Code Napoléon, because it immediately follows articles 1671-2 and the phrase "*use du pacte de rachat*" is found in it used, as he says, in the same sense as "*exercer l'action en réméré*" in those articles) are placed at the opening of the section and have there no such significance. Indeed in the whole section of the Quebec Civil Code intituled "*Du droit de réméré*" (arts. 1546-1560) the phrase "*action de réméré*" occurs only once, viz., in art. 1562. One of the chief reasons, therefore, for the construction placed by the French authors upon the language of art. 1662 C.N. does not exist in regard to art. 1550 of the

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Quebec Civil Code, and in view of the changes made in the terms in which arts. 1664, 1668, 1669, 1671 and 1672 of the Code Napoléon have been substantially reproduced in the Quebec Civil Code, there seems less reason than in other cases where that occurs for the conclusion that in reproducing art. 1662 C.N. *in ipsissimis verbis* the Quebec codifiers meant to adopt it with the construction placed upon it by the French authors. The phrase "*cette faculté*" in art. 1552 C.C. I think obviously refers to "*faculté de réméré*" in arts. 1546 and 1548 and not to "*action de réméré*" in art. 1550.

But a stronger argument in favour of the contention of the appellant is presented by the clear and unequivocal terms of the English version of art. 1550. Whatever may be said of the meaning of the phrase, *d'avoir exercé son action de réméré*, there can be no room for doubt as to the meaning of the words "to bring a suit." Both the English and the French versions of the Code are of equal authority. The article in question is one which changed the pre-existing law and in such a case where there is a difference between the English and the French texts art. 2615 provides that

that version shall prevail which is most consistent with the intention of the article and the ordinary rules of legal interpretation shall apply in determining such intention.

In the present case there is in reality no difference between the English text and the French text if the language of the latter be given its primary meaning. Whatever secondary meaning may be attached to it where the contract seems to require a different construction, the primary meaning of *action de réméré* is "action of redemption." The two versions of the Code must be read together, and, while one may undoubtedly be used to interpret the other, where the

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language used in each taken in its primary sense means a certain thing and in the English version is not susceptible of any other meaning the fact that French authorities have put another construction on the words of the French version when accompanied by a different context does not seem to afford a sufficient ground for departing from the primary meaning. The language of Lord Herschell in *Bank of England* v. *Vagliano Bros.*(1), is applicable to the Civil Code of Quebec: *Robinson* v. *Canadian Pacific Railway Co.*(2), at page 487. The comments of the Codifiers (vol. 2, pp. 18 & 19) make it clear that it was their intention to amend the old law by doing away with its uncertainties and holding the parties to an agreement for redemption strictly to the term stipulated without allowing the courts to extend it or requiring a judgment to declare the right extinct. If in determining a question as to whether the English or the French version of the Code should prevail where they differ it is material to know in which language the provision was originally drafted, the fact that in the report of the Codifiers the authorities are cited under the English version in the title with which we are dealing would indicate that this portion of the Code had been originally drafted in that language: Vol. 2, p. 61.

No doubt it seems a harsh provision that a person entitled to redeem whose tender of the amount due has been wrongfully rejected should be obliged to bring suit for the enforcement of his right within the stipulated term as a condition of preserving it. Moreover the obligation of bringing suit probably has the effect of curtailing the term within which the tender may be made and puts upon the vendor the necessity

(1) [1891] A.C. 107.
(2) [1892] A.C. 481.

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of anticipating that his legitimate offer may be wrongfully refused, and of leaving himself in that event, sufficient time to bring his action before the expiry of the term. But the existence of these obvious difficulties does not afford a sufficient reason, in my opinion, for ignoring the explicit and unmistakable language of the English version of art. 1550.

I am, for these reasons, with great respect, of the opinion that this appeal should be allowed.

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

Solicitors for the appellant: *Crepeau & Coté.*
Solicitor for the respondent: *Arthur Girouard.*

HERBERT E. VIPOND (PLAINTIFF)...APPELLANT;

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*Nov. 9, 10.
*Dec. 30.

AND

FURNESS, WITHY AND COMPANY (DEFENDANTS)............ RESPONDENTS.

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

Carrier—Bill of lading—Perishable cargo—Climatic conditions—Exemption from liability for negligence—Parties.

A consignment of fruit was shipped during the winter season at a port in Italy for London, Eng., to be transhipped thence by another line to St. John, N.B. The bill of lading for the voyage to St. John provided that the fruit would be delivered there in the like good order and condition as when received subject to exceptions and stipulations including injury from "effects of climate" or from negligence. The ship stopped for some hours at Halifax, opened the hatches and discharged other cargo, and, either while at Halifax or before arriving at St. John, the whole consignment was frozen.

Held, affirming the judgment appealed from (Q.R. 25 K.B. 325), that the injury to the fruit was due to the effects of climate and the terms of the bill of lading relieved the shipowners from liability therefor even though they may have been guilty of negligence.

The consignee of the fruit, who alone brought action against the carriers, had a dormant partner entitled to share with him the profits of the transaction.

Held, *per* Fitzpatrick C.J., that the proper parties were not before the court.

APPEAL from a decision of the Court of King's Bench, Appeal Side, for the Province of Quebec(1), reversing the judgment of the Court of Review in favour of the plaintiff.

The material facts are stated in the above head-note.

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

(1) Q.R. 25 K.B. 325.

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H. N. Chauvin K.C. and *E. G. Vipond K.C.* for the appellant.

A. Chase Casgrain K.C. for the respondents.

THE CHIEF JUSTICE.—This is an action brought to recover the value of a shipment of lemons which were frozen while in the possession of the respondents as common carriers.

When the lemons were delivered to the respondents at Liverpool in January it appears by the bill of lading that some of the original packages were in a very frail condition, stained and recoopered and consequently more liable to be affected by frost. Immediately a special marginal note was made on the bill of lading to the effect that the company would not be responsible for the condition of the goods on their arrival.

The ship sailed in the beginning of January, arrived at Halifax on the 16th of that month and at St. John, N.B., a few days afterwards. The lemons were frozen in transit. There is no satisfactory proof of the time at which the frost reached the goods. The bill of lading, however, contains clauses and stipulations which in terms cover the alleged cause of injury if we are to believe the port-warden who saw the goods when the hatches were first opened immediately on the arrival of the ship at Halifax. He says that several of the boxes of lemons which he then examined were frozen.

The bill of lading exempts from liability for loss or damage resulting from "effects of climate" and from "perils of navigation." The port-warden says that the lemons were carefully stowed in the proper place in the ship and there is no evidence of negligence except that given by Mr. Vipond who expresses the opinion

that lemons could not freeze when stowed between decks and he adds that the injury to the lemons must have been caused by leaving the hatches open after the arrival at Halifax. As against this we have the evidence of the port-warden who testifies to the condition in which he found the lemons on the arrival of the ship. There is in the bill of lading a negligence clause which extends the scope of the exception with respect to liability to acts of negligence of the company's servants or employees.

The law applicable to the facts of this case is very clearly stated by Lord Loreburn in *Nelson Line* v. *Nelson & Sons*(1), at pages 19 and 20:—

> The law imposes on ship-owners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of their duties, but unless they prove such a contract the duties remain; and such contract is not proved by producing language which may mean that and may mean something different. As Lord Macnaghten said in *Elderslie S.S. Co.* v. *Borthwick*(2), at p. 96:—"An ambiguous document is no protection."

Here we have, as I have already said, in the bill of lading exceptions and stipulations which in terms cover the injurious effects of climate, insufficient ventilation and heat holds. There is further the special entry on the bill of lading that respondent was exempt from responsibility on account of the bad condition of the goods when received and in addition a negligence clause couched in singularly clear and unambiguous terms: The bill of lading says the Steamship Company shall not be responsible for the

> injurious effects of CLIMATE, insufficient ventilation or heat holds, risk of craft, of transhipment and of storage afloat or on shore * * * whether or not any of the perils, causes or things above mentioned, or the loss or injury arising therefrom be occasioned by or arise FROM ANY ACT OR OMISSION, NEGLIGENCE, DEFAULT OR ERROR IN JUDGMENT of the master, pilot, whether compulsory or not, officers, mariners, engin-

(1) [1908] A.C. 16. (2) [1905] A.C. 93.

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eers, refrigerating or otherwise, crew, stevedores, ship's husbands or managers, or other persons whatsoever whether on board said ship or on shore.

The binding effect of such a clause cannot be doubted. *Vide* Halsbury, vol. 26, p. 116, par. 197, and Fuzier-Herman, Répertoire, vbo. "Armateur," No. 178:—

178.—L'armateur peut donc, comme le commissionnaire de transport, et même à plus forte raison, stipuler l'affranchissement complet de la responsabilité des fautes du capitaine ou de l'équipage, "responsabilité purement civile et au second degré, en présence de laquelle subsiste la responsabilité engagée du garant direct, le capitaine." Cette doctrine développée, pour la première fois en 1869, par M. l'avocat général de Raynal a été, depuis, consacrée par de nombreuses décisions de la Cour de Cassation, et l'on peut dire que la jurisprudence est aujourd'hui définitivement fixée en ce sens.—V. les conclusions de M. de Raynal, sous. Cass., 20 janv. 1869, Messageries impériales (S. 69. 1. 101, P. 69, 247, D. 69. 1.94).

I would have also been prepared to dismiss the appeal on the ground that the proper parties are not before the court.

The appeal should be dismissed with costs.

IDINGTON J.—The appellant by his accepting the first bill of lading given in Italy in order to secure a through rate, bound himself to accept such bill of lading (no matter how heavily laden with conditions or exceptions) as any intermediate carrier, for example a shipping company at London, in the course of through transportation contemplated, chose to impose.

The contract which thus came to be made at London is no doubt most onerous and at first blush somewhat ambiguous.

It was clearly intended thereby, that the carrier should run no risk, and the unfortunate shipper should, if possible, bear all the risks, of every kind that the long experience of generations of carriers have discovered might be run by them in the course of their

business. It seems clear from reading this wonderful instrument that so soon as a new risk had been discovered, some new words were introduced into the form of bills of lading used by these carriers. Thus there had grown as quaint and complex a document as legal knowledge of decided cases and mariners' experience could suggest, well suited to entrap the unwary shipper tempted to accept a through rate and shut his eyes to all implied therein.

The courts have occasionally found some of suchlike bills of lading ambiguous, and been enabled thereby to do justice by holding the respective carriers using them liable. For although these English carriers may contract themselves out of almost any liability, yet they are told by English courts of justice that the attempt to do so must be in such clear and explicit terms that those they contract with should, if they took care, be enabled to understand that they were doing so, or at least so far as the particular risks involved in the contract were in question.

The railway companies in this country and shipping carriers in the United States have been restrained by legislation from carrying the law of contract so far as the respondent's bill of lading now in question has attempted.

I think in this case now presented for our consideration the respondent carrier has accomplished its purpose and so framed its contract that it is not possible for me to hold that the language is, when closely studied and carefully weighed, so ambiguous that I am unable to give it the meaning respondent stoutly contends for.

Moreover we must observe the following stipulations in the contract:—

Any claim or dispute arising on this Bill of Lading shall, in the option of the Shipowner, be settled with the Agents of the Line in

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London according to British Law, with reference to which Law this Contract is made to the exclusion of proceedings in any other country. General average payable by cargo according to York Antwerp Rules, 1890.

In accepting this Bill of Lading, the Shipper or other Agent of the Owner of the Property carried expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed.

Why in the face of a contract, presumably under the circumstances made in London, and so expressly declared to be made in reference to British law we should have such profuse references to another law, I am not able to understand. Doing so only confuses things. Had the action arisen out of something happening on our railways then our Canadian legislation or Canadian law might perhaps have been instructive even if not directly binding the parties.

As the case stands I see nothing for it but that the appeal should be dismissed with costs.

DUFF J.—The principal point made by counsel for the appellant is that the two bills of lading, that dated the 9th December, 1910, and that dated January 2nd, 1911, must be read together and that the effect of clause ten in the earlier bill of lading is to qualify the terms of the second bill in such a way as to limit the operation of the exceptions set forth in the second paragraph of it to cases in which the causes to which injury to the shipments are ascribed could not have been counteracted by proper diligence on the part of the carriers. This argument must, I think, be rejected because it appears to me to be very plain that paragraph 10 in the earlier bill of lading is a provision in favour of the owner and not of the shipper; and I think their full normal effect must be given to the words in the 2nd paragraph,

effects of climate * * * whether or not occasioned by * * * any act or omission, negligence, default or error of judgment of the

* * * persons * * * for whose acts they would otherwise be liable,

and that these words must relieve the respondents from any liability which they might otherwise have been subject to.

Some question was raised as to the law applicable. The second bill of lading contains a paragraph plainly indicating that the intention of the parties is that it is the law of England by which the construction and effect of this instrument are to be governed. Such a stipulation is conclusive both under the law of England; *Hamlyn & Co.* v. *Talisker Distillery*(1); and under that of Quebec; Art. 8 C.C.; Savigny (Guthrie's translation, 2 ed.) secs. 369, 370, pages 194 and 197; sec. 372, page 221 (note A.), page 227; *Royal Guardians* v. *Clark*(2), at page 251; Lafleur's Conflict of Laws, at page 149.

The appeal should be dismissed with costs.

ANGLIN J.—Assuming that it is fully established that the freezing of the appellant's shipment of lemons was due to negligence of the respondents' servants, liability for such negligence is, in my opinion, clearly excluded by an express provision of the bill of lading under which the respondents carried this cargo. It is conceded, and in view of the terms of the original bill of lading with The General Steam Navigation Company it could not well have been contended otherwise, that the latter company had authority to tranship the appellant's goods at London, and to accept on his behalf from the forwarding steamship company a bill of lading in its customary form. It was in pursuance of this authority that the bill of lading in question was

(1) [1894] A.C. 202.
(2) 49 Can. S.C.R. 229.

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taken from the respondents and it is binding upon the appellant. It is not suggested that it is not in the respondents' usual form or that its acceptance was procured by any imposition, misrepresentation or concealment.

The question presented is solely one of construction. There is no ambiguity or inconsistency whatever in the terms of the bill of lading. I am unable to agree with the appellant's contention that it incorporates the provisions of the bill of lading issued by the original shippers, The General Steam Navigation Company. The clause relied upon for that purpose, viz.:—

> Through goods are also subject to all conditions of the company or companies which assist in their conveyance,

in my opinion, refers solely to conditions of any company or companies which might take over the goods from the respondents for the purpose of forwarding them to destination. That this is the meaning of the clause invoked is, I think, sufficiently clear from its own terms. But if not, it is made so by the fact that it immediately follows another clause which stipulates that:—

> In arranging for through carriage the liability of the Furness Line is to be that of forwarding agents only.

No sufficient ground has been advanced for relieving the appellant from the clear and explicit provision of the bill of lading taken on his behalf.

For the foregoing reasons as well as those assigned by Mr. Justice Cross in the Court of King's Bench I am of the opinion that under the special terms of their bill of lading the respondents were exempt from liability for injury to the appellant's cargo due to climatic conditions although that injury was occasioned by negligence of the respondents' servants.

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BRODEUR J.—The appellant claims damages for lemons which were frozen in transit between London and St. John, N.B., on a ship belonging to the respondents.

The respondents contend that they are not responsible for the condition of those goods because by the bill of lading they were exempted from liability for damages caused by frost.

Those goods were shipped from Italy to Montreal on a through bill of lading issued at Milazzo, Italy, by the General Steam Navigation Company. It was provided in the bill of lading issued by the latter company that those goods could be transhipped in England. When they reached England, the goods were handed over to the respondent company for the purpose of being transported to St. John, N.B.

One of the conditions of the new bill of lading was that the respondent company should not be responsible for injurious effects of climate whether or not

the loss or injury arising therefrom be occasioned by or arise from any act or omission, negligence, default or error in judgment of the master, etc.

It appears that when the ship came near Newfoundland they encountered a pretty severe frost and it is likely that the lemons got frozen at that time though the goods seem to have been stowed at the place where they should have been. It is in evidence also that when the ship reached Halifax the hatches were open for the purpose of discharging the cargo and that the lemons might then have got frozen.

However, the respondents claim that according to their contract they could not be held liable for negligence, default or error. Their bill of lading was

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accepted without any objection and became the contract determining the rights and obligations of the parties. It was provided also by that bill of lading that it would be interpreted according to the laws of England and it has been proved in the case that under the provisions of that law that bill of lading with such a clause was good and valid.

But it was contended on the part of the appellant that the new bill of lading issued in London by the respondent company was subject to the conditions and clauses of the original bill of lading. It appears in the original bill of lading issued in Italy that the vessel owners undertook to exercise care and diligence in the carrying of goods and that the latter clause would then be contrary to the provisions of the second bill of lading issued by the respondent company.

I am unable to find in the latter bill of lading any provisions by which all the conditions and obligations mentioned in the original bill of lading would affect the respondent company. It was even stipulated in the original bill of lading that in the event of transhipment the clauses, conditions and restrictions of the ship or other conveyance by which the goods are forwarded to destination were included in the original bill of lading in addition to the conditions therein stipulated.

The contract then could be modified by any new ship owner; and as in the present case the respondent company undertook to carry the goods but with the condition that it should not be responsible for the injurious effect of climate even if the loss arose from its own negligence or the negligence of its employees, it constituted a contract which unfortunately in the circumstances of the case would not give any relief to the appellant. Those conditions might be very unjust;

but they are the stipulations accepted by the parties and the courts are bound to give effect to them.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Vipond & Vipond.*

Solicitors for the respondents: *Casgrain, Mitchell, McDougall & Creelman.*

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*Feb. 6.

IDA LILLIAN BOYD AND OTHERS (PETITIONERS) .... APPELLANTS;

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA .... RESPONDENT;

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO .... INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Succession duties—Partnership property—Owners not domiciled in Province—Interest of deceased partner—R.S.B.C. 1911, *c.* 217, *s.* 5, s.-s. 1*a*—*Taxation—Legislative jurisdiction—"B.N.A. Act,* 1867," s. 92.

By section 5 of the "Succession Duties Act" of British Columbia (R.S.B.C. [1911] ch. 217), on the death of any person his property in the province "and any interest therein or income therefrom * * * passing by will or intestacy" is subject to succession duty whether such person was domiciled in the province or elsewhere at the time of his death. M. B. and his brother were partners doing business in Ontario and owning timber limits in British Columbia. The firm had no place of business nor man of business in that province and never worked the limits. The partnership articles provided: "8. If either partner shall die during the continuance of the partnership his executors and administrators shall be entitled to the value of his share in the partnership assets. 9. On the expiration or other determination of the said partnership a valuation of the assets shall be made and after providing for payment of liabilities the value of such property stock and credits shall be divided equally between the partners, etc." M. B. having died while the partnership existed his share in the partnership assets passed by his will to executors. The Province of British Columbia claimed that his interest in the timber limits was subject to succession duty.

Held, Davies and Anglin JJ. dissenting, that under the terms of the articles of partnership M. B. at the time of his death had an interest

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

in the timber limits in British Columbia which passed by his will and such interest was subject to duty under section five of the B.C. "Succession Duty Act."

Held, also, that the imposition of the duty, if taxation, was "direct taxation within the province" and within the competence of the Legislature of British Columbia.

APPEAL from a decision of the Court of Appeal for British Columbia(1) affirming the order of the Chief Justice who dismissed the appellants' petition.

The essential facts will be found in the above head-note. The proceedings commenced by petition to the Supreme Court of British Columbia praying for a declaration that no succession duty was payable by the estate of Mossom Boyd in respect to the lands in the Province.

Lafleur K.C. and *David Henderson* for the appellants. The share of a deceased partner is situate where the partnership business is carried on. Hanson on Death Duties, pages 109, 113; *In re Ewing*(2), at page 22; *Commissioners of Stamp Duties* v. *Salting*(3), at page 453.

A partner's property consists of his proportion of the surplus assets after conversion and payment of liabilities. Lindley on Partnership, 8 ed., pages 402, 403; *In re Ritson*(4).

J. A. Ritchie for the respondent. This case is governed by the decision of the Privy Council in *Rex* v. *Lovitt*(5), on the Succession Duty Act of New Brunswick which is substantially the same as that of British Columbia.

Nesbitt K.C. for the intervenant, the Attorney-

(1) 23 B.C. Rep. 77.
(2) 6 P.D. 19.
(3) [1907] A.C. 449.
(4) [1898] 1 Ch. 667; [1899] 1 Ch. 128.
(5) [1912] A.C. 212.

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General for the Province of Ontario, referred to *Cotton* v. *The King*(1); *In re Muir Estate*(2); *Attorney-General* v. *Hubbuck*(3).

THE CHIEF JUSTICE.—I think this case must be governed by the decision in *Rex* v. *Lovitt*(4). The only question is whether the fact that the lands were, as is alleged, the property of the partnership instead of being vested in an individual can make any difference, and I do not see that it can.

It is said that all that those claiming under the deceased would be entitled to would be a share in the surplus of assets over liabilities of the partnership. How does this differ from the ordinary case of a residuary legatee who is only entitled to the balance of the testator's estate after payment of debts? In the judgment in *Rex* v. *Lovitt*(4) it was said:—

> The tax is on the gross sum though it may be money used in trade and as such be subject to many deductions before it can fairly be treated as not property.

The case has been argued as if it depended solely upon the law governing such matters in the absence of express agreement. I am far from satisfied that that is the correct view. Paragraphs 8 and 9 of the articles of partnership are certainly not apt for providing for the usual sale, winding-up and division of the surplus of the partnership. It may well be that on a division and execution of proper releases and instruments, such as is contemplated by paragraph 9, each of them, the executors and the surviving partner, would hold one-half of the lands, the only difference being that they would hold divided instead of undivided shares.

(1) [1914] A.C. 176.
(2) 51 Can. S.C.R. 428.
(3) 13 Q.B.D. 275.
(4) [1912] A.C. 212.

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Be this as it may I am satisfied that this real estate in the Province of British Columbia passes under the will and I do not think it possible that payment of succession duty can be avoided on any allegation that the devise may be subject to answer possible liabilities of the partnership.

I do not wish to embarrass the case by suggesting unnecessary points of doubt, but it is remarkable that though the testator appointed executors and trustees of his will, there is no devise or bequest to them of any property whatever. If the land passes under the devise in the will to the widow and three sons of the testator there would seem a still stronger case why they should be liable for payment of the succession duty.

That the lands must be considered as personal property is, I think, a question that chiefly concerns the intervenant, but it must be noted that in most, at any rate, of the cases to which reference has been made the question for decision has been whether the property was liable for probate duty.

The claim that the share of a deceased partner is situate where the business of the partnership is carried on, does not, I think, further the appellant's case. The distinction is overlooked between the locality where the asset forming part of the partnership property is situated and the place where the share of the partnership is considered to be situate. So far as this particular asset is concerned the business of the partnership must, I think, be considered to have been carried on in British Columbia. In *Beaver* v. *The Master in Equity of the Supreme Court of Victoria*(1), where a firm carried on business in London, Melbourne and Adelaide, it was held

(1) [1895] A.C. 251.

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that the interest of a deceased partner in the business carried on at Melbourne was locally situate in the Colony of Victoria so as to be liable to probate duty in respect of his will.

DAVIES J. (dissenting).—The question to be determined on this appeal is whether the share or interest of Mossom Martin Boyd, deceased, in certain real estate situate in British Columbia standing at his death in his name and in that of his partner William T. C. Boyd, is liable for succession duties under the "Succession Duties Act" of British Columbia, R.S.B.C. 1911, ch. 217.

The 5th section of this Act, sub-sec. (*a*), enacts that:—

On the death of any person the following property shall be subject to succession duty. All property of such deceased person situate within the province and any interest therein or income therefrom whether the deceased person owning or entitled thereto was domiciled in the province at the time of his death or was domiciled elsewhere passing either by will or intestacy.

The case came before the courts on the petition of the executors of M. M. Boyd's estate praying for a declaration that the properties in question were not liable for succession duties because they were acquired by the partnership the "Mossom Boyd Company" and were paid for out of the partnership funds; and although standing and held in the names of the individual partners were so held by them on behalf of and as part of the assets of the partnership—and that as the business of the partnership was carried on in Ontario, where the head office was and where the books were kept, the interest of the deceased partner in these partnership lands was not liable to succession duty under the British Columbia Act.

The Chief Justice of British Columbia dismissed the petition without stating his reasons. On appeal

to the Court of Appeal for that province the court was equally divided and the judgment of the Chief Justice therefore stood.

I think the evidence shews that the partnership carried on its business in Ontario at Bobcaygeon where its head office was and its books were kept and that it had no partner or paid agent to transact business in British Columbia though it purchased and sold lands there as elsewhere in Canada under the terms of the partnership deed.

I think also it is clearly shewn that the lands in question were purchased and paid for out of the partnership funds and that although they stood in the names of the individual partners they did so in trust for the partnership and must on the death of one of the partners and for the purposes of succession duty be treated as partnership property of the firm.

I am also of opinion that the shares of the individual partners in these real properties of the firm must be treated in the absence of any binding agreement between the parties as personalty: *Attorney-General* v. *Hubbock*(1).

The reasons why this must be so are clearly explained by Brett, M.R., at page 285, and Bowen, L.J., at page 289.

But in my judgment it does not matter for the determination of the question on this appeal as to the liability of the property in question to pay succession duties whether it is treated as personalty or realty.

The sole question is whether the interest, whatever it may be, of the deceased partner comes within the section of the Act I have quoted.

The section clearly overrides and excludes the

(1) 13 Q.B.D. 275.

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rule of law based upon the maxim "*mobilia sequuntur personam*" and therefore, though the deceased's domicile was in Ontario and the lands were treated as personalty, they would not escape liability on that ground.

That point being disposed of by the express terms of the statute, we must determine whether the other judicial rules relating to partnership property have also been set aside or overruled by the statute.

It is contended on the part of the appellants, that although the lands were situated in British Columbia and the title stood in the individual names of the partners, still, as they were partnership property of a firm carrying on its business in Ontario, they were not liable under the Act for the succession duties.

The contention was made and I agree with it that as under the facts the deceased partner had in law and equity no interest in these lands within the meaning of the statute they were simply these British Columbia assets of the partnership and must be held at its dissolution and for the purposes of succession duty to be situate in Ontario where the business of the partnership was carried on—and that the only right or interest the deceased partner or his representative had at the time of his death was a right to share in the surplus assets of the partnership.

The law on this subject as above stated is clearly put in Lindley on Partnership, 8th ed., pp. 402 and 403, and Halsbury, vol. 22, p. 55, where the authorities are collected.

Mossom Martin Boyd's interest in the partnership property under these authorities consisted at the time of his death of the surplus assets of the partnership after its debts and liabilities were paid and discharged and this is the only interest which passed or could pass on his death to his representatives.

The only right of the executors of the will of the deceased partner, the petitioner in this court, is a right to have such share of the deceased properly ascertained and paid. The right of the British Columbia Legislature to change and displace these rules of law and to make the interest of a deceased partner in partnership property situate in British Columbia liable to succession duties is not disputed.

The question is: Has it done so in the section of the statute quoted above, either expressly or by necessary implication? If it has not so changed and displaced these judicial rules with reference to the interest of a deceased partner in partnership property situated within the province, then *cadit questio*.

In the case of *Rex* v. *Lovitt*(1), so much relied upon by the two learned Judges in the Court of Appeal as supporting the right of the province to claim the succession duties in this case, the Judicial Committee did certainly determine that a competent legislature may if so minded and by the use of apt language in its legislation impose a succession duty on property within its jurisdiction, even if in so doing it displaces the rule of law based upon the maxim *mobilia sequuntur personam.*

Their Lordships first decided that the monies there in question being deposits made by the deceased testator in his lifetime in a branch bank in New Brunswick of the Bank of British North America whose head office was in London, England, were primarily at least payable in St. John, New Brunswick, where the branch bank was and came therefore within the words of the statute

property within the province.

(1) [1912] A.C. 212.

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They held further that the rule of law based upon the maxim *mobilia sequuntur personam* had been expressly displaced by the language of the section which made all such property liable to succession duties *though the testator's domicile may have been outside of the province.*

But the decision in that case does not help the Crown in the case before us because the British Columbia statute does not profess to displace any of the rules of law relating to partnership property or to alter the rights of a deceased partner or his representatives on his death in or to such property.

I am quite at a loss to understand what words in the section now under discussion can be invoked to displace any of such judicial rules. If none can then these rules must be given effect to.

The mere fact that the property stood in the individual names of the two partners cannot affect the question.

It was partnership property and the partners held it in trust for the partnership.

The only interest which the partner held was a right to share in the surplus assets of the partnership and as the business was carried on outside of the province the succession duties, if any such were payable at all, would be payable in the province where the business was carried on.

The words of the section relied upon as displacing by implication the ordinary rules of law relating to partnerships and the interest of the partners therein are no doubt these,

> all property of such deceased person situate within the province and any interest therein or income therefrom.

From what I have already said it will be apparent

that my conclusions are that the deceased partner had no interest in these properties at his death within the meaning of the section in question and that any interest he had with respect to them or that his representatives had under his will was a right to have them treated as partnership properties and to share in the surplus assets of the partnership the business of which was carried on in Ontario and not in British Columbia. In other words, the property was not that of the deceased partner nor had he any interest in it. His sole right and that of his representatives on his death was the right to have the property treated as a partnership asset in winding-up its affairs in Ontario.

The answer to the argument arising out of the title to the lands standing in the individual names of both partners at the decease of Mossom Martin Boyd is that previously stated by me, namely, that it being shewn to be partnership property purchased with partnership funds the deceased and his partner would be held respecting them to be trustees for the partnership and the executors of the deceased's will would be compelled to join in a sale of the properties for partnership purposes or otherwise to convey and assure the properties to the surviving partner for partnership purposes. No interest other than his right to a share of the surplus assets of the partnership was held or possessed by the deceased partner at his death or could be disposed of by his will in these properties.

If the legislature intended to make any such interest liable to succession duties they would have used express language to displace the rules of law respecting it as they did when they desired to displace the rule of law respecting personal property founded on the maxim *mobilia sequuntur personam*.

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I would therefore allow the appeal and grant the declaration prayed for.

IDINGTON J.—The late Mossom Martin Boyd carried on business in Ontario along with his brother under articles of partnership which I will presently refer to, and having made a will, also to be referred to, died 8th June, 1914, when amongst other assets they held timber lands situate in British Columbia.

These lands had been acquired and registered in the names of the said Mossom Martin Boyd and his said brother William Thorncroft Cust Boyd and were held as partnership property.

The question raised herein is whether the Province of British Columbia can, under its "Succession Duties Act," R.S.B.C. 1911, ch. 217, sec. 5, claim that any interest in said lands or income therefrom was subject to succession duties.

Said section 5 so far as directly dealing with the matter involved, is as follows:—

5. (1) Save as aforesaid the following property shall be subject on the death of any person, to succession duty as hereinafter provided, to be paid for the use of the province over and above the probate duty prescribed in that behalf from time to time by law;

(*a*) All property of such deceased person situate within the province, and any interest therein or income therefrom whether the deceased person owning or entitled thereto was domiciled in the province at the time of his death, or was domiciled elsewhere, passing either by will or intestacy.

It is denied by appellant that this enables the province to collect duties in any case of death of a partner when the partners had carried on business and resided beyond the province at the time of such death.

We have been by means of the liberal citation of cases invited to consider the probate duties, the succession duties, the death duties, the legacy duties

payable heretofore and now under a variety of English statutes, the voters' franchise and legislation bearing thereon, and in the same way the several Acts in force in England and her colonies bearing respectively upon such like duties or rights not overlooking sundry other Acts such as "Locke King's Act," and last but not least the "Mortmain Acts," in order to be helped to a proper understanding of the sections just quoted.

Briefly put the argument was based upon the theory that land held by the members of a partnership was held as joint tenants and therefore the share of one dying would by due course of law become vested in the survivor or survivors to be held subject to the terms of the articles of partnership as part of the assets of the firm and only be accounted for by the survivor or survivors in course of his or their winding-up the firm business or default through the court which necessarily must observe the doctrine of equity jurisprudence by which all the assets must be treated as personal property and as there could be no claim made by the personal representative of a deceased partner to any of the assets and only a possible claim to share in the residue of the proceeds realized by survivor or court in Ontario in due course of liquidation there was nothing for the said statute to operate upon.

I have in deference to the course which that argument has taken in the hands of able counsel considered all these cases, but I cannot say that I am much helped thereby to a solution of the actual problem presented to us to determine. Many of these cases cited to us had to distinguish between what should be held to be real and what personal property in certain contingencies for the purpose of applying the Act imposing a pro-

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bate duty, or for other purposes the equitable doctrines properly relevant in certain cases wherein land had in fact furnished the basis of the dispute but in such view had to be treated as personal property.

We have no such distinctions to make herein or at least if such like distinction has to be observed it rests upon other conditions than those arising in many of the cases cited.

It matters not whether the interest that passes by this testator's will is real or personal or a mixture of both. Whatever it is the clear purpose of the Act is, if we study its provisions as a whole and regard its purview, to see that whatever passes shall be taxed.

There are some rather cogent reasons for holding that under the state of the law in England nothing in said land would have, if governed thereby, passed by such a will but the possible share of the personal representatives of deceased in the ultimate residue of the realized assets of the firm. But when I come to try and apply such reasons to this particular statute and its entire purpose and the relation thereof to the peculiar facts of the case and to the laws of British Columbia to which I am about to advert, I must hold that something in the nature of an interest in the property or the income thereof has passed.

It would surprise the appellants to be told that nothing in British Columbia passed by the will.

It is self-evident that everyone concerned felt the necessity of holding that something else than suggested in argument passed; else why resort to the British Columbia Probate Court for ancillary letters through the statutory provision for recognition of the Ontario probate?

And when we go a step further we find that, in

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order to make a title to any purchaser of the British Columbia lands in question, or even to one of those concerned in the event of a partition thereof, it seems necessary in order that there should be any title pass in either such case (the provisions of the "Land Registry Act" are such) that the parties concerned must resort to the will and probate and only by means thereof can title be made.

These features seem to me to furnish the crux of the case to be considered and decided.

There does not seem to be anything in the nature of a transmission to the surviving partner such as formerly enured in England and does yet, by reason of the title being one of joint tenancy.

That phase of the English law of real property seems to be practically taken away by reason of the provision of the "Land Registry Act," ch. 127, of the Revised Statutes of British Columbia, 1911, sec. 52, which enacts as follows:—

Section 52. Where by any letters patent, conveyance, assurance, or will, or other instrument made and executed after the twentieth day of April, 1891, land has been or is granted, conveyed or devised to two or more persons, other than executors or trustees, in fee-simple, or for any less estate, it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless a contrary intention appears on the face of such letters patent, conveyance, assurance, or will, or other instrument, that they are to take as joint tenants.

It will be observed that executors or trustees are the only grantees who may receive a title in joint tenancy to be governed by the incidents of survivorship peculiar to such a tenure unless by express provision to the contrary.

There is no such implication to be presumed from the mere fact of the existence of a partnership between the grantees.

There is no such statutory provision in England,

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so far as I can find, and certainly the text books indicate that the presumption of a grant to more than one person whether partners or not is, unless otherwise expressed, a grant to hold as joint tenants with all the incidents of survivorship incidental to joint tenancy.

I need not dwell on the exceptions presumed from circumstances. It may be observed that many English decisions and some of those cited to us turn upon this conception of the law in England

The right of survivorship in law founded thereon has often enabled surviving partners to deal properly and advantageously with the partnership estate and even wind it up.

We must also remember that the jurisdiction of courts of equity over the administration of partnership is so comprehensive that the views of these courts, treating the entire property of such partnerships for that and like purposes as personal property, being that to which everything in the last resort is reducible by the process they adopt, dominate legal minds.

Hence we find the propositions laid down, perhaps rather broadly, by high authority that all partnership property is personal. Obviously the expressions so quoted relate to such cases as happen to be dealt with for some purpose incidental to a partnership as such, or to the view of courts of equity in administering partnership assets.

I cannot accede to such a proposition as of universal application and covering cases where the partners see fit expressly to provide for an entirely different treatment of their assets.

What a court of equity may do and find necessary to do in the course of administering a partnership estate in order that third parties may get their share, when no other provision has been made therefor, and

the principles and practice of proceeding in a court of equity have to be observed, is one thing. But when third parties have not to be protected and the partners have by their contract between themselves made ample provision for the manner of dealing with partnership assets, it is entirely another thing, and I venture to think that in such a case no court of equity would interfere with that provision or the mode of carrying it out, but rather would aid in the due execution thereof according to the agreement.

Now what is the condition of things existent in the partnership we have to deal with and to which we have to apply if we can the statute now in question?

The articles of partnership are in the case and dated 23rd November, 1892, subsequent to the coming into operation of the statute I have quoted above relative to the nature of the tenure under which the lands acquired by the firm should be held, and constituting it, presumptively at least, a tenancy in common.

I may remark here that in Ontario there had long existed a statutory provision from which I imagine the British Columbia Legislature copied that which I quote above, substituting the year 1891 for that of 1834 in the Ontario enactment.

This fact is, of course, of no further consequence than to suggest the mode of thought likely to prevail with business men of Ontario when acting as partners they enter into a bargain for the management of and dealing with their property including real estate at home and abroad. It may require that due heed should be paid to that circumstance in interpreting the language they have used in framing their articles of partnership and the agreement therein for the winding-up of their estate.

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When due heed is paid thereto and to the language used in such articles and they are thus found to possess a meaning in accord with what a business man would read therein freed from the hampering preconceptions lawyers often have of what men are about, I submit no court should interfere with, but try to execute, the purpose in the business man's mind.

The articles of partnership in question herein provided for its continuation for ten years from the date thereof or until the partnership had been determined by either party giving six months' notice to the other.

Following such provisions are articles 8 and 9 which are as follows:—

8. If either partner shall die during the continuance of the partnership his executors and administrators shall be entitled to the value of the partnership property, stock and credits to which the deceased partner would have been entitled on the day of the date of his death.

9. On the expiration or other determination of the said partnership, a full written account shall be taken of all the partnership property, stock, credits and liabilities, and a written valuation shall be made of all that is capable of valuation, and such account and valuation shall be settled, and provision shall be made for the payment of the liabilities of the partnership, and the balance of such property, stock and credits shall be divided equally between the partners, and each shall execute to the other proper releases and proper instruments for vesting in the other, and enabling such other to get in such property, stock and credits.

Clearly this partnership ended by the testator's death and what article 9 provided, probably was duly carried out. And however that may be it is to be presumed it was so until the contrary appears.

We are not informed on all this as we might have been. Probably a full exposition of the results of the provisions just quoted and what done pursuant thereto, would have deprived the theoretical argument submitted of much of its application.

The will of the testator is produced and assuming it was intended thereby, as suggested by counsel on the

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argument, to deal with the interest of the deceased in the lands in question it furnishes an illuminating commentary on the pretensions set up in argument.

The will provides a period of ten years is to be allowed for carrying out the greater part of the provisions made therein, in order to prevent any loss to this testator's estate by too hasty a realization of the assets.

Is not the fair inference that the testator well knowing the above quoted provisions for the settlement of the partnership affairs expected and intended that there should be no enforced winding-up thereof in the manner contemplated in the argument herein, but that after the valuation there should be a division of the lands as well as goods available for partition and the trustee executors be enabled thereby to execute the testator's directions. Every one of long experience in Canada knows the need that exists for dealing with timber limits and lands as this testator directs.

Such seems to me to have been the scope and purpose of both the articles of partnership and the will, and that there was thereby a transmission of the testator's interest in the lands in question clearly within the meaning of the statute in question rendering it liable beyond peradventure to the payment of succession duties in British Columbia.

In that view there is no need for speculation as to the possible outcome of a winding-up of the partnership by a sale of the assets and on the realization thereof a payment of money in Ontario where the surviving partner and the executors presumably would execute their respective duty or trust and the money be payable.

There also seems clearly in such a view no room for the argument presented on the basis of the results of such a speculative way of looking at the matter.

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Even in such an alternative I by no means have a doubt as to what the legislature intended.

The expression of that intention might well have been better put, so as to cover the grounds taken in argument.

However that may be, there is in sub-section (*d*) of section 5 a provision made against the possible vesting of an estate in a joint tenancy whereby the beneficial owner might under the strict literal terms of sub-section (*a*) escape.

This provision against any possible resorting to such subterfuge clearly suggests, that the case of any other analogous result arising from the doctrine of survivorship in a joint tenancy was not expected as a thing that could arise under the law of British Columbia.

It is difficult to imagine a more tangible asset possessing a local situs than land in any country and especially so where both by virtue of the provisions I have quoted the tenancy would be presumed to be a tenancy in common and by the provision of the "Land Registry Act" it is contemplated that each of the parties named in the registry as owners, or their representatives, must join in order to effect a transfer of the entire estate.

The provision of section 25 of the "Partnership Act" declaring that real estate as between the partners shall "be treated" as personal or movable and not real and heritable estate, does not seem to me to affect the operation of the Act in the slightest degree so far as it relates to the situs of the property or interest therein to be taxed. It simply fits what courts of equity for purposes of administration have always, at least *primâ facie*, maintained. There may arise sometimes but cannot in this case an arguable question

as to the measure of interest of a partner in an insolvent partnership concern or one possessing little value. I express and indeed have no opinion in regard thereto.

I only refer to it to illustrate that there may be questions other than that of situs arise out of said section 5 in relation to which section 25 of the "Partnership Act" may have a bearing.

The Province of Ontario desired and was allowed to intervene. The fullest argument possible is always desirable in these cases. But we have no right, and are indeed not asked to pass upon the possible claims of that province, resting upon such theories as the argument presents, to maintain another succession duty even if the British Columbia claim is maintained. That possibility is properly suggested in argument as a reason for great care on our part.

The case of *Rex* v. *Lovitt*(1), goes a long way to maintain the respondent's claim.

The actual situation of the properties and the necessity to obtain probate where situated in order to secure the recovery of it or to enable any dealing with it, were cogent reasons in that case for maintaining the claim. Both exist and are strengthened in this case by the need for compliance with the "Land Registry Act."

Moreover, in this case it was not seriously disputed in argument that the province would have the power within the jurisdiction conferred by the "B.N.A. Act" to impose direct taxation upon or in respect of the land in such a contingency as appears to result from the dissolution of a partnership by death and all involved therein.

It comes back to the narrow question of whether or not the legislature has succeeded in expressing it-

(1) [1912] A.C. 212.

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self within the meaning of that power. I think it has. The act of doing or attempting to do so has to bear the test of its being fitted to British Columbia laws and the condition of things created thereby, or flowing therefrom. Neither the power nor the mode of expressing its exercise can be very adequately helped by analogous cases founded on other laws and other conditions of things.

I think the appeal should be dismissed with costs.

DUFF J.—The Mossom Boyd Company was a firm composed of two members, Mossom Boyd and William Boyd, carrying on (*inter alia*) a lumber business with its head office at Bobcaygeon in Ontario. The partnership was formed on the 23rd November, 1892, and by the articles was to last for ten years; but the partners continued to carry on business as a partnership at will down to the death of Mossom Boyd in June, 1914. Both partners were domiciled in Ontario. Certain timber lands and timber leases were acquired in British Columbia and, it is admitted, became partnership property, and were partnership property on the death of Mossom Boyd. These properties were acquired and were registered in the names of the partners as individuals, as tenants in common in fee simple or as lessees.

The partnership acquired property in Saskatchewan, Manitoba and Quebec as well as in Ontario and British Columbia. There was no place of business in British Columbia and, excepting the acts done in acquiring the properties mentioned, in the payment of rent and taxes and license fees and in other acts incidental to the ownership of the property, it did not at any time carry on business in British Columbia.

The question is whether the deceased Mossom

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Boyd had in these properties in British Columbia an interest that on his death became subject to succession duties under section 5, sub-sec. 1*a* of the "Succession Duty Act," R.S.B.C. 1911, which enactment is in the following words:—

Sec. 5 (1). Save as aforesaid, the following property shall be subject, on the death of any person, to succession duty as hereinafter provided, to be paid for the use of the province over and above the probate duty prescribed in that behalf from time to time by law:—

(*a*). All property of such deceased person situate within the province, and any interest therein or income therefrom, whether the deceased person owning or entitled thereto was domiciled in the province at the time of his death, or was domiciled elsewhere, passing either by will or intestacy.

That no such interest was vested in the decedent is alleged for the reason that by the law of British Columbia as well as by that of Ontario the "share" of a partner in the partnership assets is not an interest in any specific asset of the partnership but is merely a right ultimately to receive his share of the proceeds of the sale of the surplus assets after payment of the partnership liabilities. This right, it is said, is of the nature of personal property and the right had its situs, it is alleged (referring to the right of Mossom Boyd), in Ontario where the head office of the business is and where for many purposes the business must be deemed to have been carried on.

The conclusions to which we are asked to assent as flowing from this are, first, that no interest devolved under the will of Mossom Boyd which was "property" belonging to him

situate within the province

and secondly, that any attempt to subject this right of the decedent to succession duty would be *ultra vires* as not being

taxation within the province

according to the meaning of sec. 92 "B.N.A. Act."

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The second of the questions raised presents little difficulty. The title to land and to interests in land within the boundaries of the province is a subject within the exclusive jurisdiction of the province and no question can be raised touching the authority of the legislature to declare that on the devolution of a registered title consequent upon the death of one of two tenants in common the land or the undivided half interest vested in him whether as trustee or otherwise shall be charged with the payment of a duty to the Crown or that a condition of the registration of the title devolving by reason of his death or of the recognition as *jura in re* of the rights of the beneficiaries for whom that title is held in trust shall be the payment of such a duty. The extent of the legislative jurisdiction with respect to lands within the province may be gathered by reference to the decision of the Privy Council in *McGregor* v. *Esquimalt and Nanaimo Railway Co.*(1). This observation is subject to one qualification and only one, and that is that such legislation would not be effective if it appeared that, although "taxation," it did not when its real purpose was considered, fall within the description "direct taxation." *Payne* v. *Rex*(2), at page 560.

The first proposition stated above rests upon the assumption that at the time of his death Mossom Boyd had no interest in the partnership lands in British Columbia which could be described as "property" or interest in "property" within the meaning of the "Succession Duty Act." With his brother as co-partner he was registered tenant in common, having vested in him an undivided moiety in the "absolute fee" in the timber lands and being joint lessee under the

(1) [1907] A.C. 462. (2) [1902] A.C. 552.

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timber leases. It is argued, however, that the "absolute fee" vested in the partners as individuals was held by them as bare trustees for the "partnership."

The discussion of the question thus raised will be simplified by adverting to some of the fundamental principles of the English law of partnership. For our present purpose it is most suitable to quote a passage of Lord Lindley's from the 5th edition, Lindley on Partnership, at page 111:—

> The firm is not recognized by lawyers as distinct from the members composing it. In taking partnership accounts and in administering partnership assets, courts have to some extent adopted the mercantile view, and actions may now be brought by or against partners in the name of their firms; but speaking generally, the firm as such has no legal recognition. The law, ignoring the firm, looks to the partners composing it; any change amongst them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities.

Notwithstanding the change effected by the "Judicature Acts" alluded to in this passage "we have not yet" as James L.J. says in *Ex parte Blain*(1), at page 533:

> introduced into our law the notion that a firm is a *persona*.

When it is said therefore that property held in the names of the partners as partnership property is held "in trust for the partnership" it should be understood that what is meant is not that the partners are not the beneficial as well as the legal owners of the property but that as between the partners themselves and those claiming under them the property is dedicated to the purposes of the partnership, and that each partner holds his interest in trust for such purposes. The partners are owners in the fullest sense both at law and in equity.

(1) 12 Ch.D. 522.

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It is true nevertheless that as between the partners themselves and those claiming under them and generally speaking as between the creditors of the partnership and the creditors of an individual partner the share of an individual partner in the partnership assets is merely the share to which he may prove to be entitled in the clear surplus of the assets after the partnership affairs have been wound up, the property sold and the debts and liabilities paid. This rule and its effect through the operation of the equitable doctrine of conversion are explained in a well-known passage by Kindersley V.-C. in *Darby* v. *Darby*(1), referred to with approval by the Court of Appeal in *Attorney-General* v. *Hubbock*(2). The passage is in the following words:—

> Now it appears to me that, irrespective of authority and looking at the matter with reference to principles well established in this court, if partners purchase land merely for the purpose of their trade and pay for it out of the partnership property, that transaction makes the property personalty and effects a conversion out and out. What is the clear principle of this court as to the law of partnership? It is that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule and it requires no special stipulation; it is inherent in the very contract in partnership. That the rule applies to all ordinary partnership property is beyond all question; and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he should retain his own share of it in specie.

It is said to be involved in this doctrine that a partner has no right or interest in any specific asset of the partnership and further that the share of each partner in the assets is a right, the situs or constructive locality of which has no necessary relation to the situs in fact of the individual items and that the true rule of law is that for all purposes this share or interest of

(1) 3 Drew. 495. (2) 13 Q.B.D. 275.

the individual partner has its seat in contemplation of law at the firm's principal place of business.

The crucial question in the present controversy is whether Mossom Boyd had at the time of his death an interest in the British Columbia assets which the statute lays hold of. The question whether or not these assets became notionally converted into personal property on the acquisition of them by the partnership is not immaterial, but it is not the precise point involved.

In the present appeal these questions must as Mr. Ritchie argued be considered with reference to the terms of the partnership articles and the relevant provisions are these:—

WHEREAS the parties hereto are desirous of carrying on the business of manufacturing lumber in all its branches and the purchase and sale of real estate or such other ventures as may from time to time be agreed upon between said parties, and have concluded to enter into and form a partnership according to the true intent and meaning of these presents.

* * * * *

8. If either partner shall die during the continuance of the partnership his executors and administrators shall be entitled to the value of the partnership property, stock and credits to which the deceased partner would have been entitled on the day of the date of his death.

* * * * *

9. On the expiration or other determination of the said partnership, a full written account shall be taken of all the partnership property, stock, credits and liabilities, and a written valuation shall be made of all that is capable of valuation, and such account and valuation shall be settled, and provision shall be made for the payment of the liabilities of the partnership, and the balance of such property, stock and credits shall be divided equally between the partners, and each shall execute to the other proper releases and proper instruments for vesting in the other, and enabling such other to get in such property, stock and credits.

These terms of the contract between the parties seem either to exclude or greatly to restrict the application of the doctrine of *Darby* v. *Darby*(1), even as be-

(1) 3 Drew. 495.

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tween the partners themselves. Primarily the business of the firm was lumbering and *primâ facie*, I think, the arrangements of the partners did not contemplate the disposal of such properties as were purchased in British Columbia by sale of them as lands except as the result of agreement between the partners. It is quite true that no lumbering appears to have been carried on by the firm in British Columbia but we are not entitled to assume, I think, that the purchase of the timber lands and the acquisition of the leaseholds were operations merely in the business of "buying and selling real estate."

It should be noted that the "charge" arising out of the partnership articles was not registered.

Treating these timber lands as part of the assets of a firm whose business was lumbering it would follow that in law neither partner would as between himself and his co-partner during the existence of the partnership have the right to sell them without the concurrence of the other, a possibility which no doubt never entered the mind of either of them. Then the terms of section 9 exclude the right of either partner, conferred by law in the absence of agreement to the contrary, to insist upon a sale of the partnership property at dissolution, a right which as Lord Justice Cotton pointed out in *Ashworth* v. *Munn*(1), at page 374, is not merely a right to insist upon a sale for the payment of the debts but a right in each partner in his absolute discretion to insist upon a sale even after the debts have been paid. This British Columbia property cannot therefore be treated as (to use the words of Bowen L.J. in *Attorney-General* v. *Hubbock*(2)):

in the end subject to a trust for sale;

(1) 15 Ch.D. 363.

(2) 13 Q.B.D. 289.

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and this, I think, is sufficient evidence of the existence of a "contrary intention" within the meaning of section 25 of the "Partnership Act," R.S.B.C. (1911), ch. 175. The general rule therein laid down that where such "contrary intention" does not appear partnership property is as between the partners and the heirs and personal representatives of a deceased partner to be treated as personal estate, consequently does not apply.

Section 8 must of course be considered. That section, I think, should be read with section 9 and its office appears to be to fix the date in relation to which the value of the partnership assets is to be ascertained.

In this view it cannot be affirmed that no interest in the British Columbia assets devolved on the death of Mossom Boyd as part of his estate. At his death an undivided interest in these assets was vested in him as land, subject to the operation of the stipulation of section 9.

True the effect of section 9 is to provide a method of distribution which in the result might give the whole of the British Columbia assets to the surviving partner; but at the death of the deceased partner his interest was an undivided interest in the partnership assets as a whole, including the British Columbia assets, an undivided interest in every item of the assets subject to a charge for payment of debts.

Some light is thrown upon the question of the nature of the partner's legal status with reference to the real property assets of the partnership during the existence of the partnership, by a consideration of the practice existing prior to the passing of the "Partnership Act" as regards the taking in execution of a partner's share for his separate debt. Before the passing of that Act partnership property could be seized un-

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der a writ of *fi. fa.* upon judgment against one of the partners for his separate debt, the sheriff seizing such of the partnership effects as might be requisite and could be seized under the writ and selling the undivided share of the judgment debtor in them. The legal effect of such seizure and sale is described in Lindley on Partnership (5 ed.), at page 358. The purchaser being a stranger unconnected with the firm acquired for his own benefit all the judgment debtor's interest in the property comprised in the sale and became as regards such property tenant in common with the judgment debtor's co-partners. The purchaser, however, held this interest subject to all the equities which the co-partners had upon it and subject therefore to their right to have all the creditors of the firm paid out of the assets of the firm and *consequently pro tanto out of the property seized by the sheriff.*

It is clear, therefore, notwithstanding the fact that a suit in equity was formerly necessary or might have been necessary in such a case to have the partnership accounts taken and to have the partnership property correctly applied, that each of the partners had an interest in specific assets of the partnership which could be seized and sold under a judgment against him for his separate debt.

A few sentences from Lord Justice Lindley's judgment in *Helmore* v. *Smith*(1), at page 447, may be advantageously quoted:—

A writ of *fi. fa.* was issued against one of the two partners in the business of coal merchants. Let us consider what the sheriff could do under that *fi. fa.* He could seize all such of the assets of the firm as are seizable under a *fi. fa.*, but he could not seize book debts or goodwill. The *fi. fa.* does not touch such things; *and it is a mistake and a very serious mistake, to suppose that when the sheriff, under a separate execution against one of the several partners, seizes the partnership goods, and sells*

(1) 35 Ch.D. 436.

the share and interest of the execution debtor in those goods, the sheriff can or does in practice sell the whole of the execution debtor's interest in the partnership. Such a case is conceivable, but *in practice it never arises, because there are always in practice assets which cannot be reached by a fi. fa.* What the sheriff has got to sell is not the share and interest of the execution debtor in the partnership, but the share and interest of the execution debtor in such of the chattels of the partnership as are seizable under a *fi. fa.*

I find some difficulty in holding that an interest which could be seized under a *fi. fa.* in British Columbia and sold by a sheriff under the authority of the writ is not an interest in property situated in British Columbia, and therefore subject to duty under section 5 of the "Succession Duty Act."

In 1897 the law of British Columbia was changed by the "Partnership Act;" by section 24, sub-sec. 1, of that Act it was provided that a writ of execution should not issue against any part of the partnership property except on a judgment against the firm. By sub-section 2 another remedy is submitted. A judgment creditor having a judgment against a partner is given a right to obtain an order charging the debtor's interest in the property of the firm and subsequently to have a receiver appointed to get in that interest.

It seems probable that section 24 would not apply to the property of a partnership such as that of the Mossom Boyd Company, which had no place of business in British Columbia, which carried on business in other jurisdictions and had its principal place of business elsewhere; and if the section does not apply then the old law still remained applicable to the British Columbia assets of this firm and at the time of Mossom Boyd's death his interest in the partnership chattel property in British Columbia was exigible under a judgment against him in accordance with the old law.

If section 24 does apply then the second sub-sec-

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tion could only take effect as authorizing a charging order upon the partner's interest in the property in British Columbia and the appointment of a receiver to realize that interest. On this hypothesis the observation made above as to the difficulty of holding that an interest capable of being so dealt with is not an interest situated within the province and not an interest within section 5 of the "Succession Duty Act," is equally pertinent.

In 1897 when the "Partnership Act" was introduced into British Columbia and for a number of years afterwards land and interests legal and equitable in land including charges on land and the moneys thereby secured could be seized and sold under a writ of *fi. fa.* and I can see no reason why the interest of a partner in the firm's real estate should not be subject to be taken in execution under that writ just as his interest in the firm's chattels was. It is useful also to refer to *Ashworth* v. *Munn*(1), at pages 370 and 374, cited by Mr. Ritchie as shewing that a partner's interest in the assets of a partnership which possesses land among its assets is an interest in land.

Ashworth v. *Munn*(1), is an illuminating case. The decision was that a bequest in favour of a charity of the residue of a testator's real and personal property, part of which consisted in money to be derived from the sale of his share of the partnership assets which in part were land, was hit by the "Mortmain Act" and void, the share in the partnership assets being, as the court held, an interest in land. Lord Justice James, at page 369, says:—

It appears to me that in a private partnership which has got land it is difficult to say that the partner has not an interest in land * * *

(1) 15 Ch.D. 363.

their interest is exactly in proportion to what the ultimate amount coming due to them upon the final taking and adjustments of the accounts may be.

The partnership in question, it may be noted in passing, was one to which the doctrine of *Darby* v. *Darby*(1), applied. But the case is chiefly valuable because all their Lordships agreed that their decision must be governed by the judgment of Lord Cairns in *Brook* v. *Badley*(2). In effect the court held that Lord Cairns' reasoning, the substance of which is given in a passage I am about to quote, extends to the interest of a partner where land is included in the partnership assets. "If a testator," says Lord Cairns, at page 674,

> devises his land to be sold, and the proceeds given, not to one person, but to four persons in shares, and if one of those four persons afterwards makes his will, and gives either his share of the proceeds or all his property to charity, the position of that second testator with regard to the estate which is to be sold is in substance *that of a person who has a direct and distinct interest in land.* The estate is in the hands of trustees, not for the benefit of those trustees but for the benefit of the four persons between whom the proceeds of the estate are to be divided when the sale takes place. It may very well be that no one of those four persons could insist upon entering on the land, or taking the land, or enjoying the land *quâ* land, and it may very well be that the only method for each one of them to make his enjoyment of the land productive is by coming to the court and applying to have the sale carried into execution, but nevertheless the interest of each one of them is, in my opinion, an interest in land; and it would be right to say in equity that the land does not belong to the trustees, but to the four persons between whom the proceeds are to be divided.

Even on the assumption that "value" in section 8 of the partnership articles means value in money, I am unable to agree that no interest devolved having a situs in British Columbia.

I do not think the effect of section 8 on that assumption, is to convert the tenancy in common of the partners into a joint tenancy. The interest of the de-

(1) 3 Drew. 495. (2) 3 Ch. App. 672.

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ceased partner in the partnership assets existing at his death which is explicitly recognized by section 8 would devolve in the usual course subject to the rights created by sections 8 and 9 according to which the surviving partner would be entitled and compellable to take over that interest on payment of its value ascertained under section 9; and in any view there would be a charge on the whole of the partnership assets for the purpose of paying the sum thus due from the surviving partner: *Ashworth* v. *Munn*(1). The registered title to the undivided moiety of the British Columbia real estate vested in Mossom Boyd at the time of his death would devolve upon his heirs and devisees and the surviving partner, I think, would not be entitled to demand a transfer except upon paying this sum.

I can see no difficulty in ascertaining the portion of this sum which ought properly to be regarded as compensation for the interest in the British Columbia lands since the total amount is determined by the valuation of these lands among the other assets; and I have great difficulty in understanding upon what grounds it can be alleged that the charge upon these lands for the payment of the moiety of their value plus the registered title in fee to that moiety does not constitute an interest dutiable under section 5, sub-section 1*a* of the "Succession Duty Act." See *In re Hoyles*(2).

A number of decisions of the highest authority were cited in which, as between the place of domicile of the partners and the place where the assets were and where the business was wholly carried on, the courts had to decide which place was in point of law

(1) 15 Ch.D. 370. (2) [1910] 2 Ch. 333; [1911] 1 Ch. 179.

the situs of the share of a deceased partner in the partnership assets considered as an entirety; and in such a case it was held that the share had its situs where the assets and the business were: *Commissioners of Stamp Duties* v. *Salting*(1); *Beaver* v. *Master in Equity*(2); *Laidlay* v. *Lord Advocate*(3).

These authorities decide nothing as to a case where the question in dispute relates to a partnership having immovable assets purchased for the purposes of the partnership business in different jurisdictions and where the partnership articles contemplate carrying on business in those jurisdictions with a principal place of business in one of them; I think they establish no principle which governs the construction of the "Succession Duty Act" in its application to such a case.

The appeal should be dismissed.

ANGLIN J. (dissenting).—The late Mossom Martin Boyd was domiciled at Bobcaygeon, in the Province of Ontario. He was a member of the firm of Mossom Boyd & Co. which had its chief place of business at Bobcaygeon where all its affairs were managed. It had neither an office nor a resident agent in the Province of British Columbia. Amongst the partnership assets, bought with the firm's moneys, were certain timber lands and timber limits in British Columbia, title to which was registered in the names of the two partners but was held by them in trust for the firm. The question presented is whether an interest in this property devolved under the will of the late Mossom Martin Boyd which is liable to payment of succession duties under sec. 5 of the British Columbia "Succession Duties Act" (R.S.B.C. 1911, ch. 217).

(1) [1907] A.C. 449.
(2) [1895] A.C. 251.
(3) 15 App. Cas. 468.

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What passed under the will was the share or interest of the testator in the partnership assets. While living he had no enforceable claim upon or interest in any particular piece of property belonging to the partnership in specie. His only right was to be paid his share out of the surplus assets of the partnership. That and nothing more is the right which he transmitted to his personal representatives: *Re Ritson*(1), at page 131; Lindley on Partnership (8 ed.), 694-5. It is a right similar to that of a legatee of a share in the residue of an estate, which does not give him a share or interest in any particular property of the estate in specie, but merely entitles him to have the estate as a whole duly administered and to receive the designated share of the clear residue: *Sudeley* v. *Attorney-General*(2), at page 21.

So far as the firm's assets consisted of lands, in the absence of any binding agreement between the partners to the contrary they are to be regarded as personal estate (*Re Bourne*(3), at pages 432-3) as between the partners themselves and as between persons claiming under them; *In re Wilson*(4), at page 343; and they are so to be regarded in cases where the Crown is concerned as well as in other cases: *Attorney-General* v. *Hubbock*(5), at page 499.

> Whatever the character is that is impressed on the property when the breath leaves the body of the owner, that is its character for the purpose of the fiscal duties which are alleged to attach upon it: *Attorney-General* v. *Hubbock*(6), at page 280.

The operation of a contractual provision, the performance of which can only affect the property after the death, need not be considered: *ibid*, page 286. I

(1) [1899] 1 Ch. 128.
(2) [1897] A.C. 11.
(3) [1906] 2 Ch. 427.
(4) [1893] 2 Ch. 340.
(5) 10 Q.B.D. 488.
(6) 13 Q.B.D. 275.

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find no binding "agreement between the partners" which prevented their interests in the British Columbia timber lands of Mossom Boyd & Co. being regarded as personalty at the moment of Mossom Boyd's death.

The situs of a share of a deceased partner is where the business is carried on: *Stamp Commissioners* v. *Salting*(1), at page 453. A partnership may of course control several separate businesses each carried on in a distinct locality. That was the case in *Beaver* v. *Master in Equity*(2). It is not the case here. All the firm affairs were carried on as one business, managed and directed in and from Bobcaygeon, Ontario. As Lord Herschell said in *Laidlay* v. *The Lord Advocate*(3), at page 485:—

The question to be determined is what is the local situation of the asset with which we have to deal, because that the testator's interest in the partnership, however it is to be described, was one of his assets is beyond dispute.

In my opinion the share of Mossom Boyd in the partnership which devolved under his will was locally situate in Ontario.

If it be competent for a legislature whose powers of taxation are restricted to

taxation within the province

to declare that property, to which the general law of the province applicable under the circumstances attributes a situs outside the province, shall nevertheless, for the purpose of this or that species of taxation, be deemed situate within the province (I respectfully adhere to the view which I have more than once expressed that such a legislature has not that power: *Lovitt* v. *The King*(4), at page 161; *The King* v. *Cotton*(5), at pages 534-5); the legislature of British Columbia has

(1) [1907] A.C. 449.
(2) [1895] A.C. 251.
(3) 15 App. Cas. 468.
(4) 43 Can. S.C.R. 106.
(5) 45 Can. S.C.R. 469.

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not attempted to abrogate the general principles of partnership law to which allusion has been made, as it was held in *Lovitt's Case*(1), at pages 221-2—unnecessarily as I view it—the legislature of New Brunswick had done in regard to the application of the maxim *mobilia sequuntur personam* to moveable property of a non-domiciled decedent having a situs within that province. On the contrary, by sections 23 (2), 25 and 46 of the "Partnership Act" (R.S.B.C., ch. 175) so far as they go, those principles have been affirmed to be the law of the province.

It is perhaps unnecessary to state that the duties are claimed not in respect of the bare legal estate in the lands, which, although it of course devolves in, and under the law of, British Columbia, has no tangible value, but upon the beneficial interest held in trust for the partnership purposes.

I am, for these reasons, with great respect, of the opinion that the share of Mossom Martin Boyd in the partnership of Mossom Boyd & Co. which devolved under his will was not an interest in property situate in the Province of British Columbia within section 5 of the "Succession Duties Act."

I also think that the duties in question cannot be regarded as fees payable for services rendered by the provincial authorities of British Columbia in granting ancillary probate: *Re Muir Estate*(2), at page 458.

I would, therefore, allow this appeal.

Appeal dismissed with costs.

Solicitors for the appellants: *Pooley, Luxton & Pooley.*
Solicitors for the respondent: *Elliott, Maclean & Shandley.*

(1) [1912] A.C. 212.
(2) 51 Can. S.C.R. 428.

JOHN A. MARSHALL BRICK COMPANY AND OTHERS (PLAINTIFFS) .... APPELLANTS;

AND

THE YORK FARMERS COLONIZATION COMPANY (DEFENDANTS). RESPONDENTS.

1916 *Nov. 21, 22.

1917 *Feb. 19.

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

Mechanic's lien—Loan company—Agreement for sale—Advances for building—"Owner"—Request—Privity and consent—Mortgagee—R.S.O., [1914] *c.* 140, *ss.* 2 (1), 8 (3) *and* 14 (2)—" *Mechanics' Lien Act.*"

The owners of four lots of land in Toronto executed an agreement to sell them to one I. who was to make a cash deposit and undertake to build four houses on the lots, the vendors to advance $6,400 for building purposes. On completion of the houses and on receipt of the balance of price and amount of advances, the vendors to execute a deed of the lots. I. gave contracts for the building which was partly completed, and $3,400 was advanced by the vendors when I. became insolvent and the vendors, under the terms of their agreement, gave notice of forfeiture and took possession of the property. Prior to this liens had been filed for labour and materials supplied and the lien-holders brought action for enforcement thereof against the vendors.

Held, affirming the judgment of the Appellate Division (35 Ont. L.R. 542), Davies and Brodeur JJ. dissenting, that the vendors were not owners of the property according to the definition of the term "owner" in section 2 (*c*) of the "Mechanics Lien Act" and, therefore, were not liable to pay for the labour and materials supplied for the building of the houses by I.

Per Anglin J.—To make the vendors "owners" because the work was done with their privity and consent a direct dealing between them and the materialmen was requisite and of this there was no evidence.

By section 14 (2) of said Act, the vendors, under the agreement for sale, became mortgagees of the land sold with their rights as such

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

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postponed to those of the lien-holders in respect to any "increased value" given to the land by erection of the houses thereon.

Held, that though they had refused it at a former stage of the proceedings, the lien-holders should, if they wish, have a reference to permit of revision of their claims on the basis of the vendors being mortgagees, any amount found due to them on such reference to be set-off against the costs payable by them in the Appellate Division and on this appeal.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), reversing the judgment of the official referee in favour of the appellants.

The respondents the York Farmers Colonization Company, Limited, are a land company. They sold to one Irving four lots on Edmund Avenue, Toronto, for $2,400, he paying a cash deposit of $120 and undertaking to erect four houses according to plans furnished by the vendors, the company to advance money for building purposes, and, when the houses were completed, deeds to be given to the purchaser on payment of the balance of the purchase price and re-payment of the advances with interest.

The property is under the "Land Titles Act," R.S.O. ch. 126, and the agreement was not registered.

Irving proceeded to build the houses and these appellants supplied labour and materials therefor. The appellants registered mechanics' liens against the property under the Act (R.S.O. 1914, ch. 140) and it is undisputed that they are now entitled to the liens as against Irving's interest in the property.

Irving became insolvent and the company exercised their right under their contract with him to serve notice of forfeiture. After the notice of forfeiture they took possession of the property and claim now

(1) 35 Ont. L.R. 542, *sub nom. Marshall Brick Co.* v. *Irving.*

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to hold the houses free from any liability to the appellants under the mechanics' liens.

The houses when completed would have been worth about $2,400 each, that is to say $9,600, independently of the land. The respondent company advanced $3,400 to Irving under the agreement. Two of the houses were about finished, a third was roofed in and the walls of the fourth up to the joists, leaving about $3,000 still to be expended to complete all four.

The issue was tried before R. S. Neville Esquire, K.C., official referee, at Osgoode Hall, Toronto. He delivered judgment establishing the liens of these appellants as against the interests of both Irving and the York Farmers Colonization Company in the lands in question.

From this judgment the York Farmers Colonization Company appealed and the Second Appellate Division of the Supreme Court of Ontario reversed the judgment of the official referee, being of the opinion that the referee erred in finding that the liens of the appellants attached as against the interest of the respondent company in the property.

Section 6 of the Act (R.S.O. 1914, ch. 140) provides that:—

"Unless he signs an express agreement to the contrary * * * any person who performs any work or service upon or in respect of or places or furnishes any materials to be used in the making, constructing * * * any erection, building * * * for the *owner*, contractor, or sub-contractor shall by virtue thereof have a lien for the price of such work, service, or materials upon the erection, building, * * * and the and occupied thereby or enjoyed therewith or upon or in respect of which such work or service is performed,

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or upon which such materials are placed or furnished to be used."

And section 8 (1) provides that:—

"The lien shall attach upon the estate or interest of the owner in the property mentioned in section 6."

"Owner" is defined by section 2 (*c*):—

"(*c*) 'Owner' shall extend to any person body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and

(i) upon whose credit or
(ii) on whose behalf or
(iii) with whose privity and consent or
(iv) for whose direct benefit

work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished."

Sections 8 (3) and 14 (2) of the Act are as follows:—

8. (3) Where the land upon or in respect of which any work or service is performed, or materials are placed or furnished to be used, is incumbered by a prior mortgage or other charge, and the selling value of the land is increased by the work or service, or by the furnishing or placing of the materials, the lien shall attach upon such increased value in priority to the mortgage or other charge.

14. (2) Where there is an agreement for the purchase of land, and the purchase money or part thereof, is unpaid, and no conveyance has been made to the pur-

chaser, he shall, for the purposes of this Act, be deemed a mortgagor and the seller a mortgagee.

Raney K.C. and *C. Lorne Fraser* for the appellants. Respondents had an "interest" in this land and the terms of the agreement for sale respecting the building of houses amounted to a "request": *Orr* v. *Robertson*(1).

These terms also made it impossible for respondents to deny that the work was done with their privity and consent. See *Graham* v. *Williams*(2); *Blight* v. *Ray*(3); *West* v. *Elkins*(4); *Gearing* v. *Robinson*(5); *Orr* v. *Robertson*(1).

On the question of appellants' rights against the respondents as mortgagees see Thom Canadian Torrens System, page 164; *Richards* v. *Chamberlain*(6); *Hynes* v. *Smith*(7); *McVean* v. *Tiffin*(8); *McNamara* v. *Kirkland* (9); *Cook* v. *Koldoffsky* (10); *Charters* v. *McCracken* (11); *Rose* v. *Peterkin* (12); *Miller* v. *Duggan* (13).

B. N. Davis for the respondents. The appellants' lien is not superior to ours so far as the advances to Irving are concerned: *Cook* v. *Belshaw*(14); *Kennedy* v. *Haddow* (15).

Mere knowledge of the work being done and materials supplied is not "privity and consent." See

(1) 34 Ont. L.R. 147.
(2) 9 O.R. 458.
(3) 23 O.R. 415.
(4) 14 C.L.T. 49.
(5) 27 Ont. App. R. 364.
(6) 25 Gr. 402.
(7) 27 Gr. 150.
(8) 13 Ont. App. R. 1.
(9) 18 Ont. App. R. 271.
(10) 35 Ont. L.R. 555.
(11) 36 Ont. L.R. 260.
(12) 13 Can. S.C.R. 677.
(13) 21 Can. S.C.R. 33.
(14) 23 O.R. 545.
(15) 19 O.R. 240.

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Graham v. *Williams*(1); *Gearing* v. *Robinson*(2); *Slattery* v. *Lillis*(3) at page 703; *Quinn* v. *Leathem*(4), at page 506.

THE CHIEF JUSTICE.—I do not dissent from the judgment dismissing this appeal reserving to the appellant the right to a reference under the conditions mentioned in Mr. Justice Anglin's notes.

DAVIES J. (dissenting)—This is an appeal from the judgment of the Second Appellate Division of Ontario which reversed that of the official referee before whom the case was tried, which latter judgment maintained the claim of the now appellants to a lien against the interest of the respondents in the lands in question as "owners" under the "Mechanics Lien Act," R.S.O., 1914, ch. 140.

The main question argued was whether the appellants were owners of the lands within the meaning of the word "owner" defined in the interpretation clause 2(*c*) of that Act.

Subsidiary questions were also raised and argued whether if the claimants were not such "owners" the "mortgage or other charge" which the respondents claimed to have as a prior claim to the appellants' lien was the balance of the purchase money of the lands sold by the respondents to one Irving which amounted to $2,280 or that sum plus $3,400 which they had actually advanced to Irving under the agreement with him for the building of four houses upon the lands sold to him, in all $5,680.

The facts are not in controversy. The respondents,

(1) 8 O.R. 478.
(2) 27 Ont. App. R. 364.
(3) 10 Ont. L.R. 697.
(4) [1901] A.C. 495.

the York Farmers Colonization Company, Limited, are a land company. They sold to one Irving four lots on Edmund Avenue, Toronto, for $2,400, he paying a cash deposit of $120 and undertaking to erect four houses according to plans furnished by the vendors, the company to advance money for building purposes, and, when the houses were completed, deeds to be given to the purchaser on payment of the balance of the purchase price and re-payment of the advances with interest.

The property is under the "Land Titles Act" and the agreement was not registered.

Irving proceeded to build the houses by a contractor, Campbell, and these appellants supplied labour and materials therefor. The appellants registered mechanics' liens against the property under the "Mechanics Lien Act" and it is undisputed that they are now entitled to liens as against Irving's interest, if any, in the property for the amount.

Irving became insolvent and the company exercised their right under their contract with him to serve notice of forfeiture. After the notice of forfeiture they took possession of the property and claim now to hold the houses free from any liability to the appellants under the "Mechanics Lien Act."

The houses if completed would have been worth about $2,400 each, that is to say $9,600, independently of the land. The respondent company advanced $3,400 to Irving under the agreement to build them. Two of the houses were about finished, a third was roofed in and the walls of the fourth up to the joists, leaving about $3,000 or more still to be expended to complete all four.

The agreement after witnessing that the vendors agreed to sell and the vendee to buy from them lots

as described for $2,400 went on specially to provide for the building on each lot by the vendee of a solid brick house to be used for private residences only, and that the vendors should lend him $6,400 for the construction of the four houses in instalments as the work progressed, which was to be applied only to the construction of such houses and that the houses should be built according to plans and specifications dated and signed by the vendors.

Many very special stipulations were inserted for the protection of the vendors' interests and to secure that

> the houses should not be used for any purpose that might deteriorate the adjoining property

which I therefore assume was the vendors.' Time was declared to be of the essence of the contract and discontinuance of the work at any time for two weeks gave the vendors the right to take possession ,made the agreement "null and void" and forfeited to the vendor all moneys paid and improvements made thereunder.

I think it necessary to state these facts because in construing this "Mechanics Lien Act" and the rights of the different parties thereunder, it seems clear that "each case must be governed by its own facts." A few general principles have been laid down in the decided cases and accepted as the law, such as that

> mere knowledge of or consent to the work is not either a "request" or "privity and consent" within the meaning of the interpretation clause

and in the case of *Orr* v. *Robertson*(1), at page 148, Riddell J., in delivering the opinion of the Appeal Court, said:—

> While, to render the interest of an owner liable, the building, etc., must have been at his request, express or implied, there is no need that

(1) 34 Ont. L.R. 147.

this request be made or expressed to the contractor—if the owner request another to build etc., and that other proceeds to build, by himself or by an independent contractor or in whatever manner, the building being in pursuance of the request, the statute is satisfied. The taking of a contract from Hyland to build is a request within the meaning of the statute.

I think this statement of the law as to the construction of the statute a correct one.

Dealing with the main question then as to whether the respondents are under the facts proved "owners" of the land and buildings within the interpretation clause (*c*) I am not able to agree with the conclusions reached by the court of appeal that the respondents were not "owners" within that clause. That clause (*c*) reads as follows:—

(*c*) "Owner" shall extend to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and

(i) upon whose credit or
(ii) on whose behalf or
(iii) with whose privity and consent or
(iv) for whose direct benefit

work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished.

In the case before us it is not disputed that the respondents had an interest in the land. The dispute is whether there was a "request" and a "privity and consent" on the part of the respondents with respect to the work done on the buildings and the materials supplied for them for which the lien is sought.

I do not think, as I have said, a direct request is necessary from the owner to the workman or the materialman. Such a request must be one to be reasonably implied under the facts of each case: *Orr* v.

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Robertson(1), above cited, so decided and I agree with that construction of the statute. If that was not so the main purpose and object of the Act, namely the protection of these workmen or materialmen would be easily defeated. All that would be required would be the interposition of a third party between the real owner and the workman or materialman supplying the labour or the materials.

In the case now before us, therefore, I do not entertain any doubt on the facts as proved—alike on authority and on the construction of the Act apart from authority—that the work and materials for which a lien is sought to be established was done and materials supplied at the respondents' request. If that is so, I cannot find any difficulty in concluding also that they were done and supplied with the privity and consent of the respondents.

This is not a case of *mere knowledge* or *mere consent* on the part of the respondent company. The agreement they made with Irving to whom they sold the lot specially provided for the building of these four solid brick houses in accordance with the plans the company had prepared and which they required him to sign. It also provided for the advance to Irving of a substantial portion of the cost of the buildings and made very special provisions for the forfeiture, under certain circumstances of delay and otherwise, of all moneys paid by Irving to them and of all improvements made by Irving upon the lands. Under these forfeiture provisions the company acted and the referee finds that Irving's interest was determined and is gone and that the ownership of the land and buildings now belongs to the company.

(1) 34 Ont. L.R. 147.

These facts shew that the action of the company was not that of mere knowledge or mere consent to the work being done which the courts have held to be insufficient. The agreement with Irving to build the houses and to advance him a portion of the money necessary to do so was more than a mere request on their part that Irving should build. It bound him to build in accordance with plans and specifications provided by the vendors, respondents, and bound them to supply him with a substantial portion of the moneys necessary to enable him to carry out his contractual obligation—being careful, of course, to secure themselves by stipulations providing for time being of the essence of the contract, and for delay creating forfeiture and making the agreement null and void.

If the facts as proved in this case and the agreement under which the houses were partly built do not constitute a "request" under the statute, I am at a loss to know what facts would. It does seem to me, therefore, that not only was there a "request" to build, but there was necessarily involved in the agreement to build, the actual building, and the advances made by the respondent of the moneys they contracted to supply from time to time as the work progressed, the "privity and consent" also required by the section of the statute. It surely was not necessary that there should be direct contractual relations proved between the respondents and the lien claimants for the materials they supplied the contractor and the actual labour they performed. But the fair and reasonable inference from the proved facts is that there was alike such "privity" and "consent" of the respondents as satisfies the statute.

Having reached these conclusions, holding the respondents "owners" under para. (*c*) of the interpreta-

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tion clause of the Act, it is not necessary for me to deal with the other questions raised on the argument.

I would allow the appeal with costs and restore the judgment of the official referee.

DUFF J.—I concur in dismissing this appeal. I agree with the conclusions of Meredith C.J. and the reasons assigned therefor.

ANGLIN J.—Although the "Mechanics Lien Act" (R.S.O. ch. 140) in sec. 14 (2) expressly declares that an unpald vendor who has not conveyed shall

for the purposes of this Act be deemed a mortgagee,

it seems reasonably clear that if he fulfils the requirements prescribed by the statutory definition of that term he may also be regarded as an "owner." I am not convinced, however, that the Appellate Division erred in holding that the respondent company was not an owner.

As an unpaid vendor the company was not an owner apart from the statutory definition. That definition sec. 2 (*c*) extends the meaning of "owner" to include a person

having any estate or interest in the land * * * at whose request and * * * with whose privity and consent * * * (the) work or services are performed or (the) materials are placed or furnished,

in respect of which the lien is claimed. Upon the authorities holding that the "request" may be implied, of which it is necessary to refer only to *Orr* v. *Robertson*(1), the contractual provision by which the respondent company required its purchaser to erect buildings on the land according to approved plans and specifications and within a defined period may have amounted

(1) 34 Ont. L.R. 147.

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to a "request" under the statute, although an opinion to the contrary was expressed at the conclusion of the judgment delivered in this case by Mr. Justice Riddell (1). The learned judge's reasoning, however, rather points to an absence of the requisite "privity and consent."

While it is difficult if not impossible to assign to each of the three words "request," "privity" and "consent" a meaning which will not to some extent overlap that of either of the others, after carefully reading all the authorities cited I accept as settled law the view enunciated in *Graham* v. *Williams*(2), and approved in *Gearing* v. *Robinson*(3), at page 371, that "privity and consent" involves

> something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged * * *. Mere knowledge of, or mere consent to, the work being done is not sufficient.

There is no evidence here of any direct dealing by the respondent company with the purchaser's contractor such as is necessary to establish the "privity" requisite to constitute the respondent company an "owner" within the definition of the "Mechanics Lien Act."

Failing to establish the respondent's interest as "owner," the appellants prefer a right to a lien under sec. 8 (3) of the Act upon "increased selling value." In making this claim they assert the position of the respondent company to be that of a mortgagee. In so doing they necessarily invoke the agreement for sale since it is as an unpaid vendor that the statute declares the respondent to be a mortgagee (sec. 14(2)). Invoking that agreement they must take it as a whole, including its provisions for advances to be made to

(1) 35 Ont. L.R., at pp. 551-2. (2) 8 O.R. 478; 9 O.R. 458.
(3) 27 Ont. App. R. 364.

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the purchaser secured by the stipulation for re-payment before conveyance. The priority of this "charge" on the land does not depend on registration but upon its existence as a charge before the lien arose: *Cook* v. *Belshaw*(1). Under sec. 14 (1) the mortgage or charge is to be regarded as a "prior mortgage" only in respect of payments or advances made before notice in writing or registration of the lien. To the extent to which the selling value of the property has been increased by the work or services performed or the materials furnished by the plaintiffs the company's interest as such prior mortgagee is subject to the plaintiffs' lien (sec. 8 (3)): *Patrick* v. *Walbourne*(2), at pages 225-6.

At the trial before the official referee the plaintiffs expressly abandoned this right to a lien upon increased selling value. They were, nevertheless, as a matter of grace, offered in the Appellate Division an opportunity to apply for

a reference to permit of their claims being reviewed on the basis of the company being only prior mortgagees.

They failed to take advantage of the indulgence thus extended. In view of these facts they would have no ground for complaint if this branch of their appeal to this court were not entertained. But, taking all the circumstances of the case into account, I think the ends of justice will be best attained by allowing them, if so advised, even at this late date, to take a reference in the terms which I have quoted from the judgment of the learned Chief Justice of the Common Pleas.

The respondent is of course entitled to its costs of this appeal and these costs as well as the costs awarded them in the Appellate Division may be set off against

(1) 23 O.R. 545.

(2) 27 O.R. 221.

any amounts for which the appellants may establish liens on the reference, should they take it.

BRODEUR J. (dissenting)—This appeal has reference to the application and construction of the "Mechanics and Wage-Earners Lien Act of Ontario" (R.S.O. 1914, ch. 140).

The appellants have established their claims and we have now to decide whether or not those claims affect the interests of the respondent company. According to sec. 8, sub-sec. 1, the lien shall attach upon the estate or interest of the "owner" in the property. We have then to find out whether the company should be considered an "owner."

The respondent company was the proprietor of the lands in question in this case and, on the 17th of July, 1914, it entered into an agreement with a man by the name of Irving by which the company agreed to sell and Irving agreed to buy the said lands for a sum of two thousand four hundred dollars ($2,400).

The agreement recited that Irving desired to build four houses on the lands and required to borrow money for that purpose, and the company agreed to lend him a sum of $6,400 which was to be advanced for the construction of the houses during the progress of the building operations. The agreement provided that the houses should be built according to certain plans and specifications.

It was agreed also that the work would begin on the 20th of July, 1914, and be completed in the month of November of the same year, and it was further stipulated that the company should pass a deed of the property within one month after the houses would be completed if Irving re-paid the company all the moneys advanced and the purchase price.

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It was also agreed that time would be of the essence of the contract and that if the work should, at any time, be discontinued for two weeks the company would have the right to take possession of the property and the agreement of sale would become null and void.

The agreements of sale are contemplated by the "Mechanics and Wage-Earners Lien Act," sec. 14, sub-sec. 2, which declares that

Where there is an agreement for the purchase of land, and the purchase money or part thereof is unpaid, and no conveyance has been made to the purchaser, he shall, for the purposes of this Act, be deemed a mortgagor and the seller a mortgagee.

This is not, however, all the law on the matter; and, as was stated by the learned Chief Justice in the court below,

that, however, does not prevent mortgagees from being more than mortgagees, they are "owners" if they come within the definition of that word contained in the interpretation clause of the Act.

The definition is contained in sec. 2, sub-sec. (*c*), which declares that:—

"*Owner*" shall extend to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and

(i) upon whose credit or
(ii) on whose behalf or
(iii) with whose privity and consent or
(iv) for whose direct benefit

work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished.

The question then to be determined is whether the building has been built at the request of the respondent company and with its privity and consent.

The company appears to be the proprietor of a

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large number of vacant lots in the vicinity of Toronto and the form of agreement entered into in this case between the defendant company and Irving is one which has been in use by the company and its predecessors for many years. Instead of having those vacant lots built on by the company itself they make arrangements with some contractors, as they have done in this case, because Irving is a contractor and is so called in the deed, by which those contractors obligate themselves to build and if they fail to carry out their contract during a certain period of time then the buildings become the absolute property of the company. If, on the other hand, the contractor carries out his contract, builds the houses and reimburses the money which had been advanced by the company for their construction, and if he pays the price agreed upon for the sale of the land itself, then the contractor is entitled to a conveyance.

Those contracts of the respondent company had to be considered by the court in the unreported case of *Toronto Junction Co.* v. *Armstrong and Cook.* The learned referee tells us in his judgment that the case was tried before the late master in chambers and it is contended that the interest of the company was declared to be charged with the lien; but unfortunately this case is not reported, and it is contended, on the other side, that the judgment which has been rendered has not that effect.

It was decided in the case of *Orr* v. *Robertson*(1), that a contract similar in many respects to this one should be construed as constituting on the part of the respondent a request. If the company had simply agreed with Irving that it would advance to the latter the necessary money for erecting the buildings, then

(1) 34 Ont. L.R. 147.

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the relations would be those of mortgagor and mortgagee. But when Irving obligates himself towards the company to erect those buildings, then I would consider that the obligation contracted by Irving is such that he should be considered as having been requested by the company to erect the buildings and that the latter erected them with its privity and consent.

This case is distinguished from the case of *Graham* v. *Williams*(1), much relied upon by the respondents; because in that case the builder or the intended purchaser never obligated himself to build, it was purely and simply a case of the owner permitting his lessee to erect some buildings and to advance him some money. There was no formal obligation on the part of the contractor to build and the proprietor could not force the intended purchaser to build. It is a very different case from this one, where the contractor has bound himself to build. The company was entitled to retain the building if the contractor had not finished it within a certain time.

The case of *Garing* v. *Hunt*(2), has also been cited on behalf of the respondents.

That case is also, in some respects, based upon a contract very similar to the contract which we have to examine in the present case, but the relations between the parties were those of lessor and lessee, and Falconbridge, J. who rendered the judgment, relied on the fact that a formal consent in writing had not been given, as provided by sec. 5, sub-section 2, of the Act which declared that in cases where

the estate or interest charged by the lien is leasehold, the fee simple may also with the consent of the owner thereof be subject to such charge, provided such consent is testified by the signature of such owner upon the claim of lien at the time of the registering thereof and duly verified.

(1) 8 Ont. L.R. 478. (2) 27 Ont. R. 149.

That section cannot be invoked in the present case. Irving was not the lessee of the York Farmers Company but an intending purchaser.

There is also the case of *Gearing* v. *Robertson*(1), which is invoked by the respondents, where the parties were lessors and lessees; and Mr. Shepley, who argued the case for the lessors, claimed also that there was no liability because under section 2 of sub-section 7 there was no consent in writing.

In the case of *Gearing* v. *Robertson*(1), the lease also contained a clause that the lessee was allowed to make some changes in the intended structure of the building, but the lessee never bound himself, as in the present case, to make those improvements. It was simply stated that if the improvements were made the lessee would have the right to be reimbursed at the expiration of the lease.

The request certainly did not exist in that case.

The contract that we have to deal with in this case is a very different one from those which had to be construed in the last three cases relied upon by the respondent and then those cases have to be distinguished from the present case.

It may be urged that the terms of this contract do not contain any clause by which a formal request has been made by the proprietor to build houses on his property for the contract declared that the intended purchaser desires to build and much stress is laid upon the word "desires."

But the contract has to be construed by all its clauses and if the contract is made in such a way as to defeat the "Mechanics' Lien Act," I should say that

(1) 27 Ont. App R. 364.

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such an agreement should be held against public order (sec. 6).

I have come to the conclusion that the respondent company should be considered an "owner" under the provisions of the "Mechanics' Lien Act," and that its interest should be charged with the lien claimed by the appellant.

The appeal should be allowed with costs of this court and of the court below.

Appeal dismissed with costs.

Solicitor for the appellants: *C. Lorne Fraser.*
Solicitors for the respondents: *Cook & Gilchrist.*

THE CANADIAN NORTHERN RAILWAY COMPANY (PLAINTIFFS) .... APPELLANTS;

1916 *Oct. 24.
1917 *Feb. 6.

AND

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

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Statute — Construction — Application — Taxation — Exemption — Railway property—Frontage lots — Local improvements, 63 & 64 *V. c.* 57, *s.* 18; *c.* 58, *s.* 22 (*Man.*)—*R.S.M.*, 1902, *c.* 166—10 *Edw. VII.*, *c.* 74 (*Man.*).

By the "Railway Taxation Act," ch. 57, sec. 18, 63 & 64 Vict. (Man.), it was provided that every railway company subject to the Act should be free and exempt from all taxation of every nature and kind within the province except that imposed under its provisions. By ch. 58 of the same session of the legislature, ch. 57 was amended by adding section 22 thereto which provided that nothing therein should deprive any city corporation of any power it had to levy taxes on the real property of a railway company fronting on any street for local improvements. The two Acts were assented to and came into force on the same day. In 1901 an agreement, confirmed by statute, was entered into between the Manitoba Government and the Canadian Northern Ry. Co. by which the Government agreed to guarantee the company's bonds, the company to pay a percentage of its gross earnings to the Government and to be exempt from taxation provided for by section 18 of ch. 57. The "Railway Taxation Act" of 1900 became ch. 166 of the Revised Statutes of Manitoba, 1902, secs. 18 and 19 being identical with sec. 18 of ch. 57 and sec. 22 of ch. 58 respectively. In 1910 the Act 10 Edw. VII., ch. 74 was passed. Sec. 1 provided "sec. 18 of ch. 166 R.S.M., 1902, being 'The Railway Taxation Act' is hereby further amended by adding, etc.;" sec. 2 "for the removal of doubt respecting the exemption from taxation granted under clause 16 of the agreement" (of 1901

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

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above mentioned) "it is declared that the exemption so granted was and is the exemption specified in section 18 of the said 'Railway Taxation Act' existing at the date of the passage of such last mentioned Act and is unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto." Under the foregoing legislation the City of Winnipeg assessed frontage lots of the Canadian Northern Ry. Co. for local improvements.

Held, per Fitzpatrick C. J. that though it is reasonably clear that the reference to sec. 18 in the Act of 1910 was intended for sec. 18 of ch. 57 passed in 1900 yet the language used will not admit of a doubt that ch. 166, R.S.M. 1902, sec. 18 is really referred to and under that Act the company is not exempt from taxation for local improvements. Duff and Anglin JJ. contra.

Per Davies and Idington JJ.—Sec. 18 of ch. 57 and sec. 22 of ch. 58 must be read together and as if the latter had been made a part of ch. 57; so construing them the exemption of the company from taxation does not cover taxes for local improvements the right to impose which is preserved by sec. 22.

Per Duff J., dissenting.—The "Railway Taxation Act" R.S.M. 1902, ch. 166, referred to in the Act of 1910, was passed in 1900 (ch. 57), and not repealed and re-enacted in 1902. Ch. 58 of the Act of 1900 was an amendment passed concurrently with or subsequently to ch. 57 and does not affect the exemption given by the agreement of 1901; and, therefore, by the express terms of the Act of 1910, the principle of *Salmon* v. *Duncombe* (11 App. Cas. 627), applied.

Per Anglin J., dissenting.—The reference in sec. 2 of the Act of 1910 to sec. 18 of the "Railway Taxation Act" meant sec. 18 of the original Act of 1900, ch. 57, and the exemption given by the agreement was not affected by the provisions of ch. 58 amending same.

In 1910 a special survey, under the "Special Survey Act," was made of certain lots, including those in question, belonging to the railway company and each lot was charged with a proportionate share of the cost of the survey.

Held, Duff J., dissenting, that the charge so made was taxation and not being a tax for a local improvement the company was exempt from payment.

Judgment appealed from (26 Man. R. 292), affirmed.

APPEAL from a decision of the Court of Appeal for Manitoba(1), reversing in part the judgment at the trial in favour of the plaintiffs.

The appellant company was assessed by the City

(1) 26 Man. R. 292.

of Winnipeg for local improvements in respect to frontage lots and, having failed to pay, the lots were sold for such taxes. In order to prevent the issue of a certificate of title the company then paid the taxes under protest and brought an action to recover back the amount and another sum charged on the lots as its proportion of the cost of a special survey. The trial Judge, who heard the cause on a case stated by the parties, held that all the taxes were illegally levied and gave judgment for the plaintiffs. The Court of Appeal reversed his judgment as to the local improvement taxes and affirmed it in respect to the special survey rates. The legislation on which these judgments were based is set out in the headnote. Both parties appealed to the Supreme Court of Canada.

Tilley K.C. for the appellants and cross-respondent. A rate for local improvements is a tax within the exemption provided by the agreement of 1910: *City of Halifax* v. *Nova Scotia Car Works Co.*(1).

The charge on the land for the special survey is also taxation: *Ecclesiastiques de St. Sulpice* v. *City of Montreal*(2), at page 403.

T. A. Hunt K.C. for the respondent and cross-appellant. Chapters 57 and 58 of the Acts of 1900 must be read as one statute: *Canada Southern Railway Co.* v. *International Bridge Co.*(3), at page 727.

Personal statutes conferring special privileges are construed strictly against the beneficiaries: *Sion College* v. *Mayor of London*(4).

On the cross-appeal *Nova Scotia Car Works* v. *City*

(1) [1914] A.C. 992.
(2) 16 Can. S.C.R. 399.
(3) 8 App. Cas. 723.
(4) [1901] 1 K.B. 617.

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of Halifax(1); *Ponton* v. *City of Winnipeg*(2), and *McLellan* v. *Assiniboia*(3), were cited.

THE CHIEF JUSTICE.—This case must be governed by the last statute, *i.e.*, "the Act to amend the 'Railway Taxation Act,'" 10 Edw. VII., ch. 74. The first section of the Act declares that

section 18 of ch. 166 of the Revised Statutes of Manitoba, 1902, being the "Railway Taxation Act" is

amended as thereby provided. Section 2 declares that the exemption granted to the appellant by the agreement of 11th February, 1901, is

the exemption specified in section 18 of the said "Railway Taxation Act" as existing at the date of the passage of such last mentioned Act and is unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto.

As stated by Richards, J.A.:—

If we are as hitherto to read the section as referring to the Act of 1900 notwithstanding that ch. 166 of the Revised Statutes of 1902 is mentioned then the respondent is exempt. That this was what the Legislature intended need not be doubted but perhaps nothing but an amending statute can carry out the intention. It does not seem to be a question of construction of the Act, the words of which are not equivocal. The trouble is that the words of the Act are reasonably clear, only they do not carry out the intention of the Legislature.

Mr. Tilley admitted at the argument that the exemption granted is in terms not that of the Act of 1900 but that

specified in sec. 18 of the said "Railway Taxation Act"

(*i.e.*, ch. 166 of the Rev. S.M. 1902). This would have been the Act by virtue of the "Interpretation of Statutes Act," R.S.M. 1902, ch. 89, sec. 8 (*b*), even if ch. 166 had not been mentioned. But he said it is reasonably clear that the Act of 1900 was meant which may be conceded.

(1) 47 Can. S.C.R. 406. (2) 41 Can. S.C.R. 18.
(3) 5 Man. R. 265.

It is argued that if the Revised Statutes had been intended the addition of the words

as existing at the date of the passage of such last mentioned Act

would have been superfluous and meaningless and that the only conceivable purpose of their insertion was to make clear the application of section 7 of the "Act Respecting the Revised Statutes." This apparently concedes that without the addition of these words, section 7 of the "Act Respecting the Revised Statutes" would not have had its application. May not the purpose of their insertion have been precisely to prevent the application which section 7 would have had if they had not been inserted. If the legislature had really intended section 18 of the Revised Statutes of 1902, could it have expressed more clearly an intention to prevent the operation of section 7 of the "Act Respecting the Revised Statutes" than by the addition of the words

as existing at the date of the passage of such last mentioned Act

(*i.e.*, the Revised Statutes of 1902).

It seems a forced construction in any case this calling in aid section 7 of the "Act Respecting the Revised Statutes." What that Act says is that where the provisions of the repealed Act and the Revised Statutes are the same they shall be held to operate retrospectively as well as prospectively; this is a very simple provision and one that hardly seems capable of being invoked to prove that the repealed Act must be that referred to in section 2 of the Act of 1910.

It is reasonably clear what the legislature said and also what it intended; further that it did not say what it intended and that without disregarding the words of the statutes it is difficult to give effect to the intention.

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Although a statute is to be construed according to the intent of them that made it, if the language admits of no doubt or secondary meaning it is simply to be obeyed. As Lord Watson said in *Salomon* v. *Salomon & Co.*(1), at page 38:—

In a court of law or equity what a legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact either in express words or by reasonable and necessary implication.

This appeal should be dismissed with costs.

DAVIES J.—This appeal involves the proper construction of several Acts of the Legislature of Manitoba relating to the taxation of railways in that province and specially with respect to the power of incorporated cities to collect frontage taxes for local improvements on railway lands.

I agree with the judgment appealed from affirming that power and right and negativing the right claimed by the respondents in addition of levying on the railway lands and collecting what was called a special survey tax.

The reasoning of Chief Justice Howell, concurred in by Perdue, Cameron and Haggart JJ.A., commends itself to me as being sound and reasonable.

In the session of the legislature of 1900 there was passed a statute, ch. 57 of the statutes of that year, called the "Railway Taxation Act," imposing upon railway companies owning or operating any line or lines of railway within the province a tax of 2% upon the gross earnings of such railway companies on its lines within the province in the years 1900, 1901 and 1902, and after that, a sum to be fixed by the Lieuten-

(1) [1897] A.C. 22.

ant-Governor in Council not to exceed 3% of such gross earnings. The 18th section of that statute declared railway companies coming within and paying taxes under its provisions to be

free and exempt from all assessments and taxation of every nature and kind within the Province of Manitoba by whomsoever made or imposed, except such as are made and imposed under the provisions of this Act.

At some period of the session it was found that the language of this exemption clause was too sweeping and went further than was intended and another statute, ch. 58, was passed concurrently with that containing the exempting clause enacting that

the "Railway Act" passed at the present session of the Legislative Assembly is hereby amended by adding thereto the following section:—

22. Nothing herein contained shall take away from any incorporated city any right or power which any incorporated city may now have of assessing and levying on the real property of any railroad company fronting or abutting on any street or place, taxes for local improvement done, in, under or upon any such street or place according to the frontage of such real property so fronting or abutting on such street or place or relieve any railway or telegraph company owning or operating a telegraph line or lines in the province from the payment of the taxes imposed in that behalf under the provisions of the "Corporations Taxation Act."

The two Acts constituting in reality one were assented to by the Lieutenant-Governor together and, in my judgment, should be read together; otherwise the plain, obvious intent and purpose of the legislature not to deprive cities of the right and power of levying taxes for local improvements on railway companies as well as on other owners of lands would be defeated. Read together they preserve this right and power unto these cities and unless subsequent legislation has taken them away they should be maintained.

In the following year, an agreement dated the 11th February, 1901, was entered into between the Manitoba Government and the appellant company guaranteeing the payment of certain railway bonds of

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the appellant by the Province of Manitoba in which the company covenanted up to the maturity of the bonds so to be guaranteed, to pay to the Government a sum not exceeding two per cent. of its gross earnings from its lines in Manitoba and in consideration of such payments it was agreed that

> their properties, incomes and franchises shall be exempt from such taxation as is provided for by section 18 of ch. 57 of the Statutes of Manitoba of 1900 during the currency of the said bonds hereby agreed to be guaranteed.

Now, strictly speaking, no taxation was "provided for" in this section 18, but exemption from such taxation as they would be otherwise liable for. What was therefore the law at the end of the session of 1900 when the above two mentioned statutes were passed and on the 11th February, 1901, when this agreement was made?

Can it be doubted that this section 18 of ch. 57 was to be read and construed as if the amending or declaratory contemporaneous Act with the section named as section 22 had actually formed one of its sub-sections?

In law, I think it did form one of its sub-sections and was to be read and construed as one and that when the agreement in question of the 11th February, 1901, was entered into declaring the appellant company exempt

> from such taxation as is provided for by section 18 of ch. 57 of the statutes of 1900,

it meant section 18 as modified by section 22 and such exemption did not extend to or embrace local improvement taxes from which the legislature had already declared they were not exempt. These frontage taxes for local improvements which that 22nd section of same Act as amended in the same session explicitly

declared railway companies should not be relieved from are those we are now asked to declare the company should be relieved from.

In the Revised Statutes for 1902, ch. 166, this legislation is re-enacted, section 22 being made section 19, following section 18 which remains numbered as before in the "Railway Taxation Act."

But then it is said, assuming that to be so, subsequent legislation in 1910 sets the question definitely at rest as to the meaning of clause 16 of the agreement of February 11, 1901, and exempts the company from liability from local improvement taxes as well as general taxes. That legislation is embodied in 10 Edw. VII. (1910), ch. 74.

It makes no direct or specific reference to the local improvement taxes but enacts generally for the removal of doubt respecting the exemption from taxation granted under section 16 of the agreement of 1901 which agreement was validated and confirmed by statute that

> the exemption so granted was and is the exemption specified in section 18 of the said "Railway Taxation Act" as existing at the date of the passage of such last mentioned Act, and is unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto.

Now at this time and ever since 1902 sec. 22 of the "Railway Taxation Act" had formed section 19 of ch. 166 of the Revised Statutes and if it was intended to repeal that section and exempt the railway from local improvement taxes it was not difficult to say so in a few words. It will be noticed that this legislation declares the exemption so granted was and is the exemption specified in section 18. I have already given my reasons for holding that this section 18 must be read together with section 22 to determine its true meaning and that latter section expressly declared that

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nothing in that railway Act contained should take away from any city the right to tax for local improvements or relieve any railway from the payment of such taxes.

The Act of 1910, which is relied upon as effecting such exemption, merely declares in general terms that the exemption granted by clause 16 of the agreement of 1901 confirmed by ch. 39 of the statutes of that year was and is the exemption specified in section 18 of the "Railway Taxation Act" as existing at the date of the passage of such last mentioned Act. We are asked to say that the meaning of section 18 must be found within its own ambit and without reference to sub-section 22 which, in my opinion, formed part of it, though enacted in a separate chapter and withdrew local improvement taxes from its operation. I decline doing so because it would be bad construction.

I have already given my reasons for holding that at the date of the passage of the "Railway Taxation Act" of 1900 the right of the cities to levy and assess railways for local improvements was retained to them and these special taxes were not amongst those from which the railways were exempted and I think the legislation of 1910, though no doubt intended by the promoters to effect that exemption, failed because of the vague and uncertain language used.

If the legislature intended to exempt the railways from these local improvement taxes in 1910 they could have expressly said so in a few words.

In 1900, when they desired to continue the liability of the railways for these taxes the intention was clearly expressed in section 22 of the Act. In 1902 when the statutes were revised that intention was expressly re-enacted.

I do not think legislation so clear and explicit, mentioning local improvement taxes specifically, should

be held to have been repealed by such vague and general words as the promoters of the Act of 1910 have used carefully avoiding the mention of those local improvement taxes.

Shortly re-stated my conclusion is that section 22 must be read into the "Railway Taxation Act" of 1900 as if it formed one of the sections of that Act and that its being enacted as a separate chapter of the same session's legislation makes no difference. That the meaning and intent of section 18 when read in conjunction with sub-section 22 clearly does not include local improvement taxes amongst those exempted. That the subsequent revision of the statutes in 1902 makes that still more clear and that it would require equally clear and plain language to be used to reverse that legislation and exempt railways from local improvement taxes and thus throw heavier burdens upon the other owners of lands liable for such taxes; that the language of the Act of 1910 is altogether too vague and uncertain to effect that object; and there therefore never was a time when the appellant company was exempt from local improvement taxes.

With respect to the special survey charges I agree with the decision of the Court of Appeal.

I would therefore dismiss both appeal and cross-appeal with costs in each.

IDINGTON J.—Inasmuch as the expression used in the agreement in question by way of incorporating therein section 18 referred to does not when read therewith produce anything quite clear and unambiguous, I am driven to try and make of it something that is apparently what the contracting parties meant.

The part of the agreement which adopts for its

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definition of an exemption from such taxation as provided by a section which is in itself largely an exempting section instead of one directly providing for taxation, seems calculated to present a set of puzzles.

Surely whatever else was intended to be agreed to and thereby adopted, it must have been the substantial legal effect of section 18 as it stood amended at the date of the agreement.

I conclude that is the fair interpretation and that the judgment of the court below should be maintained for that reason and the reasons assigned therefor by Chief Justice Howell.

The appeal should be dismissed with costs.

I am unable to comprehend why a municipality should so persist in its wrong-doing and seek to escape from the consequence of its acts as respondent does in regard to the costs it put appellant to. As the payments were made under protest the conception covered by a voluntary payment cannot help it.

The survey tax was covered by the phrase "by whomsoever imposed" in section 18.

The cross-appeal should also be dismissed with costs.

DUFF J. (dissenting).—With respect I am unable to concur in the conclusion of the Court of Appeal for Manitoba.

The point raised on the main appeal is, in my judgment, concluded by section 2 of ch. 74 of the statutes of 1910, which is in the following words:—

For the removal of doubt respecting the exemption from taxation granted under clause 16 of the Agreement dated the eleventh day of February, 1901, set out in schedule "A" to chapter 36 of the statutes passed in the year 1901, it is declared that the exemption so granted was and is the exemption specified in section 18 of the said "Railway Taxation Act" as existing at the date of the passage of such last men-

tioned Act, and is unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto.

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The enactment must of course be read and construed in light of the circumstances with reference to which it was passed; and, to apply the principle on which the Judicial Committee of the Privy Council proceeded in *Salmon* v. *Duncombe* (1), at p. 634, it must not be given a construction which makes it nugatory or insensible with reference to those circumstances unless such a construction is forced upon us by the "absolute intractability" of the language used.

First, then, what is it that the legislature is dealing with in this section? It is dealing with clause 16 in a certain agreement dated the 11th February, 1901, confirmed and validated by ch. 39 of the statutes of that year and the enactment has specific reference to a certain provision in that clause 16 by which it is stipulated that the

property, incomes and franchises of the company,

that is to say of the now appellant company,

shall be exempt from such taxation as is provided for by section 18 of ch. 57 of the Statutes of Manitoba of 1900.

It has explicit reference to this stipulation and it was passed "for the removal of doubt respecting" the meaning and effect of the stipulation. What was the nature of the doubt that had arisen? In order to make that clear let us reproduce textually section 18 of ch. 57 of the statutes of 1900. That enactment is in the following words:—

18. Every railway company coming within and paying taxes under the provisions of this Act or any Act or Acts amending this Act, and the property of every nature and kind of every such railway company, except the land subsidy to which such company is or may be entitled

(1) 11 App. Cas. 627.

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from the Dominion Government, and any land held by it for sale, shall, during the continuance of this Act, or any Act or Acts amending this Act be free and exempt from all assessments and taxation of every nature and kind within the Province of Manitoba by whomsoever made or imposed, except such as are made and imposed under the provisions of this Act, or any Act or Acts amending this Act, and no person or body corporate or politic having power to make assessments or impose taxation of any kind shall during the continuance of this Act or any Act or Acts amending this Act make any assessment or impose any taxation of any kind of or upon any such railway company or any property of such railway company except the land subsidy to which such company is or may be entitled from the Dominion Government and any land held by it for sale as aforesaid.

The field in which the exemption hereby created is to operate, it will be observed, is limited by an exception, the exception being such assessment and taxation

as are made and imposed under the provisions of this Act or any Act or Acts amending this Act;

and it is upon the scope of this exception that the dispute had arisen. It was occasioned by these circumstances. In the very same year, the year 1900, the legislature passed an Act, ch. 58, amending ch. 57 (which was intituled "Railway Taxation Act") introducing an additional section, sec. 22, as part of that Act and by this last mentioned section introduced by this amending Act (ch. 58) it was declared that nothing contained in the Act (*i.e.*, nothing contained in ch. 57 of the "Railway Taxation Act") should take away any right or power which an incorporated city "may now have" of assessing and levying on any property of a railway company taxes for local improvements. The argument against the railway company, and it certainly was not without force, was that this section introduced as section 22 by way of an amendment brought within the sweep of the exception from the exemption created by section 18, taxes for local improvements so assessed and levied; this consequence

resulting, it was argued, from the fact that the exception embraces taxation imposed under the

provisions of this Act or any Act or Acts amending this Act,

taxation imposed under section 22 being taxation imposed under an "Act amending this Act;" and that consequently the exemption from taxation stipulated for by clause 16 of the agreement of February, 1911, which was to be an exemption from such taxation

as is provided for by sec. 18 of ch. 57 of the statutes of Manitoba of 1910

must be held to be subject to an exception embracing taxation for local improvements under section 22. This then was the point in dispute. Did the stipulation which was entered into in February, 1910, defining the exemption to which the company should be entitled, exclude from the scope of that exemption the sort of taxation authorized by section 22 introduced by the amending Act, (ch. 58, statutes of 1900) or did it confer an exemption, the scope of which was to be determined by an examination of section 18 alone without regard to the amending statute?

That being the point in dispute and the Act of 1910 being passed for the sole purpose of settling the controversy, how does the enactment of 1910 deal with the subject? The declaration of section 2 seems, when the circumstances just mentioned are considered, to be too explicit for misapprehension. The exemption intended to be created is to be the exemption specified in section 18 of the "Railway Taxation Act," that is to say, of ch. 57 of the statutes of 1900, and it is further declared that the exemption is

unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto.

Comment would appear to be superfluous. The dispute being whether or not for the purpose of ascer-

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taining the scope and character of the exemption, section 18 of ch. 57 of 1900 and section 22 introduced by ch. 58 of 1900 are to be read together or section 18 is to be read alone and ch. 58 disregarded—such being the nature of the controversy—can there be any doubt about the effect of this language of section 2 of the Act of 1910? Ch. 58 beyond question is an Act "amending this Act" (ch. 57) passed concurrently with or subsequently to it. Ch. 58 is therefore to be excluded from our purview when considering the effect of section 18.

It is argued on behalf of the respondent that "Railway Taxation Act" must be taken to have been the "Railway Taxation Act" of Revised Statutes of Manitoba, 1902, which, it is said, was passed in 1902. The answer to that is that the "Railway Taxation Act," ch. 166, R.S.M. 1902, was in truth passed in the year 1900, and was not repealed and re-enacted in 1902, as sufficiently appears from section 1, sub-secs. 1, 6, 7, 8, of the statutes of 1902, ch. 41, the "Act Relating to the Revised Statutes." But there is the additional reason that the construction proposed derives the intention of the Act of 1901 and the agreement confirmed by it from the provisions of a statute passed a year later; and the still further reason that it deprives the governing words of section 2, those relating to amendments, of all effect, and instead of removing doubts leaves the dispute exactly where it was; in other words it makes the statute nugatory as regards its declared object, the "removal of doubt."

A much more difficult question arises on the cross-appeal. It is difficult to believe that the legislature had in contemplation such charges as those provided for by ch. 182 R.S.M., 1913. On the other hand much may be said for the view that these charges are

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within the same category for the purposes of deciding this question as charges for local improvements. The point is a disputable one, but on the whole my conclusion is this: The amount chargeable (if not the question whether any amount at all shall be charged) against a specific property included in the survey is an amount not fixed by the reference to any rule prescribed by law but rests in the discretion of a public officer; and I think the charge falls rather within the class of imposts which would include the costs of works required by a Board of Railway or Municipal Commissioners assessed against a municipality or a railway company, which class of imposts would not according to the common notions of Canadian mankind come under the description "taxes;" and I think common usage should be a guide in construing such agreements as that before us.

Such expressions as that quoted from Strong J. (*St. Sulpice* v. *City of Montreal*(1), by the Chief Justice of Manitoba—

every contribution to a public purpose imposed by superior authority is a "tax" and nothing less

—must not, I think be taken too absolutely; they are not intended as definitions but as descriptions emphasizing the characteristic brought into relief by the controversy in relation to which they are employed.

ANGLIN J. (dissenting).—By an agreement made in 1901 with the Government of Manitoba, confirmed by statute, the Canadian Northern Railway Company was granted an exemption during the currency of certain bonds from the taxation dealt with by section

(1) 16 Can. S.C.R. 403.

18 of the "Railway Taxation Act" of 1900, ch. 57. That section exempted railway companies and all their property, except the Dominion Government land subsidy and land held for sale, from "all assessments and taxation of every nature and kind" except such as are made and imposed under the provisions of the "Railway Taxation Act" itself or any amending Acts. By an Act also passed during the session of 1900, but as a separate statute (ch. 58), there was added to the "Railway Taxation Act," as section 22, a declaratory clause providing that nothing therein contained should take away from any incorporated city the right to assess and levy taxes for improvements on real property of any railway company fronting or abutting on any street or place in, under or upon which such improvements should be done. In 1902 there was a revision of the statutes of Manitoba. In the "Railway Taxation Act" in that revision (ch. 166) section 18 is reproduced as it was in the Act of 1900 and the amending declaratory provision above referred to appears as section 19. A statute was passed in 1910, as ch. 74, in the following terms:—

1. Section 18 of ch. 166 of the Revised Statutes of Manitoba, 1902, being the "Railway Taxation Act," is hereby further amended by adding at the end thereof the following words, "and except all lands and property held by the company not in actual use in the operation of the railway."

2. For the removal of doubt respecting the exemption from taxation granted under clause 16 of the Agreement dated the eleventh day of February, 1901, set out in schedule "A" to ch. 59 of the statutes passed in the year 1901, it is declared that the exemption so granted was and is the exemption specified in section 18 of the said "Railway Taxation Act" as existing at the date of the passage of such last mentioned Act, and is unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto.

Notwithstanding the reference to ch. 166 of the Revised Statutes of Manitoba, 1902, in sec. 1 of this enactment, it seems to me reasonably clear that by

section 18 of the "Railway Taxation Act" mentioned in section 2 was meant section 18 of the original Act of 1900, and that by the words

unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto,

it was intended to exclude the amendment of 1900 which afterwards became sec. 19 of the "Railway Taxation Act" of 1902. By sec. 7 of the Act respecting the Revised Statutes (3 Edw. VII., ch. 41), to which Mr. Tilley directed our attention, it is enacted that the provisions of the Revised Statutes of 1902 corresponding to and substituted for provisions of repealed Acts, where they are the same as those of the Act so repealed, shall be held to have been passed on the days respectively upon which the Acts so repealed came into effect. By

the date of the passage of such last mentioned Act

(*i.e.*, the "Railway Taxation Act") in section 2 of ch. 74 of the statutes of 1910 above quoted, is therefore meant not the date of the coming into effect of the Revised Statutes of 1902 but that at which ch. 57 of the statutes of 1900 (the repealed Act) came into force; and

the exemption specified in section 18

as contained in that Act, "unaffected by the amendment passed concurrently," and found in ch. 58, is the exemption to which section 2 of the Act of 1910 declares the appellant company entitled. Of course this might readily have been made clearer and this litigation avoided had the Act of 1910, passed "for the removal of doubt"(!) referred directly to "the exemption specified in section 18 of ch. 57, 63 & 64 Vict., unaffected by section 1 of ch. 58, 63 & 64 Vict., instead of to that

specified in section 18 of the said "Railway Taxation Act"

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(*i.e.*, ch. 166 of the R.S.M., 1902). But if it had been intended to declare the right of exemption to be that provided by section 18 of the "Railway Taxation Act" as found in the Revised Statutes (*i.e.*, subject to the declaratory provision of sec. 19) the addition of the words

as existing at the date of the passage of such last mentioned Act

would have been superfluous. The only conceivable purpose of their insertion in sec. 2 of the Act of 1910 was to make clear the application to it of section 7 of the "Act Respecting the Revised Statutes." Moreover, as applied to the Revised Statutes of 1902, the words

unaffected by any amending Act * * passed concurrently therewith

would have no point. There was no amendment to the "Railway Taxation Act" in 1902 or 1903. They were obviously and aptly used in reference to the legislation of 1900, ch. 58. Notwithstanding the unhappy phraseology of section 2 of the Act of 1910, on a careful consideration of all this legislation it appears to me to express with sufficient certainty the intention of the legislature to exempt the Canadian Northern Railway from — to use the language of section 18—

all assessments and taxation of every nature and kind,

except taxation made and imposed under provisions of the "Railway Taxation Act" and amending Acts.

Counsel for the respondents sought to bring local improvement rates within this exception by treating the declaratory clause, added by amendment as section 22, as an amending Act by which assessments and taxation were made and imposed. I am unable to accept that view of the scope and effect of section 22. Its provisions are negative. They do not provide for the making or imposition of any tax but merely declare that other provisions of the "Railway Taxation Act"

shall not take away a right or power to assess and levy taxes for local improvement rates conferred by other legislation. It is by, or by virtue of such other legislation that local improvement taxation is imposed. I would therefore allow the appeal of the Canadian Northern Railway Company.

As to the cross-appeal, I am of the opinion that the cost of surveys authorized by the legislature to be assessed upon the property affected is assessment or taxation within the meaning of the exemption provided for by section 18 of the "Railway Taxation Act," provincial and not municipal taxation it may be, but nevertheless taxation: *City of Halifax* v. *Nova Scotia Car Works, Ltd.*(1), at page 998—"a demand of sovereignty," *State Freight Tax Case*(2), at page 278. As to the percentage added to the taxes and the cost of making title which the appellants were obliged to pay in order to redeem their property and prevent the issue of a certificate of title to it to the tax sale purchaser, cancellation of which they might have been unable afterwards to procure, I see no reason why these should not be refunded to them as well as the taxes themselves to which they were incidental. In view of the terms in which the special case has been submitted the plaintiffs are, in my opinion, entitled to a judgment against the defendant municipal corporation for the refund by it of the whole amount paid to it to prevent certificates of title for the lands wrongfully sold being issued, with interest thereon from the date of such payment. They should also have their costs of this litigation throughout.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellants: *Clark & Jackson.*
Solicitor for the respondent: *Theodore A. Hunt.*

(1) [1914] A.C. 992.
(2) 15 Wall. 232.

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*Feb. 6.
*Feb. 19.

RICHARD WEBB BURNETT (DEFENDANT) .... APPELLANT;

AND

THE HUTCHINS CAR ROOFING COMPANY AND ROBERT E. FRAME (PLAINTIFFS) .... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Appeal—Exchequer Court—Patent—Conflicting claims—Amount in controversy.

An appeal lies to the Supreme Court of Canada from the judgment of the Exchequer Court overruling an objection to its jurisdiction.

Per Anglin J.—In exercising the jurisdiction conferred by section 23(a) of the "Exchequer Court Act" the court does not act as the substitute for the arbitrators who are given the same jurisdiction by section 20 of the "Patent Act" but acts in discharge of its ordinary curial functions and its judgment is appealable to the Supreme Court of Canada.

The appeal to the Supreme Court of Canada provided for by section 82 of the "Exchequer Court Act" is not confined to cases where the action is brought to recover a sum of money but extends to those seeking to establish a claim to property or rights.

MOTION to quash an appeal from the judgment of the Exchequer Court in favour of the plaintiffs (respondents).

Conflicting applications for a patent were filed with the Patent Office by the parties. The defendant started proceedings for arbitration under section 20 of "The Patent Act" and the plaintiffs took action in the Exchequer Court.

To the said action defendant pleaded, *inter alia*, want of jurisdiction which plea was overruled and

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

judgment was given on the merits for the plaintiffs. Defendant appealed and plaintiffs moved to quash on the grounds that the exercise of the power conferred on the Court below by section 23(a) was only in substitution of that given to arbitrators by "The Patent Act," and the judgment of the court was final and not susceptible of appeal just as that of the arbitrators would be; that the appeal to the Supreme Court allowed by "The Exchequer Court Act" lies only in cases where a sum of money is demanded; and that it was not shewn that the sum of $500 was in controversy and no leave to appeal had been obtained. As to the last ground the court held that affidavits filed established the value of the patent in dispute at more than $500.

R. C. H. Cassels for the motion.

McMaster K.C. contra.

THE CHIEF JUSTICE.—Two grounds are presented by Mr. Cassels in support of his motion to quash the above appeal for want of jurisdiction. The first one, as I understand it, is that this court has no jurisdiction because the Exchequer Court has exclusive jurisdiction without appeal. Section 20 of "The Patents Act," ch. 69 R.S.C., 1906, in cases of conflicting applications for patents provides that the matter in dispute shall be submitted to arbitration and no provision is made for an appeal. This section of the Act comes from the R.S.C. 1886, ch. 61, sec. 19 The present "Exchequer Court Act" came into force in 1887 (50 & 51 Vict. ch. 16) and by a later amendment in 54 & 55 Vict. ch. 26, jurisdiction is conferred on the court in all cases of conflicting applications for any patent of invention.

The contention of Mr. Cassels is that the Exchequer

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Court has at most concurrent jurisdiction but without appeal as in the case of an application made under section 20, "Patent Act." He then urges that the court is *curia designata.*

Section 82 of the "Exchequer Court Act," R.S.C. ch. 140, provides for an appeal to the Supreme Court by any party dissatisfied with any final judgment of the Exchequer Court where the amount in controversy exceeds $500. In other words, this provides for a review by the Supreme Court of all decisions of the Exchequer Court whatever may be the grounds of such decisions and I see no distinction between the case where the Exchequer Court assumes jurisdiction where it has none, and the case where the Exchequer Court has erred in its appreciation of any matter of law or fact.

The point has come up before this court where the court below has denied its own jurisdiction and a party dissatisfied with such judgment has appealed to the Supreme Court to reverse this view of the court below and to declare that such lower court had jurisdiction. In the case of *Ste. Cunégonde* v. *Gougeon* (1), an appeal had been taken from the Superior Court to the Court of Queen's Bench, and the plaintiff moved to have this appeal quashed for want of jurisdiction, and his motion was granted. The municipality then appealed to the Supreme Court of Canada whereupon plaintiff moved in this court to have the appeal quashed on the ground that there was no judgment of the Court of Queen's Bench and therefore no appeal lay to the Supreme Court. Sir Henry Strong, who gave the judgment of the Supreme Court, there says that as the Court of Queen's Bench properly refused to entertain jurisdiction, it followed that no appeal

(1) 25 Can. S.C.R. 78.

would lie to the Supreme Court. It is clear therefore that this court quashed the appeal because it was of the opinion that the Court of Queen's Bench was correct in holding that it had no jurisdiction and therefore the merits of the appeal could not be considered by the Supreme Court.

In the case of *Beck* v. *Valin* (1), there was an appeal to this court from a judgment of the Court of Appeal for Ontario, affirming a judgment of the Divisional Court which sustained the refusal of a judge in chambers to issue a writ of mandamus. In that case Mr. Justice Idington says:—

> The right to assert an appeal against a court asserting jurisdiction where it has none, is a very common case and I have not the slightest doubt of the right to appeal on the converse ground of failure to assert jurisdiction.

In *Hull Electric Co.* v. *Clement* (2), a motion was made to affirm the jurisdiction of the Supreme Court to entertain an appeal from the judgment of the King's Bench, which quashed an appeal from the judgment of the Superior Court on the ground that the appeal was incompetent and that it (Court of King's Bench) had no jurisdiction to hear such an appeal. The motion therefore to the Supreme Court raised the question whether this court could review a judgment of the Court of King's Bench where the latter court had held it had no jurisdiction. The court in that case disposed of the appeal by reviewing the propriety of the judgment of the Court of King's Bench in holding it was without jurisdiction. The Chief Justice, concluding his judgment said there:—

> I would follow *City of Ste. Cunégonde* v. *Gougeon*(3), *et al* where it was held that the Court of Queen's Bench having properly declined to exercise jurisdiction, no appeal lies to this court.

(1) 40 Can. S.C.R. 523. (2) 41 Can. S.C R. 419.
(3) 25 Can. S.C.R. 78.

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In short, my view is that under the general power of appeal given from a lower court to the Supreme Court, if the court below has quashed an appeal to itself on the ground that is has no jurisdiction and the party dissatisfied with this judgment appeals to the Supreme Court, this court, on a motion to quash, may affirm the judgment below by granting the order. If the court below holds it has jurisdiction and proceeds to dispose of the case on its merits, this court has jurisdiction to review on appeal the decision below and if it is of opinion that the court below was without jurisdiction, it can so determine without considering anything with respect to the merits of the case.

I am, therefore, of opinion that there is an appeal from a judgment rendered in a patent case where the court exercises the jurisdiction conferred by section 23. The appeal is given by section 82

to any party to any action, suit, cause, matter or other judicial proceeding.

These words are broad enough to cover a case of conflicting applications for a patent of invention like this.

The other ground presented by Mr. Cassels is that the amount involved was not shewn to be over $500.00.

The practice is well settled that in patent cases the value of the patent can be established by affidavit and where the appellant neglects to have this shewn in chambers, he may be penalized by way of costs. This was done in the case of *Dreschel* v. *Auer Light Co.*, (1).

I am, therefore, of the opinion that the motion to quash should be refused, but without costs.

DAVIES J.—Two objections were raised on this motion to our jurisdiction to hear this appeal from the

(1) 28 Can. S.C.R. 268.

Exchequer Court and, in my opinion, they must both fail.

The judgment of the Exchequer Court proceeds on the ground that jurisdiction to hear and determine the action was vested in that court. Whether such jurisdiction exists or not can more properly be decided when the merits of the appeal come to be considered. Certainly an appeal lies to this court from any judgment of the Exchequer Court otherwise appealable under the statute which court has either improperly assumed jurisdiction or, improperly, expressly decided that such jurisdiction exists.

On the second point, I am of opinion that section 82 of the "Exchequer Court Act" gives a right of appeal to this court in cases such as the present. The words of the section "sum or value" clearly indicate that an appeal lies as well from a judgment in an action brought to recover a sum of money as from one brought to establish a claim to property or rights. In the latter cases the "value" of such property or rights claimed and in controversy may be established by affidavits and need not necessarily appear in the record.

I would dismiss the motion with costs.

IDINGTON J.—I think the motion to quash the appeal herein should be dismissed with costs.

DUFF J.—This is a motion to quash an appeal from a judgment delivered by the learned judge of the Exchequer Court dismissing an action brought by one of two applicants for a patent. Steps had been taken by one of the applicants to have the controversy determined by resort to the procedure provided by section 20 of the "Patent Act," when

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an action was brought by the other applicant in the Exchequer Court under section 23a of the "Exchequer Court Act. Among other pleas the defendants (the appellants) denied the jurisdiction of the Exchequer Court to deal with a controversy in respect of which the procedure prescribed by section 20 of the "Patent Act" is available. The application to the learned judge of the Exchequer Court to dismiss the action as brought without jurisdiction was at the suggestion of the learned judge turned into an application for a stay of proceedings and this application was eventually dismissed. At the trial judgment was given in favour of the plaintiff.

The first objection which is now raised is that the jurisdiction of the "Exchequer Court" in cases of conflicting applications for patents is an exclusive jurisdiction; this is to say, that a judgment of the Exchequer Court given in exercise of this jurisdiction is not appealable.

I do not find it necessary for the purposes of the present motion to consider whether or not in respect of some matters the judgment of the learned judge of the Exchequer Court in an action such as that out of which this appeal arises is final in the sense of being non-appealable; that is a question which may be much more conveniently dealt with when the appeal comes on for hearing on the merits. It is sufficient to say in regard to the matter I am now considering that the appellants having denied the jurisdiction of the Exchequer Court to entertain the action and the learned judge of the Exchequer Court having by entertaining the action and giving judgment affirmed judicially that such jurisdiction exists, his decision as a decision on the point of jurisdiction or no jurisdiction is appealable to this court provided the other conditions

of appealability indicated by secs. 82 and 83 are present. *In re Padstow Total Loss and Collision Assur. Assoc.* (1); *Cornwall* v. *Ottawa and New York Railway Co.* (2).

The next objection is that the condition laid down in sec. 82 in the words "action, * * * matter or other judicial proceeding in which the actual amount in controversy exceeds $500 is not fulfilled because, first, the action raises no question with regard to any pecuniary demand by either plaintiff or defendant, and, secondly, it is not satisfactorily shewn that the value of the thing in controversy, the right to receive a patent, reaches the sum of $500.

As to the second of these grounds, it is unnecessary to say more than that the affidavits filed taken together with the agreement which is in evidence in the cause are sufficient to dispose of it.

As to the first ground the words "amount in controversy exceeds $500" do undoubtedly point to a controversy in relation to a pecuniary demand or in relation to a sum of money as being the kind of controversy contemplated by sec. 82, s.s. 1. I am satisfied, however, that this is not the necessary meaning of these words. The first of the meanings attributable to the word "amount" in the Oxford dictionary is "The sum total to which anything mounts up or reaches" and to construe these words one must ask the question: "Amount of what?" Amount exceeding $500 of course does pointedly indicate that the answer to the question must be amount of money. But the words are not altogether intractable; "exceeding $500" may be read as exceeding $500 in value, in other words, the phrase undoubtedly is susceptible of being

(1) 20 Ch.D., 137. (2) 52 Can. S.C.R. 466

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paraphrased thus: "in which the sum total of the thing in controversy exceeds the value of $500." That, I say, is a possible construction; and I am far from satisfied that if I had to pass upon this section standing alone this construction ought not to be preferred to that advanced on behalf of the respondent in order to avoid the quite absurd result that the Legislature, in conferring jurisdiction on the Exchequer Court with respect to various matters enumerated in sections 19 to 24, provided that it is only in respect of matters mentioned in sec. 83 that an appeal lies to this court as of right. There is no doubt that the exceptional class of cases intended to be described by the clause "actual amount * * or value of $500" is co-extensive with the class of cases described in the words of sec. 82,

in which the actual amount in controversy exceeds $500,

and by this legislative interpretation supplied by sec. 83 all doubt and difficulty are removed.

Since writing the above I have considered the point and have concluded that there is no solid reason for holding that a judgment pronounced in an action brought under sec. 23a is excluded from the operation of sec. 82.

The motion to quash should be dismissed with costs.

ANGLIN J.—I am of the opinion that in exercising the jurisdiction conferred by sec. 23(a) of the "Exchequer Court Act" the Exchequer Court acts not a mere *locum tenens* or substitute for the arbitrators under sec. 20 of the "Patent Act," but in the discharge of its ordinary curial functions and that a proceeding under sec. 23(a) is a judicial proceeding in which its

judgment is appealable to this court under ss. 82 *et seq.* of the Exchequer Court Act. Mr. Cassels's forceful argument failed to raise any doubt in my mind on this point.

I am equally clearly of the opinion that the fact that the learned judge of the Exchequer Court affirmed his own jurisdiction to deal with the matter in controversy, which was challenged, far from casting doubt on the appealability of his judgment only serves to make it more certain.

As to the value of the matter in controversy the affidavits and the agreement in evidence sufficiently establish that it exceeds the requisite $500.

A construction of section 83 which would confine the right of appeal to proceedings in which there is an actual pecuniary demand before the court, thus excluding most important cases in which the right asserted or the matter in controversy, though not presented in the form of a claim to recover money, far exceeds in value $500 would, in my opinion, be too narrow and would frustrate the purpose of Parliament. Section 83 is not happily phrased. "Amount in controversy" is, no doubt, an ill-chosen expression calculated to lend colour to the contention of the respondent. But the use of the words by which it is followed, "sum or value," makes it reasonably certain that it is not intended to restrict the right of appeal to cases in which the controversy is as to the right to recover a sum of money. If so, the addition of the words "or value" would be meaningless.

I would dismiss the motion.

Motion dismissed with costs.

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ACTION—*Parties—Contract—Consideration—Settlement of action—Statute of Frauds—Trade agreement—Restraint of trade—Crim. Code s.* 498.] In 1905, M. and his two brothers entered into a contract with R. by which they gave him exclusive control of their salt works with some reservations as to local trade. R. assigned the contract to the Dominion Salt Agency, a partnership consisting of his firm and two salt manufacturing companies, which agency thereafter controlled about ninety per cent. of the output of manufacturers in Canada. In 1914, M., as administrator of his father's estate, brought action against the estate of C. who, in his lifetime, had been president of the Dominion Salt Agency and president of and largest shareholder in one of the companies composing it. This action was based on an alleged agreement by C., in connection with the settlement of a prior action against the three partners in the Agency, by which he promised to pay five-sixteenths of the difference between the amount claimed and that paid on settlement. Evidence of the agreement was given by the plaintiff's solicitor in the former action and by defendants' solicitor also. The original agreement transferring the salt business to R. was executed by the three brothers "as representing the estate of M. deceased." The action which was settled was brought by the same three persons. After the settlement letters of administration to M.'s estate were taken out.—*Held*, that the present action was properly brought in the name of the administrator but, if necessary for defendants' protection, his two brothers might be added as plaintiffs. MacEwan *v.* Toronto General Trusts Corp....... 381

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ADMIRALTY LAW—*Navigation of canal—"Narrow channel" — Marine Department Regulations, rule* 25 — *Starboard course — Fairways and mid-channels — "Canada Shipping Act," R.S.C.* 1906, *c.* 113, *s.* 916 —*Collision —Liability for damages—Canal Regulations, rule* 22—*Right of way.* The steamboat "Honoreva" was under way going up the Soulanges Canal and appoaching a bridge across the channel which was swung open when she was about 300 feet below it. The steam tug "Jackman" was then observed descending the canal, with the current, at a greater distance above the bridge and also under way. The "Honoreva," in attempting to pass first through the abutments of the bridge (a space of about 100 feet in width), and keeping a course in mid-channel, came into collision with the barge "Maggie," which was being towed by the "Jackman," and the barge was injured and sunk. In an action for damages against the "Honoreva" she counterclaimed for damages sustained by her owing, as alleged, to the negligent navigation of the tug-and-tow.—*Held*, that the vessels thus navigating the canal were, at the place where the collision occurred, in a "narrow channel;" that article 25 of the rules of the Marine Department respecting the passage of vessels, which requires them when safe and practicable to keep to the starboard in fairways and mid-channels, applied to the navigation of the vessels in question, and that the "Honoreva," having failed to obey that rule, was in fault within the meaning of section 916 of the "Canada Shipping Act," R.S.C., 1906, ch. 113; that there was no negligence proven on the part of the tug-and-tow, and that the "Honoreva" was, therefore, solely liable for the damages resulting from the collision.—*Per* Davies and Anglin JJ.—Under sub-section *b* of article 25 of the rules of the Marine Department, the down-going tug-and-tow had the right of way, notwithstanding that the up-going vessel may have been closer to the bridge when it was opened, and that the tug-and-tow were not obliged to stop and make fast to posts until the up-going vessel had passed, as is required by the 22nd rule of the "Canal Regulations" in regard to vessels approaching a lock. Bonham *v.* The "Honoreva"..................... **51**

APPEAL—*The Registrar in Chambers—Appeal—Jurisdiction—Assessment and taxation—Adjudication authorised by provincial authority—"Supreme Court Act,"*

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R.S.C., 1906, *s.* 41—*Finality of provincial decision—"Court of last resort."*] A provincial statute, providing that judgments of courts in the province on appeal from decisions of courts of revision in respect of assessments for taxation purposes shall be final and conclusive on the matters adjudicated upon thereby, does not circumscribe the appellate jurisdiction given to the Supreme Court of Canada in such matters by section 41 of the "Supreme Court Act," R.S.C., 1906, ch. 139. *Crown Grain Co.* v. *Day* ((1908) A.C. 504) applied—A district court judge, in the Province of Alberta, adjudicating in matters concerning the assessment of property for municipal purposes under the provisions of the North-West Territories Ordinance No. 33, of 1893, as amended by the statutes of Alberta, ch. 9 of 1909, and ch. 27 of 1913, sec. 7, is a "court of last resort created under provincial legislation" within the meaning of section 41 of the "Supreme Court Act," R.S.C., 1906, ch. 139, and, consequently, an appeal from his decision lies to the Supreme Court of Canada when it involves the assessment of property at a value of not less than ten thousand dollars. *City of Toronto* v. *Toronto Railway Co.* (27 Can. S.C.R. 640) referred to as effete, *Canadian Niagara Power Co.* v. *Township of Stamford* (50 Can. S.C.R. 168) and *Re Heintze, Fleitman* v. *The King* (52 Can. S.C.R. 15) referred to. PEARCE *v.* CITY OF CALGARY................ 1

2——*Jurisdiction—Action in county court—Concurrent jurisdiction with superior court—Construction of statute—R.S.C.*, 1906, *c.* 139, *ss.* 37*b*, 70, *"Supreme Court Act"—R.S.B.C.*, 1911, *c.* 51, *"Court of Appeal Act"—R.S.B.C.*, 1911, *c.* 53, *"County Courts Act"—Motion for new trial—Re-hearing on appeal.*] An action in a county court in British Columbia to recover $578, damages for injuries sustained, alleged to have been caused through negligence, was dismissed by the county court judge after the evidence for the plaintiff had been put in; the defendants offered no evidence, but asked for dismissal on the evidence as it stood. The plaintiff appealed to have judgment entered in his favour or, alternatively, to have the case remitted to the county court to have damages assessed, or for such further order as might be deemed proper by the Court of Appeal. The appeal was dismissed and the judgment appealed from affirmed. The British Columbia "Court of Appeal Act" (R.S.

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B.C., 1911, ch. 51, sec. 15, subsec. 3), provides that every appeal shall include a motion for a new trial unless otherwise stated in the notice of appeal. On motion to quash an appeal to the Supreme Court of Canada on the grounds that the notice prescribed by section 70 of the "Supreme Court Act," R.S.C., 1906, ch. 139, had not been given within 20 days from the date of the judgment appealed from and that the action was not of the class in which a county court had concurrent jurisdiction with a superior court, under section 37*b* of the "Supreme Court Act" limiting appeals to the Supreme Court of Canada. —*Held*, Duff J. dissenting, that no appeal could lie to the Supreme Court of Canada. —*Per* Fitzpatrick C.J. and Idington J. (Duff and Anglin JJ. *contra*).—As the case was not one in which a county court is given concurrent jurisdiction with a superior court, under section 40 of the "County Courts Act," R.S.B.C., 1911, ch. 53, the Supreme Court of Canada had no jurisdiction to entertain the appeal. *Champion* v. *The World Building Co.* (50 Can. S.C.R. 382), referred to.—*Per* Anglin J.: In the circumstances of the case the judgment of the Court of Appeal for British Columbia should be regarded as a judgment upon a motion for a new trial, within the meaning of section 70 of the "Supreme Court Act," R.S.C., 1906, ch. 139, and, notice not having been given as thereby provided, there could be no appeal to the Supreme Court of Canada. *Sedgewick* v. *Montreal Light, Heat and Power Co.* (41 Can. S.C.R. 639), and *Jones* v. *Toronto and York Radial Railway Co.* (Cam. S.C. Prac. 432), referred to.—*Per* Duff J., dissenting. The judgment from which the appeal is asserted was not a judgment upon a motion for a new trial but a decision on the merits of the case upon an appeal by way of re-hearing by the Court of Appeal for British Columbia which had before it all the evidence necessary for that purpose. There being no ground on which either party could have demanded a new trial, section 70 of the "Supreme Court Act" had no application to the appeal to the Supreme Court of Canada. *Sedgewick* v. *Montreal Light, Heat, and Power Co.* (41 Can. S.C.R. 639) followed. Further, the County Court derived its jurisdiction in the case in question from the provisions of section 30, sub-sec. 1, of the "County Courts Act" (R.S.B.C., 1911, ch. 53), and section 22 of that Act shews that this jurisdiction is concurrent; consequently, the County

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Court possessed "concurrent jurisdiction" with the Supreme Court of British Columbia within the meaning of section 37*b* of the "Supreme Court Act," R.S.C., ch. 139, notwithstanding that the word "concurrent" is not employed in either of those sections of the "County Courts Act." TAIT *v.* BRITISH COLUMBIA ELECTRIC RY. Co. 76

3——A., by order of a master, was allowed to prosecute one action against three insurance companies on three separate policies and obtained from the Appellate Division judgment against each for an amount less than $1,000 though the amounts in the aggregate exceeded that sum.—*Held*, following *Bennett* v. *Havelock Electric Light Co.* (46 Can. S.C.R. 640) that the defendants were in the same position as if a separate action had been brought against each and as none of them was made liable for a sum exceeding $1,000 no appeal would lie to the Supreme Court of Canada. GLEN FALLS INS. CO. *v.* ADAMS 88

4——*Jurisdiction—Matter in controversy —"Supreme Court Act," s.* 46 (*b*) *and* (*c*) *—Action to remove cloud on title—Discharge of mortgage—Deferment of payment of accruing instalments—Title to land—Future rights.*] The judgment appealed from maintained the plaintiff's action brought to obtain an order that it should not be obliged to pay certain deferred instalments of the price of land sold to it by the defendants with warranty against all hypothecs, save one for $2,000, until the discharge of certain other incumbrances alleged to be registered as affecting the said lands, and for costs of protest, etc., amounting to $33.90. On a motion to quash an appeal taken from this judgment to the Supreme Court of Canada.—*Held* (Duff J. taking no part in the judgment), that, as there was no amount in controversy of the sum or value of $2,000, nor any matter in controversy relating to the title to the lands or to matters wherein future rights thereto might be bound, the Supreme Court of Canada had no jurisdiction to entertain the appeal under the provisions of section 46, sub-sections *b* and *c* of the "Supreme Court Act," R.S.C., 1906, ch. 139. *Carrier* v. *Sirois* (36 Can. S.C.R. 221), applied. MONTARVILLE LAND CO. *v.* ECONOMIC REALTY CO. 140

5——*Exchequer Court—Patent—Conflicting claims—Amount in controversy.*] An appeal lies to the Supreme Court of Canada from the judgment of the Exchequer Court overruling an objection to its jurisdiction.—*Per* Anglin J. In exercising the jurisdiction conferred by section 23(a) of the "Exchequer Court Act". the court does not act as the substitute for the arbitrators who are given the same jurisdiction by section 20 of the "Patent Act" but acts in discharge of its ordinary curial functions and its judgment is appealable to the Supreme Court of Canada. The appeal to the Supreme Court of Canada provided for by section 82 of the "Exchequer Court Act" is not confined to cases where the action is brought to recover a sum of money but extends to those seeking to establish a claim to property or rights. BURNETT *v.* HUTCHINS CAR ROOFING CO. 610

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ASSESSMENT AND TAXES—*Statute—Construction — Application — Taxation — Exemption—Railway property—Frontage lots—Local improvements,* 63 & 64 *V. c.* 57, *s.* 18; *c.* 58, *s.* 22 (*Man.*)—*R.S.M.*, 1902, *c.* 166; 10 *Edw. VII.*, c. 74 (*Man.*).] By the "Railway Taxation Act," ch. 57, sec. 18, 63 & 64 Vict. (Man.), it was provided that every railway company subject to the Act should be free and exempt from all taxation of every nature and kind within the province except that imposed under its provisions. By ch. 58 of the same session of the legislature, ch. 57 was amended by adding section 22 thereto which provided that nothing therein should deprive any city corporation of any power it had to levy taxes on the real property of a railway company fronting on any street for local improvements. The two Acts were assented to and came into force on the same day. In 1901 an agreement, confirmed by statute, was entered into between the Manitoba Government and the Canadian Northern Ry. Co. by which the Government agreed to guarantee the company's bonds, the company to pay a percentage of its gross earnings to the Government and to be exempt from taxation provided for by section 18 of ch. 57. The "Railway Taxation Act" of 1900 became ch. 166 of

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the Revised Statutes of Manitoba, 1902, secs. 18 and 19 being identical with sec. 18 of ch. 57 and sec. 22 of ch. 58 respectively. In 1910 the Act 10 Edw. VII., ch. 74, was passed. Sec. 1 provided "sec. 18 of ch. 166 R.S.M., 1902, being 'The Railway Taxation Act' is hereby further amended by adding, etc.;" sec. 2 "for the removal of doubt respecting the exemption from taxation granted under clause 16 of the agreement" (of 1901 above mentioned) "it is declared that the exemption so granted was and is the exemption specified in section 18 of the said 'Railway Taxation Act' existing at the date of the passage of such last mentioned Act and is unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto." Under the foregoing legislation the City of Winnipeg assessed frontage lots of the Canadian Northern Ry. Co. for local improvements.—*Held, per* Fitzpatrick C.J. that though it is reasonably clear that the reference to sec. 18 in the Act of 1910 was intended for sec. 18 of ch. 57 passed in 1900 yet the language used will not admit of a doubt that ch. 166, R.S.M. 1902, sec. 18 is really referred to and under that Act the company is not exempt from taxation for local improvements.—Duff and Anglin JJ. contra. — *Per* Davies and Idington JJ. Sec. 18 of ch. 57 and sec. 22 of ch. 58 must be read together and as if the latter had been made a part of sec. 57; so construing them the exemption of the company from taxation does not cover taxes for local improvements the right to impose which is preserved by sec. 22.—*Per* Duff J., dissenting. The "Railway Taxation Act" R.S.M. 1902, ch. 166, referred to in the Act of 1910, was passed in 1900 (ch. 57), and not repealed and re-enacted in 1902. Ch. 58 of the Act of 1900 was an amendment passed concurrently with or subsequently to ch. 57 and does not affect the exemption given by the agreement of 1901; and, therefore, by the express terms of the Act of 1910 the principle of Salmon v. Duncombe (11. App. Cas. 627) applied. —*Per* Anglin J., dissenting. The reference in sec. 2 of the Act of 1910 to sec. 18 of the "Railway Taxation Act" meant sec. 18 of the original Act of 1900, ch. 57, and the exemption given by the agreement was not effected by the provisions of ch. 58 amending same. In 1910 a special survey, under the "Special Survey Act," was made of certain lots, including those in question, belonging to the railway company and each lot was charged with a proportionate share of the cost of the survey. —*Held,* Duff J., dissenting, that the charge so made was taxation and not being a tax for a local improvement the company was exempt from payment. Judgment appealed from (26 Man. R. 292), affirmed. CANADIAN NORTHERN RY. CO. *v.* CITY OF WINNIPEG........................ 589

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CONTRACT—*continued.*

Hamilton did not, as a consequence of the annexation of county territory, become the "successor" of the county under said agreement and by-law so as to be entitled to a proportion of the payments to be made by the railway company thereunder.—*Per* Fitzpatrick C.J. and Idington and Duff JJ.—The Ontario Railway and Municipal Board was not invested with authority to provide, in its order extending the boundaries of the city, that such rights as those reserved by section 24 of the county by-law should, on such extension of the boundaries, pass to the city in whole or in part. Judgment of the Appellate Division (35 Ont. L.R. 434) reversed and that of the trial judge (31 Ont. L.R. 659) restored. COUNTY OF WENTWORTH *v.* HAMILTON RADIAL ELECTRIC RY. CO. 178

2——*Negligence—Action against two defendants—Joint liability—Agreement between defendants—Right to indemnity.*] By an agreement between the Interurban Electric Co. and the City of Toronto, operating the Hydro-Electric System, the former undertook to "save harmless and indemnify the said corporation * * * against all loss, damages * * * which the corporation may * * * have to pay * * * by reason of any act, default or omission of the company or otherwise howsoever." An employee of the company was killed in course of his employment and in an action by his personal representative the jury found that the city and the company were each guilty of negligence which caused the accident.—*Held*, that the agreement did not apply to the case of damages which the city would have to pay as a consequence of its own negligence and neither relieved it from liability nor entitled it to indemnity. Judgment of the Appellate Division (36 Ont. L.R. 269) affirmed. LAMBERT *v.* CITY OF TORONTO 200

3——*Consideration—Settlement of action—Statute of Frauds—Trade agreement—Restraint of trade—Crim. Code s.* 498.] In 1905, M. and his two brothers entered into a contract with R. by which they gave him exclusive control of their salt works with some reservations as to local trade. R. assigned the contract to the Dominion Salt Agency, a partnership consisting of his firm and two salt manufacturing companies, which agency thereafter controlled about ninety per cent. of the output of manufacturers in Canada.—*Held*, that the contract was not *ex facio* illegal and as the Canadian output was exceeded by the quantity imported which may have competed with it, and the price was not enhanced by reason of this control by the Agency, the Court should not hold that it had the effect of unduly restraining the trade in salt or that it contravened the provisions of section 498 of the Criminal Code. In 1914, M., as administrator of his father's estate, brought action against the estate of C. who, in his lifetime, had been president of the Dominion Salt Agency and president of and largest shareholder in one of the companies composing it. This action was based on an alleged agreement by C., in connection with the settlement of a prior action against the three partners in the Agency, by which he promised to pay five-sixteenths of the difference between the amount claimed and that paid on settlement. Evidence of the agreement was given by the plaintiff's solicitor in the former action and by defendants' solicitor also.—*Held*, reversing the judgment of the Appellate Division (36 Ont. L.R. 244), Fitzpatrick C.J. and Duff J. dissenting, that the settlement of the action was good consideration for C.'s contract; that his agreement was not a promise to answer for the debt of another and did not need to be in writing; that it was sufficiently proved; and that the evidence of the plaintiffs' solicitor in the former action was corroborated (R.S.O., [1914] ch. 76, sec. 12) by that of the solicitor for the defendants.—*Per* Anglin and Brodeur JJ.—The solicitor was not an interested party and corroboration was not required for that reason; if required for any other it was furnished. The original agreement transferring the salt business to R. was executed by the three brothers "as representing the estate of M. deceased." The action which was settled was brought by the same three persons. After the settlement letters of administration to M.'s estate were taken out.—*Held*, that the present action was properly brought in the name of the administrator but, if necessary for defendants' protection, his two brothers might be added as plaintiffs. MACEWAN *v.* TORONTO GENERAL TRUSTS CORP. 381

CRIMINAL LAW—*Criminal law — Constitution of grand jury — Bias — Presentment of true bill—Presence of accuser on grand jury—Prejudice — Criminal Code, s.* 899—*Evidence.*] The appellant was indicted for perjury. The complainant had

CRIMINAL LAW—*continued.*

been summoned to act as a grand juror for the assizes at which the trial took place. The complainant was present with the grand jury when it was charged and when the presentment of a true bill was made. While the bill was under consideration by the grand jury one of the jurymen to whom the complainant had stated that it was a deplorable case, but it had come to the pass that either he or the accused would have to leave the town, repeated this statement to other grand jurors. In the reserved case it was stated by the trial judge that the complainant had in no manner taken any part in the deliberations of the grand jury on the indictment.—*Held*, affirming the judgment appealed from (Q.R. 25 K.B. 275), Anglin and Brodeur JJ. dissenting, that, in the circumstances stated in the reserved case, neither the fact of the presence of the complainant as a member of the grand jury nor the statement made by him constituted a well-founded objection to the constitution of the grand jury which had passed upon the indictment which therefore could not be quashed under the provisions of section 899 of the Criminal Code.—*Per* Davies, Anglin and Brodeur JJ.:—An indictment preferred after consideration in which a grand juror disqualified by interest had participated should be quashed. *Rex* v. *Hayes* (9 Can. Crim. Cas. 101) disapproved. —*Per* Anglin and Brodeur JJ.:—The reasonable inference from the facts stated in the special case is that the complainant was present with the grand jury during their deliberation upon the bill against the accused. The statement made by the complainant to the juryman B., and by him repeated to his fellow-jurymen, was calculated to influence them. It is impossible to know whether the complainant's presence and his statement, so repeated, did or did not affect the grand jury adversely to the accused. He is entitled to have it assumed that they did. He was thereby deprived of his right to have his case passed upon by a duly qualified grand jury which was not improperly biased, and he thereby suffered prejudice within section 899 of the Criminal Code which warrants the quashing of the indictment. *Reg.* v. *Justices of Hertfordshire* (6 Q.B. 753); *The Queen* v. *Inhabitants of Upton St Leonards* (10 Q.B. 827); *The Queen* v. *Gorbet et al.* (1 P.E.I. Rep. 262), and *Reg.* v. *McGuire* (4 Can. Crim. Cas. 12) referred to. *Per* Anglin J.—On a motion to quash an indictment found by a grand jury it is improper to admit evidence of what took place in the grand jury-room during the inquiry in regard to the indictment. *Reg.* v. *Justices of Hertfordshire* (6 Q.B. 753); *Rex* v. *Lancashire Justices* (75 L.J.K.B. 198); *Reg.* v. *Meyer* (1 Q.B. 173) and *Reg.* v. *London County Council* ((1892) 1 Q.B. 190) referred to. VERONNEAU *v.* THE KING 7

2——*Indictment—Separate counts—Verdict—Conspiracy—Extraditable offence—Inadmissible evidence—Conviction—Inconsistency—Irregularity of procedure—Charge to jury—Address of counsel—Substantial wrong or miscarriage—New trial—"Criminal Code," s. 1019—Penalty.*] On an indictment containing several counts, including charges for theft, receiving stolen property and obtaining money under false pretences, in respect of which the person accused had been extradited from the United States of America, evidence was admitted on behalf of the Crown, for the purpose of shewing *mens rea*, which involved participation of the accused in an alleged conspiracy. The principal objections urged against a conviction upon the charges mentioned were (*a*) that by the manner in which the trial had been conducted the jury may have been given the impression that the accused was on trial for conspiracy, a non-extraditable offence; (*b*) that misstatements and inflammatory observations had been made by counsel for the Crown in addressing the jury; and (*c*) that, in his charge, the trial judge had failed to correct impressions which may have been thus made on the minds of the jury or to instruct them that portions of the evidence admitted in regard to other counts ought not to be considered by them in disposing of the charge of obtaining money under false pretences. *Held*, that, as there was sufficient evidence to support the verdict of the jury on the charge of obtaining money under false pretences, quite apart from the irregularities alleged to have taken place at the trial, no substantial wrong or miscarriage had been occasioned and there could be no ground for setting aside the conviction or directing a new trial under the provisions of section 1019 of the Criminal Code. Judgment appealed from, [1917] 1 W.W.R. 46 affirmed. KELLY *v.* THE KING 220

3——*Restraint of trade—Contract—Consideration—Crim. Code s.* 498 381

See CONTRACT 3.

CROWN—*Public work—Incorporation of company—Construction of canal—Governor-in-Council—Approval of plans—Discretion—Refusal to Approve—Right of action.*] The statute 61 Vict ch. 107 (D.) incorporated a company for the purpose of constructing and operating a canal between the St. Lawrence and Richelieu Rivers. Section 22 provided that before the work of constructing the canal was begun, the plans, etc., were to be approved by the Governor-in-Council.—*Held*, affirming the judgment appealed from (16 Ex. C.R. 125), Fitzpatrick C.J. and Brodeur J. dissenting, that the refusal of the Governor-in-Council to approve plans submitted did not give the company a claim for damages which could be enforced against the Crown.—*Per* Duff J. that the refusal to consider the plans did not give birth to a claim for which a petition of right lies.—*Held, per* Fitzpatrick C.J. and Anglin and Brodeur JJ. that the Governor-in-Council had no discretionary power to refuse approval of the plans on the ground that the undertaking authorized by Parliament was opposed to public policy. LAKE CHAMPLAIN AND ST. LAWRENCE SHIP CANAL CO. *v.* THE KING **461**

2——*Information of intrusion—Adverse possession—Interruption—Nullum Tempus Act—Acknowledgment of title* **331**

See LIMITATION OF ACTIONS.

CROWN LANDS — *Navigable waters—Floatability—Ownership of beds—Grant—Conveyance of bed—Title to land—Art. 400 C.C.*] Without express terms to that effect a Crown grant, made in 1806, of township lands in territory now comprised in the Province of Quebec did not pass title to the grantee in the bed of navigable waters within the area described in the letters patent of grant. Idington J. dissented on the ground that the language of the letters patent in question was intended and was sufficiently explicit and comprehensive to convey to the grantee the bed of the navigable waters included within the limits of the description of the lands granted. The judgment appealed from (15 Ex. C.R. 189), was affirmed, Idington J. disenting. LEAMY *v.* THE KING........ **143**

2——*Escheat—5 Geo.* V. *c.* 5 (*Alta.*) .. **107**

See CONSTITUTIONAL LAW 2.

DEBTOR AND CREDITOR — *Agreement for extension of time—Preference—Public order—Advantage to creditor—Security for debt—Conflict of laws—Lex loci.*] Where a debtor obtains the assent in writing of his creditors to an extension of time for payment of their respective debts, upon an undertaking that he will not "give a preference" without their consent, a prior secret arrangement by which one of such creditors obtains security and more favourable terms of payment than that provided in the agreement is void as a fraud against the other creditors and as against public order. The debtor carried on his business in Toronto where the deed granting the extension of time was drawn and executed. H., a New York creditor, obtained security by means of the debtor's promissory note, drawn up and made payable in Toronto and indorsed by the defendant, residing in Montreal. The action on the notes was brought, in Quebec, against the indorser.—*Held*, per Idington and Anglin JJ., that the case should be decided according to the law of Ontario if there is any difference between it and the Quebec law on the subject-matter. Judgment appealed from (Q.R. 25 K.B. 421), affirmed. HOCHBERGER *v.* RITTENBERG...................... **480**

DEVOLUTION OF ESTATES — *Escheat—Dominion or provincial land* — 5 *Geo. V.* 5 (*Alta.*) **107**

See CONSTITUTIONAL LAW 2.

ESCHEAT

See CONSTITUTIONAL LAW 2.

EVIDENCE — *Broker* — *Sale of goods—Principal and agent—Parol testimony—Arts.* 1206, 1233, 1235 *C.C.*] An action by a broker against his principals to recover commissions and expenses incurred in respect of sales and purchases of goods is not an action upon the contracts of sale or purchase in which evidence in writing is required by clause four of Art. 1235 C.C. and proof may be made therein by oral testimony of the facts concerning the transactions as provided by Art. 1233. *Trenholme* v. *McLennan* (24 L.C. Jur. 305) overruled. Judgment appealed from (Q.R. 24 K.B. 151) reversed. CARRUTHERS & CO. *v.* SCHMIDT................ **131**

2——*Criminal case—Proceedings before grand jury*........................ **7**

See CRIMINAL LAW 1.

EVIDENCE—*continued.*

3——*Sale of land—Purchase of equity—Indemnity against mortgage—Parol evidence of relations* 28
See MORTGAGE 1.

4——*Expropriation of land—Compensation—Sales in vicinity* **395**
See EXPROPRIATION OF LAND.

EXPROPRIATION OF LAND—*Expropriation—Railways—Date for valuation of lands—Deposit of plan—Notice—Benefit to lands not taken—Set-off—Excessive compensation—Appeal—6 Edw. VII. c.* 30 (*Ont.*)—3 & 4 *Geo. V. c.* 36 (*Ont.*).] Where the expropriation of land is governed by the provisions of the Ontario "Railway Act" of 1906 the date for valuation is that of the notice required by sec. 68(1). The effect is the same under the Act of 1913 if the land has not been acquired by the railway company within one year from the date of filing the plan, etc. The compensation for the land expropriated should not be diminished by an allowance for benefit by reason of the railway to the lands not taken, the Ontario "Railway Acts" making no provision therefor. On appeal in a matter of expropriation the award should be treated as the judgment of a subordinate court subject to rehearing. The amount awarded should not be interfered with unless the appeal court is satisfied that it is clearly wrong, that it does not represent the honest opinion of the arbitrators, or that their basis of valuation was erroneous. Where the land expropriated is an important and useful part of one holding and is so connected with the remainder that the owner is hampered in the use or disposal thereof by the severance he is entitled to compensation for the consequential injury to the part not taken: *Holditch* v. *Canadian Northern Railway Co.* (50 Can. S.C.R. 265; [1916] 1 A.C. 536) distinguished. To estimate the compensation for lands expropriated the arbitrators are justified in basing it on a subdivision of the property if its situation and the evidence respecting it shew that the same is probable.—*Held, per* Fitzpatrick C.J. and Anglin J., that to prove the value of the lands expropriated evidence of sales between the date of filing the plans and that of the notice to the owner is admissible and also of sales subsequent to the latter date if it is proved that no material change has taken place in the interval. Brodeur J., dissenting, held

EXPROPRIATION OF LAND—*con.*

that the damages should be reduced; that the arbitrators should have considered only the market value of the lands established by evidence of recent sales in the vicinity. TORONTO SUBURBAN RY. CO. *v.* EVERSON **395**

2—— *Municipal Corporation — Statutory powers — Appointment of arbitrators — "Towns Corporation Act"—"Expropriation Act," 54 V. c. 28 (Que.)—Town charter 3 Edw. VII. c. 69; 6 Edw. VII. c.* 50 .... **310**
See MUNICIPAL CORPORATION 2.

FELLOW WORKMEN
See MASTER AND SERVANT.

GRAND JURY—*Inquiry on indictment—Complainant on panel—Bias—Prejudice—Criminal Code s.* 899 7
See CRIMINAL LAW 1.

HIGHWAY — *Maintenance — Sidewalk—Damage by trespasser—Nuisance* **443**
See MUNICIPAL CORPORATION 3.

INDICTMENT — *Proceedings before Grand Jury—Complainant on panel—Criminal Code s.* 899 7
See CRIMINAL LAW 1.

INSURANCE — *Stallion — Accident or disease—Conditions—Attachment of risk.*] S. applied for insurance on a stallion "for the season" the application in a marginal note stating "term 3 mos." and, in the body of the document, that the insurers would not be liable until the premium was paid and the policy delivered. The policy as issued stated that the insurance would expire at noon on Sept. 7th, and insured against the death of the stallion, after premium paid and policy delivered, from accident or disease "occurring or contracted after the commencement of the company's liability." The policy was delivered and premium paid before four o'clock p.m. of 8th June; the horse had become sick early that morning and died before six o'clock p.m.—*Held*, affirming the judgment of the Appellate Division (37 Ont. L.R. 344), that the statement in the application "term 3 mos." coupled with that in the policy "date of expiry 7th Sept." did not override the express provision as to commencement of liability and make the risk attach from noon of June 7th; that the liability did not commence until the

INSURANCE—*continued.*

policy was delivered on June 8th; and as the horse died of an illness contracted before such delivery S. could not recover. SHARKEY *v.* YORKSHIRE INS. CO ... 92

LIEN — *Mechanic's lien—Loan company—Agreement for sale—Advances for building—"Owner"—Request—Privity and consent—Mortgagee—R.S.O.,* [1914] *c,* 140, *ss.* 2 (1), 8 (3) *and* 14 (2)—*"Mechanics' Lien Act."*] The owner of four lots of land in Toronto executed an agreement to sell them to one I. who was to make a cash deposit and undertake to build four houses on the lots, the vendors to advance $6,400 for building purposes. On completion of the houses and on receipt of the balance of price and amount of advances, the vendors to execute a deed of the lots. I. gave contracts for the building which was partly completed, and $3,400 was advanced by the vendors when I. became insolvent and the vendors, under the terms of their agreement, gave notice of forfeiture and took possessoin of the property. Prior to this liens had been filed for labour and materials supplied and the lien-holders brought action for enforcement thereof against the vendors.—*Held,* affirming the judgment of the Appellate Division (35 Ont. L.R. 542), Davies and Brodeur JJ. dissenting, that the vendors were not owners of the property according to the definition of the term "owner" in section 2 (*c*) of the "Mechanics Lien Act" and, therefore, were not liable to pay for the labour and materials supplied for the building of the houses by I.—*Per* Anglin J.—To make the vendors "owners" because the work was done with their privity and consent a direct dealing between them and the materialmen was requisite and of this there was no evidence. By section 14 (2) of said Act, the vendors, under the agreement for sale, became mortgagees of the land sold with their rights as such postponed to those of the lien-holders in respect to any "increased value" given to the land by erection of the houses thereon.—*Held,* that though they had refused it at a former stage of the proceedings, the lien-holders should, if they wish, have a reference to permit of revision of their claims on the basis of the vendors being mortgagees, any amount found due to them on such reference to be set-off against the costs payable by them in the Appellate Division and on this appeal. MARSHALL

LIEN—*continued.*

BRICK CO. *v.* YORK FARMERS COLONIZATION CO. 569

LIMITATION OF ACTIONS—*Title to land—Adverse possession against Crown—"Nullum Tempus Act"—Interruption of possession—Information of Intrusion—Judgment by default—Acknowledgment of title—"Real Property Limitations Act" (Ont.).*] A judgment by default, on information of intrusion against persons in possession of Crown lands, which was never enforced did not interrupt such possession and prevent it ripening into title under the "Nullum Tempus Act." "The Real Property Limitations Act" of Ontario (C.S.U.C. ch. 88, sec. 15; R.S.O. [1914] ch. 75, sec. 14) providing that an acknowledgment of title in writing shall interrupt the adverse possession does not apply to possession of Crown lands and such acknowledgment is not an interruption under the "Nullum Tempus Act." The provision in the "Ontario Limitation of Actions Act" of 1902, making an acknowledgment apply to interrupt possession of Crown lands is not retroactive or, if it is, it cannot apply to a case in which the adverse possession had ripened into title before it was passed.—*Per* Duff J.—As intrusion does not, in itself, deprive the Crown of possession, the occupation required to attract the benefit of the first section of the "Nullum Tempus Act," 9 Geo. III., ch. 16, is not technically possession; but lands are "held or enjoyed" within the meaning of that section where facts are proved which, in litigation between subject and subject, would constitute civil possession as against the subject owner. The judgment of the Exchequer Court (16 Ex. C.R. 67) in favour of the Crown on information of intrusion was reversed, Fitzpatrick C.J. holding that the Crown had failed to prove title, Idington, J., that the claim was barred by the negative clause of the first section of the "Nullum Tempus Act," and the other judges that the defendants had obtained title by operation of the "Nullum Tempus Act." HAMILTON *v.* THE KING 331

2——*Railway company—Dominion railway—R.S.C.* (1906) *c.* 37 *s.* 306—*Conflict of laws—Operation of railway—Constitutional law* 36

See RAILWAY 1.

MASTER AND SERVANT — *Negligence—Employer's liability—Competent superin-*

MASTER AND SERVANT—*continued.*

tendence—Common employment—Contributory negligence.] B. was employed by the company as a labourer in preparing a site for a power house, and was working on a narrow ledge on a hillside preparing a place on which to erect a drilling machine. Stones or earth falling from above struck him and he fell off the ledge to the bottom of the excavation sustaining severe injuries. In an action against the company for damages under the common law it was contended that failure to protect the workmen by a barrier above the ledge was negligence for which defendants were responsible.—*Held, per* Davies and Anglin JJ., that such negligence was that of the company's superintendent, a fellow servant of B., and the company was not responsible.—*Per* Duff and Anglin JJ., following *Wilson* v. *Merry* (L.R. 1 H.L. Sc. 326), that, as it was proved that the company had appointed a competent engineer to take charge of the work, invested him with the requisite authority and responsibility for protecting the workmen and supplied him with the materials necessary for the purpose, they had discharged their duty towards their employees and were not responsible for the injury to B. Judgment of the Court of Appeal (22 B.C. Rep. 241) reversed, Idington and Brodeur JJ. dissenting. WESTERN CANADA POWER CO. *v.* BERGLINT.................. 285

MECHANICS LIEN

See LIEN.

MORTGAGE—*Sale of land—Consideration—Exchange of properties—Mortgage—Indemnity to vendor—Evidence.*] In 1912 D. advanced money to P., who conveyed to him certain properties, in Ottawa, Ont., including one on LeBreton Street. In 1913, P. entered into an agreement with C. to exchange the LeBreton Street property for lots on Lisgar Street, which was carried out by conveyances between C. and D. In his deed C. stated that the consideration was "an exchange of lands and $1.00," and conveyed the lots on Lisgar Street, subject to certain mortgages, the description being followed by the words, "the assumption of which mortgages is part of the consideration herein." C. was obliged to pay these mortgages, and brought suit against D. to recover the amount so paid.—*Held*, affirming the judgment of the Appellate Division (34 Ont. L.R. 580), that the case was not within the rule of equity whereby the purchaser of an equity of redemption may be obliged to indemnify his vendor against liability for the mortgage. *Small* v. *Thompson* (28 Can. S.C.R. 219) distinguished.—*Held*, also, that parol evidence was properly received to shew the relations between P. and D.; that D. received the conveyance from C. merely as P.'s nominee, and held it afterwards only as security for his advances to P.; that he never claimed to be owner and never went into possession except as P.'s agent; and that he was not a purchaser of the property, but only a mortgagee. CAMPBELL *v.* DOUGLAS.. 28

2——*Mechanic's lien—Loan company—Agreement for sale—Advances for building—"Owner"—Request—Privity and consent—Mortgagee—R.S.O.*, [1914] *c.* 140, *ss.* 2 (1), 8 (3) *and* 14 (2)—*"Mechanics' Lien Act."*] The owners of four lots of land in Toronto executed an agreement to sell them to one I. who was to make a cash deposit and undertake to build four houses on the lots, the vendors to advance $6,400 for building purposes. On completion of the houses and on receipt of the balance of price and amount of advances, the vendors to execute a deed of the lots. I. gave contracts for the building which was partly completed, and $3,400 was advanced by the vendors when I. became insolvent and the vendors, under the terms of their agreement, gave notice of forfeiture and took possession of the property. Prior to this liens had been filed for labour and materials supplied and the lien-holders brought action for enforcement thereof against the vendors. By section 14 (2) of the "Mechanics Lien Act," the vendors, under the agreement for sale, became mortgagees of the land sold with their rights as such postponed to those of the lien-holders in respect to any "increased value" given to the land by erection of the houses thereon.—*Held*, that though they had refused it at a former stage of the proceedings, the lien-holders should, if they wish, have a reference to permit of revision of their claims on the basis of the vendors being mortgagees, any amount found due to them on such reference to be set-off against the costs payable by them in the Appellate Division and on this appeal. MARSHALL BRICK CO. *v.* YORK FARMERS COLONIZATION CO........ 569

MUNICIPAL CORPORATION—*Annexation of territory—Portion of county road—Railway franchise—Annual payments*

MUNICIPAL CORPORATION—*con.*

— *Divisibility after annexation — Ontario Railway and Municipal Board — Order for annexation.*] In 1902, the County of Wentworth passed a by-law by which an electric railway company was given the privilege of running cars over a county road on paying annually to the county a certain sum for each mile of the operated road. In 1909, territory of the county, including part of said road, was annexed to the City of Hamilton.—*Held*, Brodeur J. dissenting, that the agreement with the railway company remained in force in respect to the portion of road so annexed and the county was entitled to the whole annual payment as if the annexation had not taken place. The railway company, by agreement in writing, accepted the said by-law of the county and covenanted with the latter "their successors and assigns" to perform all the conditions thereof.—*Held*, Brodeur J. dissenting, that the City of Hamilton did not, as a consequence of the annexation of county territory, become the "successor" of the county under said agreement and by-law so as to be entitled to a proportion of the payments to be made by the railway company thereunder.—*Per* Fitzpatrick C.J. and Idington and Duff JJ.—The Ontario Railway and Municipal Board was not invested with authority to provide, in its order extending the boundaries of the city, that such rights as those reserved by section 24 of the county by-law should, on such extension of the boundaries, pass to the city in whole or in part. Judgment of the Appellate Division (35 Ont. L.R. 434) reversed and that of the trial judge (31 Ont. L.R. 659) restored. COUNTY OF WENTWORTH *v.* HAMILTON RADIAL ELECTRIC RY. CO. 178

2——*Expropriation—Statutory powers—Lands outside municipality—Appointment of arbitrators — Procedure — Award — "Towns Corporations Act," R.S.Q.*, 1888, *arts.* 4561-4569—*Charter of Town of Fraserville, 3 Edw. VII., c.* 69; 6 *Edw. VII., c.* 50 —*Quebec "Expropriation Act,"* 54 *Vict. c.* 38—*Words and phrases—"Avoisinant" —"Adjoining."*] The statutes incorporating the Town of Fraserville (3 Edw. VII., ch. 69, 6 Edw. VII., ch. 50 (Que.)), by section 183 gave power to expropriate lands both within and outside the limits of the municipality and section 193 substituted a new section to replace article 4561 of the Revised Statutes of Quebec, 1888, in regard to expropriations. In expropriating lands outside its limits for an electric lighting system the town proceeded under articles 4562 to 4569 of the "Towns Corporations Act," R.S.Q., 1888, incorporated as part of the charter by force of article 4178, R.S.Q., 1888, and obtained an order appointing an arbitrator on behalf of the owner from a judge of the Superior Court. Notwithstanding objection by the owner, an award was made and he brought action to set it aside on the ground that, by section 193, the application of articles 4562 to 4569 was confined, in the case of the Town of Fraserville, to expropriations within its limits and, as to expropriations beyond that area, nominations of arbitrators could be made only by the Attorney-General as provided by the "Expropriation Act," 54 Vict. ch. 38.—*Held*, Anglin J. dissenting.—That the sixth section of the Act, 6 Edw. VII., ch 50, by specifically authorizing the municipality to expropriate lands outside its limits enacted provisions incompatible with those of article 4561, R.S.Q., 1888, as so replaced by section 193, and it was, therefore, repealed as the repugnant provisions of the later statute prevailed. *The King* v. *The Justices of Middlesex* (2 B. & Ad. 818), and *In re Cannings and County Council of Middlesex* ([1907], 1 K.B. 51), followed. Consequently, the procedure adopted for the appointment of arbitrators was proper and the award was valid. The statute, 6 Edw. VII., ch. 50, by section 6, authorizing expropriations outside the town, in the French version made use of the phrase "dans ou en dehors de la ville et les municipalités avoisinantes," while the English version used the term "adjoining municipalities." The 297th section of the charter provided that in the event of discrepancy preference should be given to the French version.—*Held*, that the statute should be interpreted according to the meaning of the broader term "avoisinantes," used in the French version and, consequently, in exercising such powers of expropriation, the municipality was not limited to taking lands in contiguous municipalities.—*Per* Anglin J. By section 193 of the charter the application of the provisions of the "Towns Corporations Act," arts. 4165 *et seq.* R.S.Q., 1888, is expressly confined to expropriations within the town; section 193 was not excluded from the charter nor impliedly repealed by the amendment of 1906 to section 183, and the appointment of arbitrators by the judge was an usurpation of the jurisdiction

MUNICIPAL CORPORATION—*con.*
conferred by articles 5754*d* and 5754*e*, R.S.Q., 1888 (54 Vict. ch. 38, sec. 1), upon the Attorney-General of the province. POULIOT *v.* TOWN OF FRASERVILLE... **310**

3——*Maintenance of highways—Improper use of sidewalk—Damage by trespasser—Notice of disrepair—Nuisance—Negligence—Injury to pedestrian—Liability for damages.*] The municipal corporation was obliged, and given power, to maintain its highways in a reasonable state of repair, having regard to the character of the streets and the locality in which they were situated, and regulations had been enacted to prohibit vehicular traffic over the sidewalks except at crossings specially constructed in a manner to sustain such traffic. At a place where no such crossing had been provided vehicles had been, for over a year, habitually driven across a wooden sidewalk and no action to prevent such trespasses had been taken by the municipal authorities. During the afternoon of the day before the accident, a plank was broken by a heavy vehicle crossing the sidewalk and it continued in this condition until the evening of the following day when a pedestrian tripped in the hole and sustained injuries for which he brought action to recover damages.—*Held*, reversing the judgment appealed from (9 West. W.R. 1287; 33 West. L.R. 851), Davies J. dissenting, that, in these circumstances, the municipal corporation was charged with notice of the condition of disrepair of its public sidewalk and, having failed to remedy the nuisance within a reasonable time, it was guilty of negligence involving liability in damages.—*Per* Duff J. Section 507 of the charter of the City of Edmonton does not impose upon the municipality an absolute responsibility for harm suffered by individuals in consequence of a street being in a state of disrepair constituting a dangerous nuisance; but the municipality is responsible for the consequences of such a state of disrepair if, through the observance of proper precautions, it could have prevented the nuisance coming into existence: *Hammond* v. *Vestry of St. Pancras* (L.R. 9 C.P. 316), and *Bateman* v. *Poplar District Board of Works* (37 Ch. D. 272), applied. Proof of the existence of such a nuisance and resulting damage is, in itself, sufficient to create a *primâ facie* cause of action against the municipality under section 507 of the charter. JAMIESON *v.* CITY OF EDMONTON......... **443**

NARROW CHANNEL — *Admirality law—Navigation of canal—"Narrow channel"—Marine Department Regulations, rule 25—Starboard course—Fairways and mid-channels—"Canadian Shipping Act," R.S.C. 1906. c. 113, s. 916—Collision—Liability for damages—Canal Regulations, rule 22—Right of way.*] The steamboat "Honoreva" was under way going up the Soulanges Canal and approaching a bridge across the channel which was swung open when she was about 300 feet below it. The steam tug "Jackman" was then observed descending the canal, with the current, at a greater distance above the bridge and also under way. The "Honoreva," in attempting to pass first through the abutments of the bridge (a space of about 100 feet in width), and keeping a course in mid-channel, came into collision with the barge "Maggie," which was being towed by the "Jackman," and the barge was injured and sunk. In an action for damages against the "Honoreva" she counterclaimed for damages sustained by her owing, as alleged, to the negligent navigation of the tug-and-tow. *Held*, that the vessels thus navigating the canal were, at the place where the collision occurred, in a "narrow channel;" that article 25 of the rules of the Marine Department respecting the passage of vessels, which requires them when safe and practicable to keep to the starboard in fairways and mid-channels, applied to the navigation of the vessels in question, and that the "Honoreva," having failed to obey that rule, was in fault within the meaning of section 916 of the "Canada Shipping Act," R.S.C., 1906, chap. 113; that there was no negligence proven on the part of the tug-and-tow, and that the "Honoreva" was, therefore, solely liable for the damages resulting from the collision.—*Per* Davies and Anglin JJ.—Under sub-section *b* of article 25 of the rules of the Marine Department, the down-going tug-and-tow had the right of way, notwithstanding that the up-going vessel may have been closer to the bridge when it was opened, and that the tug-and-tow were not obliged to stop and make fast to posts until the up-going vessel had passed, as is required by the 22nd rule of the "Canal Regulations" in regard to vessels approaching a lock. BONHAM *v.* THE "HONOREVA".. **51**

NAVIGATION —*Obstructions in river—Navigable in part—Crown domain.*] In the Province of Quebec, a river which,

NAVIGATION—*continued.*
owing to natural obstructions, is capable only of floating loose timber (*flottables à bûches perdues*), in portions of its course may, at least from its mouth upwards until some such obstruction is reached be navigable and subject to the rule of law applicable to navigable waters. As the river in question for several miles from its mouth upwards to a point where its course is obstructed by rapids is in fact capable of being utilized for the purposes of navigation the bed of the stream for that distance forms part of the Crown domain. (Art. 400 C.C.) LEAMY *v.* THE KING. 143

NEGLIGENCE — *Electric shock—Action against two defendants—Findings of jury—Joint liability—Agreement between defendants—Right to indemnity.*] In an action against two parties claiming from them jointly and severally compensation for the death of plaintiff's son from electric shock caused by negligence, where there is no contributory negligence both defendants may be held liable if the negligence of each was a real cause of the accident. *Cf. Algoma Steel Corporation* v. *Dube* (53 Can. S.C.R. 48). By an agreement between the Interurban Electric Co. and the City of Toronto, operating the Hydro-Electric System, the former undertook to "save harmless and indemnify the said corporation * * * against all loss, damages * * * which the corporation may * * have to pay * * * by reason of any act, default or omission of the company or otherwise howsoever." An employee of the company was killed in course of his employment and in an action by his personal representative the jury found that the city and the company were each guilty of negligence which caused the accident.—*Held*, that the agreement did not apply to the case of damages which the city would have to pay as a consequence of its own negligence and neither relieved it from liability nor entitled it to indemnity. Judgment of the Appellate Division (36 Ont. L.R. 269) affirmed. LAMBERT *v.* CITY OF TORONTO....... 200

2——*Government railway—Height of rails—Statutory rule—Act of third person.*] A level crossing of the Intercolonial Railway had planking between the rails which raised the roadbed so that the tracks did not rise more than an inch above the surface of the highway. Under a regulation for the guidance of trackmasters and trackmen, made by the railway authorities,

NEGLIGENCE—*continued.*
the planks were removed during the winter season to permit safe operation of snowploughs and flangers, during this season the space occupied by the planking being filled by snow and ice. In April, before the use of snowploughs and flangers had been discontinued, the ice and snow melted and left the tracks about six inches above the roadbed. After the usual inspection by the trackmen, some unknown person placed a fence-rail against one of the tracks to assist sleighs over the obstruction and, later in the day, suppliant in driving his sleigh along the highway had his foot crushed between the fence-rail and the track and sought damages from the Crown for the injuries sustained:—*Held*, that the condition of the crossing constituted negligence of officers and servants of the Crown while acting within the scope of their duties and employment in the construction and maintenance of the railway in consequence of which the Crown was liable in damages notwithstanding that the resulting injury might not have occurred but for the intervening act of some unknown third person: *Latham* v. *R. Johnson & Nephew* [1913], 1 K.B. 398), referred to. BELANGER *v.* THE KING 265

3——*Negligence — Employer's liability — Competent superintendence—Common employment—Contributory negligence.*] B. was employed by the company as a labourer in preparing a site for a power house, and was working on a narrow ledge on a hillside preparing a place on which to erect a drilling machine. Stones or earth falling from above struck him and he fell off the ledge to the bottom of the excavation sustaining severe injuries. In an action against the company for damages under the common law it was contended that failure to protect the workmen by a barrier above the ledge was negligence for which defendants were responsible.—*Held*, *per* Davies and Anglin JJ., that such negligence was that of the company's superintendent, a fellow servant of B., and the company was not responsible.—*Per* Duff and Anglin JJ., following *Wilson* v. *Merry* (L.R. 1 H.L. Sc. 326), that, as it was proved that the company had appointed a competent engineer to take charge of the work, invested him with the requisite authority and responsibility for protecting the workmen and supplied him with the materials necessary for the purpose, they had discharged their duty towards their

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employees and were not responsible for the injury to B. Judgment of the Court of Appeal (22 B.C. Rep. 241) reversed, Idington and Brodeur JJ. dissenting. WESTERN CANADA POWER CO. *v.* BERGLINT........................... 285

4——*Driving lumber—Rights in navigable waters—River improvements—Contract with Crown—Rights of contractor—Reckless driving—"Rivers and Streams Act" (Ont.)—"B.N.A. Act, 1867,"* ss. 91 (10), 92 (10).] In 1910, Parliament voted money for "Montreal River Improvements above Latchford" and the Crown, through the Minister of Public Works, gave a contract to L. in connection with the work. In performance of the work L. placed a cofferdam on each side of the river leaving an opening between them some 200 feet wide. In the spring of 1911 the cofferdam on the north side was covered by three feet of water and the logs of B., being driven down through the opening, were allowed to rest against a pier a few hundred feet below and formed a jam the rear of which was over the cofferdam. Either by weight of the jam or increased pressure by breaking it, in the ordinary mode, the destruction of the cofferdam was caused.—*Held,* Fitzpatrick C.J. and Duff J. dissenting, that B. was responsible for the injury so caused; that with more care in driving the formation of the jam might have been avoided; that, if breaking the jam in the ordinary way was likely to cause damage, another mode should have been adopted even if it would cause delay and greater expense; and that the employees of B. acted with a wilful disregard of the contractors' rights and caused "unnecessary damage."—*Held, per* Davies, Anglin and Brodeur JJ., that, in the absence of Dominion legislation to the contrary, the rights of lumbermen under the Ontario "Rivers and Streams Act" (pre-Confederation legislation) are not subordinate but equal to those of persons acting for the Dominion Government in matters respecting navigation.—*Per* Davies and Duff JJ., Anglin J. *dubitante.*—The cofferdam was a "structure" and subject to the provisions of section 4 of the "Rivers and Streams Act."—*Per* Davies and Anglin JJ. Even if not a "structure" as it was placed in the river under sanction of Dominion legislation B.'s rights were restricted practically as they would be under section 4.—*Held, per* Fitzpatrick C.J. and Duff J.—A vote for "River Improvements" does not of

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itself authorize an interference with the rights of lumbermen under the "Rivers and Streams Act." These rights were exercised in the usual and proper manner and as no breach of duty by B. to avoid "unnecessary damage" was proved he could not be held liable for the damage to the cofferdam. Judgment of the Appellate Division (37 Ont. L.R. 17) reversing that at the trial (34 Ont. L.R. 204), affirmed. BOOTH *v.* LOWERY................. 421

5——*Municipal corporation—Maintenance of highways—Improper use of sidewalk—Damage by trespasser—Notice of disrepair—Nuisance—Injury to pedestrian.*] The municipal corporation was obliged, and given power, to maintain its highways in a reasonable state of repair, having regard to the character of the streets and the locality in which they were situated, and regulations had been enacted to prohibit vehicular traffic over the sidewalks except at crossings specially constructed in a manner to sustain such traffic. At a place where no such crossing had been provided vehicles had been, for over a year, habitually driven across a wooden sidewalk and no action to prevent such trespasses had been taken by the municipal authorities. During the afternoon of the day before the accident, a plank was broken by a heavy vehicle crossing the sidewalk and it continued in this condition until the evening of the following day when a pedestrian tripped in the hole and sustained injuries for which he brought action to recover damages.—*Held,* reversing the judgment appealed from (9 West. W.R. 1287; 33 West. L.R. 851), Davies J. dissenting, that, in these circumstances, the municipal corporation was charged with notice of the condition of disrepair of its public sidewalk and, having failed to remedy the nuisance within a reasonable time, it was guilty of negligence involving liability in damages.—*Per* Duff J. Section 507 of the charter of the City of Edmonton does not impose upon the municipality an absolute responsibility for harm suffered by individuals in consequence of a street being in a state of disrepair constituting a dangerous nuisance; but the municipality is responsible for the consequences of such a state of disrepair if, through the observance of proper precautions, it could have prevented the nuisance coming into existence: *Hammond* v. *Vestry of St. Pancras* (L.R. 9 C.P. 310), and *Bateman* v. *Poplar*

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District Board of Works (37 Ch. D. 272), applied. Proof of the existence of such a nuisance and resulting damage is, in itself, sufficient to create a *primâ facie* cause of action against the municipality under section 507 of the charter. JAMIESON *v.* CITY OF EDMONTON 443

6——*Railway company—Unloading Cars—Limitation of action—Operation of railway—R.S.C.* (1906) *c.* 37, *s.* 306..... 36
See RAILWAYS 1.

7——*Carrier—Bill of lading—Exemption from liability—Climatic conditions—Frost* 521
See SHIPPING.

8——*Admiralty Law—Collision—Narrow channel—Departmental rules* 51
See ADMIRALTY LAW.

NEW TRIAL —*R.S.B.C.*, 1911, *c.* 51—*Motion for Judgment—Re-hearing* 76
See PRACTICE AND PROCEDURE 1.

NUISANCE — *Highway—Use of sidewalk—Municipal responsibility* 443
See MUNICIPAL CORPORATION 3.

PARTIES— *Carrier—Bill of lading—Loss of goods—Action—Dormant partner* .. 521
See SHIPPING.

PARTNERSHIP — *Succession Duties — Partnership property—Owners not domiciled in Province—Interest of deceased partner—R.S.B.C.* 1911, *c.* 217, *s.* 5, *s.-s.* 1*a*—*Taxation—Legislative jurisdiction—"B.N.A. Act,* 1867," *s.* 92.] By section 5 of the "Succession Duties Act" of British Columbia (R.S.B.C. [1911] ch. 217), on the death of any person his property in the province "and any interest therein or income therefrom * * * passing by will or intestacy" is subject to succession duty whether such person was domiciled in the province or elsewhere at the time of his death. M. B. and his brother were partners doing business in Ontario and owning timber limits in British Columbia. The firm had no place of business nor man of business in that province and never worked the limits. The partnership articles provided: "8. If either partner shall die during the continuance of the partnership his executors and administrators shall be entitled to the value of his share in the

PARTNERSHIP—*continued.*

partnership assets. 9. On the expiration or other determination of the said partnership a valuation of the assets shall be made and after providing for payment of liabilities the value of such property stock and credits shall be divided equally between the partners, etc." M. B. having died while the partnership existed his share in the partnership assets passed by his will to executors. The Province of British Columbia claimed that his interest in the timber limits was subject to succession duty.—*Held*, Davies and Anglin JJ. dissenting, that under the terms of the articles of partnership M. B. at the time of his death had an interest in the timber limits in British Columbia which passed by his will, and such interest was subject to duty under section five of the B.C. "Succession Duty Act."—*Held*, also, that the imposition of the duty, if taxation, was "direct taxation within the province" and within the competence of the Legislature of British Columbia. BOYD *v.* ATTORNEY-GENERAL OF BRITISH COLUMBIA 532

PATENT —*Conflicting claims—Judgment of Exchequer Court—Appeal to Supreme Court* 610
See APPEAL 5.

PRACTICE AND PROCEDURE — *Appeal—Jurisdiction—Action in county court—Concurrent jurisdiction with superior court — Construction of statute — R.S.C.*, 1906, *c.* 139, *ss.* 37*b*, 70, *"Supreme Court Act"—R.S.B.C.*, 1911, *c.* 51, *"Court of Appeal Act"—R.S.B.C.*, 1911, *c.* 53, *"County Courts Act"—Motion for new trial—Re-hearing on appeal.*] An action in a county court in British Columbia to recover $578, damages for injuries sustained, alleged to have been caused through negligence, was dismissed by the county court judge after the evidence for the plaintiff had been put in; the defendants offered no evidence, but asked for dismissal on the evidence as it stood. The plaintiff appealed to have judgment entered in his favour or, alternatively, to have the case remitted to the county court to have damages assessed, or for such further order as might be deemed proper by the Court of Appeal. The appeal was dismissed and the judgment appealed from affirmed. The British Columbia "Court of Appeal Act" (R.S.B.C., 1911, ch. 51, sec. 15, sub-sec. 3), provides that every appeal shall include

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a motion for a new trial unless otherwise stated in the notice of appeal. On motion to quash an appeal to the Supreme Court of Canada on the grounds that the notice prescribed by section 70 of the "Supreme Court Act," R.S.C., 1906, ch. 139, had not been given within 20 days from the date of the judgment appealed from and that the action was not of the class in which a county court had concurrent jurisdiction with a superior court, under section 37*b* of the "Supreme Court Act" limiting appeals to the Supreme Court of Canada. —*Held*, Duff J. dissenting, that no appeal could lie to the Supreme Court of Canada. —*Per* Fitzpatrick C.J. and Idington J., (Duff and Anglin JJ. *contra*).—As the case was not one in which a county court is given concurrent jurisdiction with a superior court, under section 40 of the "County Courts Act," R.S.B.C., 1911, ch. 53, the Supreme Court of Canada had no jurisdiction to entertain the appeal. *Champion* v. *The World Building Co.* (50 Can. S.C.R. 382), referred to.—*Per* Anglin J.—In the circumstances of the case the judgment of the Court of Appeal for British Columbia should be regarded as a judgment upon a motion for a new trial, within the meaning of section 70 of the "Supreme Court Act," R.S.C., 1906, ch. 139, and, notice not having been given as thereby provided, there could be no appeal to the Supreme Court of Canada. *Sedgwick* v. *Montreal Light, Heat and Power Co.* (41 Can. S.C.R. 639), and *Jones* v. *Toronto and York Radial Railway Co.* (Cam. S.C. Prac. 432), referred to. *Per* Duff J., dissenting,—The judgment from which the appeal is asserted was not a judgment upon a motion for a new trial but a decision on the merits of the case upon an appeal by way of re-hearing by the Court of Appeal for British Columbia which had before it all the evidence necessary for that purpose. There being no ground on which either party could have demanded a new trial, section 70 of the "Supreme Court Act" had no application to the appeal to the Supreme Court of Canada. *Sedgwick* v. *Montreal Light, Heat, and Power Co.* (41 Can. S.C.R. 639) followed. Further, the County Court derived its jurisdiction in the case in question from the provisions of section 30, sub-sec. 1, of the "County Courts Act" (R.S.B.C., 1911, ch. 53), and section 22 of that Act shews that this jurisdiction is concurrent; consequently, the County Court possessed "concurrent jurisdiction" with the Supreme Court of British Columbia within the meaning of section 37*b* of the "Supreme Court Act," R.S.C., ch. 139, notwithstanding that the word "concurrent" is not employed in either of those sections of the "County Courts Act." TAIT *v.* BRITISH COLUMBIA ELECTRIC RY. CO... **76**

2——*Expropriation of land—Award—Rehearing—Amount of award.*] On appeal in a matter of expropriation the award should be treated as the judgment of a subordinate court subject to re-hearing. The amount awarded should not be interfered with unless the appeal court is satisfied that it is clearly wrong, that it does not represent the honest opinion of the arbitrators, or that their basis of valuation was erroneous. TORONTO SUBURBAN RY. CO. *v.* EVERSON **395**

3——*Criminal Law—False pretences—Charge to jury—Conspiracy—Inflammatory address by counsel—New trial* **220**

See CRIMINAL LAW 2.

PREFERENCE —*Debtor and creditor—Agreement for extension—Advantage to one creditor* **480**

See DEBTOR AND CREDITOR.

PUBLIC WORK — *Incorporation of company — Construction of canal — Governor-in-Council — Approval of plans — Discretion — Refusal to approve — Right of action.*] The statute 61 Vict. ch. 107 (D.) incorporated a company for the purpose of constructing and operating a canal between the St. Lawrence and Richelieu Rivers. Section 22 provided that before the work of constructing the canal begun, the plans, etc., were to be approved by the Governor-in-Council.—*Held*, affirming the judgment appealed from (16 Ex. C.R. 125), Fitzpatrick C.J. and Brodeur J. dissenting, that the refusal of the Governor-in-Council to approve plans submitted did not give the company a claim for damages which could be enforced against the Crown. —*Per* Duff J. that the refusal to consider the plans did not give birth to a claim for which a petition of right lies.—*Held, per* Fitzpatrick C.J. and Anglin and Brodeur JJ., that the Governor-in-Council had no discretionary power to refuse approval of the plans on the ground that the undertaking authorized by Parliament was opposed to public policy. LAKE CHAMPLAIN AND ST. LAWRENCE SHIP CANAL *v.* THE KING....................... **461**

RAILWAYS—*Negligence—Construction of statute—"Railway Act," R.S.C.* 1906, *c.* 37, *s.* 306—*Constitutional law—"Civil rights"—Jurisdiction of Dominion Parliament—Provincial legislation—"Employers' Liability Act," R.S.M.*, 1913, *c.* 61—*Paramount authority—"Operation of railway"—Limitation of actions—Conflict of laws.*] An employee of a Dominion railway company sustained injuries while engaged in unloading rails from a car alleged to have been unsuitably equipped for such purposes. The unloading of the rails was for the convenience of the company in using them to replace other rails already in use on the constructed tracks. An action was brought to recover damages, under the Manitoba "Employers' Liability Act," R.S.M., 1913, ch. 61, within two years from the time of the accident, the limitation provided by section 12 of that Act, but after the expiration of the limitation of one year provided, in respect of actions against Dominion railway companies, by the first sub-section of section 306 of the "Railway Act," R.S.C., 1906, ch. 37. The fourth sub-section of section 306 provides that such railway companies shall not be relieved from liability under laws in force in the province where responsibility arises.—*Held*, affirming the judgment appealed from (25 Man. R. 655), that, in the exercise of authority in respect of railways subject to its jurisdiction, the Parliament of Canada had power to enact the first sub-section of section 306 of the "Railway Act," R.S.C., 1906, ch. 37, providing a limitation of one year for the commencement of actions against Dominion railway companies for the recovery of damages for injury sustained by reason of the construction or operation of the railway. *Grand Trunk Rway. Co.* v. *Attorney-General for Canada* ((1907) A.C. 65), applied.—*Per* Fitzpatrick, C.J. and Davies, Anglin and Brodeur JJ. (Idington J. *contra*).—The fourth sub-section of section 306 of the "Railway Act," R.S.C., 1906, ch. 37, does not so qualify the limitation provided by the first sub-section thereof as to admit the application, in such cases, of a different limitation provided under provincial legislation. *Greer* v. *Canadian Pacific Rway. Co.* (51 Can. S.C.R. 338) followed. The unloading of rails for the convenience of a railway company to be used in replacing those already in use on the constructed permanent way is included in "operation of railway" under the first sub-section of section 306 of the "Railway Act," R.S.C., 1906, ch. 37. Idington J. *contra*. The judgment appealed from (25 Man. R. 655) was reversed, Idington J. dissenting. CANADIAN NORTHERN RY. CO. *v.* PSZENICNZY................ **36**

2——*Government railways—Construction and maintenance—Level crossings—Regulations by Governor-in-Council—Construction of statute—"Government Railways Act," R.S.C.*, 1906, *c.* 36, *ss.* 16, 49, 54—*Negligence—Act of third person—Liability of Crown for damages.*] The right to construct Government railways across highways conferred by section 16 of the "Government Railways Act," R.S.C., 1906, ch. 36, is subject to the continuing duty imposed upon the Government railway authorities that, in regard to the relative levels of the railway tracks and the highways, so long as any such crossings are maintained on the level of the roads the railway tracks shall not rise or sink more than one inch above or below the surface of the highways. Regulations made by the Governor-in-Council under the provisions of section 49 and falling within section 54 of the "Government Railways Act," R.S.C., 1906, ch. 36, must not conflict with specific enactments of the statute; a regulation which may be the cause of conditions existing which are inconsistent with explicit requirements of the statute must be construed as subordinate to an implied proviso that nothing therein shall sanction a departure from any special requirement of the statute: *Institute of Patent Agents* v. *Lockwood* ((1894) A.C. 347) and *Booth* v. *The King* (51 Can. S.C.R. 20) applied. A level crossing of the Intercolonial Railway had planking between the rails which raised the roadbed so that the tracks did not rise more than an inch above the surface of the highway. Under a regulation for the guidance of trackmasters and trackmen, made by the railway authorities, the planks were removed during the winter season to permit safe operation of snowploughs and flangers, during this season the space occupied by the planking being filled by snow and ice. In April, before the use of snowploughs and flangers had been discontinued, the ice and snow melted and left the tracks about six inches above the roadbed. After the usual inspection by the trackmen, some unknown person placed a fence-rail against one of the tracks to assist sleighs over the obstruction and, later in the day, suppliant in driving his

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sleigh along the highway had his foot crushed between the fence-rail and the track and sought damages from the Crown for the injuries sustained:—*Held*, that the condition of the crossing constituted negligence of officers and servants of the Crown while acting within the scope of their duties and employment in the construction and maintenance of the railway in consequence of which the Crown was liable in damages notwithstanding that the resulting injury might not have occurred but for the intervening act of some unknown third person: *Latham* v. *R. Johnson & Nephew* ((1913), 1 K.B. 398), referred to. BELANGER *v.* THE KING **265**

3——*Expropriation—Date for valuation of lands—Deposit of plan—Notice—Benefit to lands not taken—Set-off—Excessive compensation—Appeal*—6 *Edw. VII. c.* 30 (*Ont.*) —3 & 4 *Geo. V. c.* 36 (*Ont.*).] Where the expropriation of land is governed by the provisions of the Ontario "Railway Act" of 1906 the date for valuation is that of the notice required by sec. 68(1). The effect is the same under the Act of 1913 if the land has not been acquired by the railway company within one year from the date of filing the plan, etc. The compensation for the land expropriated should not be diminished by an allowance for benefit by reason of the railway to the lands not taken, the Ontario "Railway Acts" making no provision therefor. TORONTO SUBURBAN TRUSTS CO. *v.* EVERSON........................ **395**

4——*Statute — Construction — Application — Taxation — Exemption — Railway property—Frontage lots—Local improvements*, 63 & 64 *V. c.* 57, *s.* 18; *c.* 58, *s.* 22 (*Man.*)—*R.S.M.*, 1902, *c.* 166; 10 *Edw. VII.*, *c.* 74 (*Man.*).] By the "Railway Taxation Act," ch. 57, sec. 18, 63 & 64 Vict. (Man.), it was provided that every railway company subject to the Act should be free and exempt from all taxation of every nature and kind within the province except that imposed under its provisions. By ch. 58 of the same session of the legislature, ch. 57 was amended by adding section 22 thereto which provided that nothing therein should deprive any city corporation of any power it had to levy taxes on the real property of a railway company fronting on any street for local improvements. The two Acts were assented to and came into force on the same day. In 1901 an agreement, confirmed by statute, was entered into between the Manitoba Government and the Canadian Northern Ry. Co. by which the Government agreed to guarantee the company's bonds, the company to pay a percentage of its gross earnings to the Government and to be exempt from taxation provided for by section 18 of ch. 57. The "Railway Taxation Act" of 1900 became ch. 166 of the Revised Statutes of Manitoba, 1902, secs. 18 and 19 being identical with sec. 18 of ch. 57 and sec. 22 of ch. 58 respectively. In 1910 the Act 10 Edw. VII., ch. 74 was passed. Sec. 1 provided "sec. 18 of ch. 166 R.S.M., 1902, being 'The Railway Taxation Act' is hereby further amended by adding, etc.;" sec. 2 "for the removal of doubt respecting the exemption from taxation granted under clause 16 of the agreement" (of 1901 above mentioned) "it is declared that the exemption so granted was and is the exemption specified in section 18 of the said 'Railway Taxation Act' existing at the date of the passage of such last mentioned Act and is unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto." Under the foregoing legislation the City of Winnipeg assessed frontage lots of the Canadian Northern Ry. Co. for local improvements—*Held, per* Fitzpatrick C.J., that though it is reasonably clear that the reference to sec. 18 in the Act of 1910 was intended for sec. 18 of ch. 57 passed in 1900 yet the language used will not admit of a doubt that ch. 166, R.S.M. 1902, sec. 18 is really referred to and under that Act the company is not exempt from taxation for local improvements.—Duff and Anglin JJ. contra—*Per* Davies and Idington JJ. Sec. 18 of ch. 57 and sec. 22 of ch. 58 must be read together and as if the latter had been made a part of sec. 57; so construing them the exemption of the company from taxation does not cover taxes for local improvements the right to impose which is preserved by sec. 22.—*Per* Duff J., dissenting. —The "Railway Taxation Act" R.S.M. 1902, ch. 166, referred to in the Act of 1910, was passed in 1900 (ch. 57), and not repealed and re-enacted in 1902. Ch. 58 of the Act of 1900 was an amendment passed concurrently with or subsequently to ch. 57 and does not affect the exemption given by the agreement of 1901.—*Per* Anglin J., dissenting. The reference in sec. 2 of the Act of 1910 to sec. 18 of the "Railway Taxation Act" clearly meant sec. 18 of the original Act of 1900, ch. 57,

RAILWAYS—*continued.*
and the exemption given by the agreement was not affected by the provisions of ch. 58 amending same. In 1910 a special survey, under the "Special Survey Act," was made of certain lots, including those in question, belonging to the railway company and each lot was charged with a proportionate share of the cost of the survey.—*Held,* Duff J., dissenting, that the charge so made was taxation and not being a tax for a local improvement the company was exempt from payment. Judgment appealed from (26 Man. R. 292), affirmed. CANADIAN NORTHERN RY. CO. *v.* CITY OF WINNIPEG..... 589

RIVERS AND STREAMS—*Navigable waters—Floatability—Ownership of beds—Grant of Crown lands—Conveyance of bed of navigable waters—Title to land—Art. 400 C.C.*] In the Province of Quebec, a river which, owing to natural obstructions, is capable only of floating loose timber (*flottables à bûches perdues*), in portions of its course may, at least from its mouth upwards until some such obstruction is reached be navigable and subject to the rule of law applicable to navigable waters. As the river in question for several miles from its mouth upwards to a point where its course is obstructed by rapids is in fact capable of being utilized for the purposes of navigation the bed of the stream for that distance forms part of the Crown domain. (Art. 400 C.C.) Without express terms to that effect a Crown grant, made in 1806, of township lands in the territory now comprised in the Province of Quebec did not pass title to the grantee in the bed of navigable waters within the area described in the letters patent of grant. Idington J. dissented on the ground that the language of the letters patent in question was intended and was sufficiently explicit and comprehensive to convey to the grantee the bed of the navigable waters included within the limits of the description of the lands granted. The judgment appealed from (15 Ex. C.R. 189), was affirmed, Idington J. dissenting. LEAMY *v.* THE KING.................... 143

2——*Driving lumber—Rights in navigable waters—River improvements—Rivers and Streams Act (Ont.)—"B.N.A. Act, 1867," ss.* 91(10) 92(10).................. 421

See NEGLIGENCE 4.

SALE—*Sale of land—Consideration—Exchange of properties—Mortgage—Indemnity to vendor—Evidence.*] In 1912 D. advanced money to P., who conveyed to him certain properties, in Ottawa, Ont., including one on LeBreton Street. In 1913, P. entered into an agreement with C. to exchange the LeBreton Street property for lots on Lisgar Street, which was carried out by conveyances between C. and D. In his deed C. stated that the consideration was "an exchange of lands and $1.00," and conveyed the lots on Lisgar Street, subject to certain mortgages, the description being followed by the words, "the assumption of which mortgages is part of the consideration herein." C. was obliged to pay these mortgages, and brought suit against D. to recover the amount so paid.—*Held,* affirming the judgment of the Appellate Division (34 Ont. L.R. 580), that the case was not within the rule of equity whereby the purchaser of an equity of redemption may be obliged to indemnify his vendor against liability for the mortgage. *Small* v. *Thompson* (28 Can. S.C.R. 219) distinguished.—*Held,* also, that parol evidence was properly received to shew the relations between P. and D.; that D. received the conveyance from C. merely as P.'s nominee, and held it afterwards only as security for his advances to P.; that he never claimed to be owner and never went into possession except as P.'s agent; and that he was not a purchaser of the property, but only a mortgagee. CAMPBELL *v.* DOUGLAS........................ 28

2——*Sale of land—Vente à réméré—Redemption—Term—Judicial proceedings—Art.* 1550 *C.C.*] Article 1550 of the Civil Code does not oblige the vendor, in a *vente à réméré,* to take judicial proceedings for redemption within the time stipulated in the deed. It is sufficient that, within such time, he signifies to the vendee his intention to redeem. Duff and Anglin JJ. dissented. Judgment appealed from (Q.R. 25 K.B. 464), affirmed. JOHNSON *v.* LAFLAMME........................ 495

3——*Sale of goods—Action by broker—Proof—Arts.* 1206, 1233, 1235 *C.C.*.. 131

See EVIDENCE 1.

SHIPPING—*Carrier—Bill of lading—Perishable cargo—Climatic conditions—Exemption from liability for negligence—Parties.*] A consignment of fruit was shipped during the winter season at a port in Italy for London, Eng., to be transhipped thence by another line to St. John, N.B.

SHIPPING—*continued.*

The bill of lading for the voyage to St. John provided that the fruit would be delivered there in the like good order and condition as when received subject to exceptions and stipulations including injury from "effects of climate" or from negligence. The ship stopped for some hours at Halifax, opened the hatches and discharged other cargo, and, either while at Halifax or before arriving at St. John, the whole consignment was frozen.—*Held*, affirming the judgment appealed from (Q.R. 25 K.B. 325), that the injury to the fruit was due to the effects of climate and the terms of the bill of lading relieved the shipowners from liability therefor even though they may have been guilty of negligence. The consignee of the fruit, who alone brought action against the carriers had a dormant partner entitled to share with him the profits of the transaction.—*Held, per* Fitzpatrick C.J., that the proper parties were not before the court. VIPOND *v.* FURNESS, WITHY & Co........................... 521

STATUTE — *Application* — *Assessment —Final Judgments*] A provincial statute, providing that judgments of courts in the province on appeal from decisions of courts of revision in respect of assessments for taxation purposes shall be final and conclusive on the matters adjudicated upon thereby, does not circumscribe the appellate jurisdiction given to the Supreme Court of Canada in such matters by section 41 of the "Supreme Court Act," R.S.C., 1906, ch. 139. *Crown Grain Co.* v. *Day* ((1908) A.C. 504) applied. PEARCE *v.* CITY OF CALGARY.............. 1

2—— *Railways — Negligence — Construction of statute—"Railway Act," R.S.C.* 1906, *c.* 37, *s.* 306—*Constitutional law—"Civil rights"—Jurisdiction of Dominion Parliament—Provincial legislation—"Employers' Liability Act," R.S.M.*, 1913, *c.* 61 *—Paramount authority—"Operation of railway"—Limitation of actions—Conflict of laws.*] An employee of a Dominion railway company sustained injuries while engaged in unloading rails from a car alleged to have been unsuitably equipped for such purposes. The unloading of the rails was for the convenience of the company in using them to replace other rails already in use on the constructed tracks. An action was brought to recover damages, under the Manitoba "Employers' Liability Act, " R.S.M., 1913, ch. 61, within two

STATUTE—*continued.*

years from the time of the accident, the limitation provided by section 12 of that Act, but after the expiration of the limitation of one year provided, in respect of actions against Dominion railway companies, by the first sub-section of section 306 of the "Railway Act," R.S.C., 1906, ch. 37. The fourth sub-section of section 306 provides that such railway companies shall not be relieved from liability under laws in force in the province where responsibility arises.—*Held*, affirming the judgment appealed from (25 Man. R. 655), that, in the exercise of authority in respect of railways subject to its jurisdiction, the Parliament of Canada had power to enact the first sub-section of section 306 of the "Railway Act," R.S.C., 1906, ch. 37, providing a limitation of one year for the commencement of actions against Dominion railway companies for the recovery of damages for injury sustained by reason of the construction or operation of the railway. *Grand Trunk Rway. Co.* v. *Attorney-General for Canada* ((1907) A.C. 65), applied.—*Per* Fitzpatrick, C.J. and Davies, Anglin and Brodeur JJ. (Idington J. *contra*).—The fourth sub-section of section 306 of the "Railway Act," R.S.C., 1906, ch. 37, does not so qualify the limitation provided by the first sub-section thereof as to admit the application, in such cases, of a different limitation provided under provincial legislation. *Greer* v. *Canadian Pacific Rway. Co.* (51 Can. S.C.R. 338) followed. The unloading of rails for the convenience of a railway company to be used in replacing those already in use on the constructed permanent way is included in "operation of the railway" under the first sub-section of section 306 of the "Railway Act," R.S.C., 1906, ch. 37. Idington J. *contra*. The judgment appealed from (25 Man. R. 655) was reversed, Idington J. dissenting. CANADIAN NORTHERN RY. CO. *v.* PSZENICNZY......... 36

3——*Government railways—Construction and maintenance—Level crossings— Regulations by Governor-in-Council—Construction of statute—"Government Railways Act," R.S.C.*, 1906, *c.* 36, *ss.* 16, 49, 54—*Negligence—Act of third person—Liability of Crown for damages.*] The right to construct Government railways across highways conferred by section 16 of the "Government Railways Act," R.S.C., 1906, ch. 36, is subject to the continuing duty imposed upon the Government railway authorities that, in regard to the relative

STATUTE—*continued.*

levels of the railway tracks and the highways, so long as any such crossings are maintained on the level of the roads the railway tracks shall not rise or sink more than one inch above or below the surface of the highways. Regulations made by the Governor-in-Council under the provisions of section 49 and falling within section 54 of the "Government Railways Act," R.S.C., 1906, ch. 36, must not conflict with specific enactments of the statute; a regulation which may be the cause of conditions existing which are inconsistent with explicit requirements of the statute must be construed as subordinate to an implied proviso that nothing therein shall sanction a departure from any special requirement of the statute: *Institute of Patent Agents* v. *Lockwood* ((1894) A.C. 347) and *Booth* v. *The King* (51 Can. S.C.R. 20), referred to. BELANGER *v.* THE KING........... 265

4——*Expropriation—Municipal corporation—Statutory powers—Lands outside municipality—Appointment of arbitrators—Procedure—Award—"Towns Corporations Act," R.S.Q.*, 1888, *arts.* 4561-4569—*Charter of Town of Fraserville, 3 Edw. VII., c.* 69; 6 *Edw. VII., c.* 50—*Quebec "Expropriation Act,"* 54 *Vict. c.* 38—*Words and phrases — "Avoisinant" — "Adjoining."*] The statute incorporating the Town of Fraserville (3 Edw. VII., ch. 69, 6 Edw. VII., ch. 50 (Que.)), by section 183 gave power to expropriate lands both within and outside the limits of the municipality and section 193 substituted a new section to replace article 4561 of the Revised Statutes of Quebec, 1888, in regard to expropriations. In expropriating lands outside its limits for an electric lighting system the town proceeded under articles 4562 to 4569 of the "Towns Corporations Act," R.S.Q., 1888, incorporated as part of the charter by force of article 4178, R.S.Q., 1888, and obtained an order appointing an arbitrator on behalf of the owner from a judge of the Superior Court. Notwithstanding objection by the owner, an award was made and he brought action to set it aside on the ground that, by section 193, the application of articles 4562 to 4569 was confined, in the case of the Town of Fraserville, to expropriations within its limits and, as to expropriations beyond that area, nominations of arbitrators could be made only by the Attorney-General as provided by the "Expropriation Act," 54 Vict. ch. 38.—*Held*, Anglin J. dissenting, that the sixth section of the Act, 6 Edw. VII., ch. 50, by specifically authorizing the municipality to expropriate lands outside its limits enacted provisions incompatible with those of article 4561, R.S.Q., 1888, as so replaced by section 193, and it was, therefore, repealed as the repugnant provisions of the later statute prevailed. *The King* v. *The Justices of Middlesex* (2 B. & Ad. 818), and *In re Cannings and County Council of Middlesex* ([1907], 1 K.B. 51), followed. Consequently, the procedure adopted for the appointment of arbitrators was proper and the award was valid. The statute, 6 Edw. VII., ch. 50, by section 6, authorizing expropriations outside the town, in the French version made use of the phrase "dans ou en dehors de la ville et les municipalités avoisinantes," while the English version used the term "adjoining municipalities." The 297th section of the charter provided that in the event of discrepancy preference should be given to the French version.—*Held*, that the statute should be interpreted according to the meaning of the broader term "avoisinantes," used in the French version and, consequently, in exercising such powers of expropriation, the municipality was not limited to taking lands in contiguous municipalities.—*Per* Anglin J. By section 193 of the charter the application of the provisions of the "Towns Corporations Act," arts. 4165 *et seq.* R.S.Q., 1888, is expressly confined to expropriations within the town; section 193 was not excluded from the charter nor impliedly repealed by the amendment of 1906 to section 183, and the appointment of arbitrators by the judge was an usurpation of the jurisdiction conferred by articles 5754*d* and 5754*e*, R.S.Q. 1888 (54 Vict. ch. 38, sec. 1), upon the Attorney-General of the province. POULIOT *v.* TOWN OF FRASERVILLE. 310

5——*Negligence—Driving lumber—Rights in navigable waters—River improvements—Contract with Crown—Rights of contractor—Reckless driving—"Rivers and Streams Act" (Ont.)—"B.N.A. Act,* 1867," *ss.* 91 (10), 92 (10).] In 1910, Parliament voted money for "Montreal River Improvements above Latchford" and the Crown, through the Minister of Public Works, gave a contract to L. in connection with the work. In performance of the work L. placed a cofferdam on each side of the river leaving an opening between them some 200 feet wide. In the spring of 1911 the cofferdam on the north side was cov-

STATUTE—*continued.*

ered by three feet of water and the logs of B., being driven down through the opening, were allowed to rest against a pier a few hundred feet below and formed a jam the rear of which was over the cofferdam. Either by weight of the jam or increased pressure by breaking it, in the ordinary mode, the destruction of the cofferdam was caused.—*Held, per* Davies, Anglin and Brodeur JJ., that, in the absence of Dominion legislation to the contrary, the rights of lumbermen under the Ontario "Rivers and Streams Act" (pre-Confederation legislation) are not subordinate but equal to those of persons acting for the Dominion Government in matters respecting navigation.—*Per* Davies and Duff JJ., Anglin J. *dubitante.* The cofferdam was a "structure" and subject to the provisions of section 4 of the "Rivers and Streams Act." —*Per* Davies and Anglin JJ. Even if not a "structure" as it was placed in the river under sanction of Dominion legislation B.'s rights were restricted practically as they would be under section 4.—*Held, per* Fitzpatrick C.J. and Duff J. A vote for "River Improvements" does not itself authorize an interference with the rights of lumbermen under the "Rivers and Streams Act." These rights were exercised in the usual and proper manner and as no breach of duty by B. to avoid "unnecessary damage" was proved he could not be held liable for the damage to the cofferdam. Judgment of the Appellate Division (37 Ont. L.R. 17) reversing that at the trial (34 Ont. L.R. 204), affirmed. BOOTH *v.* LOWERY................. 421

6—— *Construction — Application — Taxation — Exemption — Railway property— Frontage lots—Local improvements,* 63 & 64 *V. c.* 57, *s.* 18; *c.* 58 *s.* 22 (*Man.*)—*R.S. M.*, 1902, *c.* 166; 10 *Edw. VII., c.* 74 (*Man.*).] By the "Railway Taxation Act," ch. 57, sec. 18, 63 & 64 Vict. (Man.), it was provided that every railway company subject to the Act should be free and exempt from all taxation of every nature and kind within the province except that imposed under its provisions. By ch. 58 of the same session of the legislature, ch. 57 was amended by adding section 22 thereto which provided that nothing therein should deprive any city corporation of any power it had to levy taxes on the real property of a railway company fronting on any street for local improvements. The two Acts were assented to and came into force on the same day. In 1901 an

STATUTE—*continued.*

agreement, confirmed by statute, was entered into between the Manitoba Government and the Canadian Northern Ry. Co. by which the Government agreed to guarantee the company's bonds, the company to pay a percentage of its gross earnings to the Government and to be exempt from taxation provided for by section 18 of ch. 57. The "Railway Taxation Act" of 1900 became ch. 166 of the Revised Statutes of Manitoba, 1902, secs. 18 and 19 being identical with sec. 18 of ch. 57 and sec. 22 of ch. 58 respectively. In 1910 the Act 10 Edw. VII., ch. 74 was passed. Sec. 1 provided "sec. 18 of ch. 166 R.S.M., 1902, being 'The Railway Taxation Act' is hereby further amended by adding, etc.;" sec. 2 "for the removal of doubt respecting the exemption from taxation granted under clause 16 of the agreement" (of 1901 above mentioned) "it is declared that the exemption so granted was and is the exemption specified in section 18 of the said 'Railway Taxation Act' existing at the date of the passage of such last mentioned Act and is unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto." Under the foregoing legislation the City of Winnipeg assessed frontage lots of the Canadian Northern Ry. Co. for local improvements.—*Held, per* Fitzpatrick C.J., that though it is reasonably clear that the reference to sec. 18 in the Act of 1910 was intended for sec. 18 of ch. 57 passed in 1900 yet the language used will not admit of a doubt that ch. 166, R.S.M. 1902, sec. 18 is really referred to and under that Act the company is not exempt from taxation for local improvements. Duff and Anglin JJ. contra.—*Per* Davies and Idington JJ. Sec. 18 of ch. 57 and sec. 22 of ch. 58 must be read together and as if the latter had been made a part of ch. 57; so construing them the exemption of the company from taxation does not cover taxes for local improvements the right to impose which is preserved by sec. 22.—*Per* Duff J., dissenting. The "Railway Taxation Act" R.S.M. 1902, ch. 166, referred to in the Act of 1910, was passed in 1900 (ch. 57), and not repealed and re-enacted in 1902. Ch. 58 of the Act of 1900 was an amendment passed concurrently with or subsequently to ch. 57 and does not affect the exemption given by the agreement of 1901. —*Per* Anglin J., dissenting. The reference in sec. 2 of the Act of 1910 to sec. 18 of the "Railway Taxation Act" meant sec. 18 of the original Act of 1900, ch. 57,

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and the exemption given by the agreement was not affected by the provisions of ch. 58 amending same. CANADIAN NORTHERN RY. CO. *v.* CITY OF WINNIPEG..... 589

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2——*C.S.U.C.*, *c.* 88 *s.* 15; *R.S.O.* (1914), *c.* 75 *s.* 14 (*Real Property Limitations Act*).............................. 331
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3——*R.S.C.* (1906) *c.* 36 *ss.* 16, 49, 54 (*Government Railways*)............. 265
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4——*R.S.C.* (1906) *c.* 37 *s.* 306 (*Railway Act*).............................. 36
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5——*R.S.C.* (1906) *c.* 113 (*Shipping Act*).............................. 51
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6——*R.S.C.* (1906) *c.* 139 *ss.* 37 (*b*), 70 (*Supreme Court Act*.............. 76
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9——*R.S.C.* (1906) *c.* 146 *s.* 498 (*Criminal Code*).............................. 381
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13——*R.S.Q.*, 1888, *Arts.* 4561-4569 (*Towns Corporations Act*)........... 310
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17——*R.S.M.*, 1901, *c.* 166; 10 *Edw. VII.*, *c.* 74 (*Local Improvements*).......... 589
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21——*R.S.B.C.*, 1911, *c.* 217 *s.* 5 *ss.* 1 (*a*) (*Succession Duties Act*) 532
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SUCCESSION DUTIES — *Partnership property—Owners not domiciled in Province —Interest of deceased partner—R.S.B.C. 1911, c. 217, s. 5, s.-s. 1a—Taxation—Legislative jurisdiction — "B.N.A. Act, 1867," s. 92.*] By section 5 of the "Succession Duties Act" of British Columbia (R.S.B.C. [1911] ch. 217), on the death of any person his property in the province "and any interest therein or income therefrom * * * passing by will or intestacy" is subject to succession duty whether such person was domiciled in the province or elsewhere at the time of his death. M. B. and his brother were partners doing business in Ontario and owning timber limits in British Columbia. The firm had

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no place of business nor man of business in that province and never worked the limits. The partnership articles provided: "8. If either partner shall die during the continuance of the partnership his executors and administrators shall be entitled to the value of his share in the partnership assets. 9. On the expiration or other determination of the said partnership a valuation of the assets shall be made and after providing for payment of liabilities the value of such property stock and credit shall be divided equally between the partners, etc." M.B. having died while the partnership existed his share in the partnership assets passed by his will to executors. The Province of British Columbia claimed that his interest in the timber limits was subject to succession duty.—*Held*, Davies and Anglin JJ. dissenting, that under the terms of the articles of partnership M. B. at the time of his death had an interest in the timber limits in British Columbia which passed by his will and such interest was subject to duty under section five of the B.C. "Succession Duty Act."—*Held*, also, that the imposition of the duty, if taxation, was "direct taxation within the province" and within the competence of the Legislature of British Columbia. BOYD *v.* ATTORNEY-GENERAL OF BRITISH COLUMBIA 532

TITLE TO LAND — *Adverse possession against Crown—"Nullum Tempus Act"—Interruption of possession—Information of Intrusion—Judgment by default—Acknowledgement of title—"Real Property Limitations Act" (Ont.).*] A judgment by default, on information of intrusion against persons in possession of Crown lands, which was never enforced did not interrupt such possession and prevent it ripening into title under the "Nullum Tempus Act." "The Real Property Limitations Act" of Ontario (C.S.U.C. ch. 88, sec. 15; R.S.O. [1914] ch. 75, sec. 14) providing that an acknowledgment of title in writing shall interrupt the adverse possession does not apply to possession of Crown lands and such acknowledgment is not an interruption under the "Nullum Tempus Act." The provision in the "Ontario Limitation of Actions Act" of 1902, making an acknowledgment apply to interrupt possession of Crown lands is not retroactive or, if it is, it cannot apply to a case in which the adverse possession had ripened into title before it was passed.—*Per* Duff J. As intrusion does not, in itself, deprive the Crown of possession the occupation required to attract the benefit of the first section of the "Nullum Tempus Act," 9 Geo. III., ch. 16, is not technically possession; but lands are "held or enjoyed" within the meaning of that section where facts are proved which, in litigation between subject and subject, would constitute civil possession as against the subject owner. The judgment of the Exchequer Court (16 Ex. C.R. 67) in favour of the Crown on information of intrusion was reversed, Fitzpatrick C.J. holding that the Crown had failed to prove title, Idington, J., that the claim was barred by the negative clause of the first section of the "Nullum Tempus Act," and the other judges that the defendants had obtained title by operation of the "Nullum Tempus Act." HAMILTON *v.* THE KING...... 331

TRADE — *Contract — Consideration — Settlement of action—Statute of Frauds—Trade agreement—Restraint of trade—Crim. Code s.* 498.] In 1905, M. and his two brothers entered into a contract with R. by which they gave him exclusive control of their salt works with some reservations as to local trade. R. assigned the contract to the Dominion Salt Agency, a partnership consisting of his firm and two salt manufacturing companies, which agency thereafter controlled about ninety per cent. of the output of manufacturers in Canada.—*Held*, that the contract was not *ex facie* illegal and as the Canadian output was exceeded by the quantity imported which may have competed with it, and the price was not enhanced by reason of this control by the Agency, the Court should not hold that it had the effect of unduly restraining the trade in salt or contravened the provisions of section 498 of the Criminal Code. MACEWAN *v.* TORONTO GENERAL TRUSTS CORP.. 381

VENTE A REMERE—*Sale of land—Redemption — Term — Judicial proceedings—Art.* 1550 *C.C.*] Article 1550 of the Civil Code does not oblige the vendor, in a *vente à réméré*, to take judicial proceedings for redemption within the time stipulated in the deed. It is sufficient that, within such time, he signifies to the vendee his intention to redeem. Duff and Anglin JJ. dissented. Judgment appealed from

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