REPORTS

OF THE

SUPREME COURT

OF

CANADA.

REPORTER

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ASSISTANT REPORTER

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1903.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. SIR HENRY STRONG, Knight, C. J.

The Hon. HENRI ELZÉAR TASCHEREAU J.

" JOHN WELLINGTON GWYNNE J.

" ROBERT SEDGEWICK J.

" DÉSIRÉ GIROUARD J.

" SIR LOUIS HENRY DAVIES J., K. C. M. G.

" DAVID MILLS J.

ATTORNEYS-GENERAL OF THE DOMINION OF CANADA:

The Hon. DAVID MILLS, K.C.

" CHARLES FITZPATRICK, K.C.

SOLICITORS-GENERAL OF THE DOMINION OF CANADA:

THE HON. CHARLES FITZPATRICK, K.C.

" HENRY GEORGE CARROLL, K.C.

ERRATA AND ADDENDA.

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

Page 47, line 25, for "which" read "while."

MEMORANDA.

On the 7th day of January, 1902, the Honourable John Wellington Gwynne, one of the Puisné Judges of the Supreme Court of Canada, died at the City of Ottawa.

On the 8th day of February, 1902, the Honourable David Mills, a member of the King's Privy Council for Canada, and one of His Majesty's Counsel learned in the law, was appointed a Puisné Judge of the Supreme Court of Canada, in the room and stead of the Honourable John Wellington Gwynne, deceased.

On the 18th day of November, 1902, the Right Honourable Sir Samuel Henry Strong, Knight, one of His Majesty's Most Honourable Privy Council, resigned the office of Chief Justice of Canada.

On the 21st day of November, 1902, the Honourable Sir Henri Elzéar Taschereau, one of the Puisné Judges of the Supreme Court of Canada, was appointed Chief Justice of Canada, in the room and stead of the Right Honourable Sir Samuel Henry Strong, resigned.

On the 21st day of November, 1902, the Honourable John Douglas Armour, Chief Justice of Ontario, was appointed a Puisné Judge of the Supreme Court of Canada in the room and stead of the Honourable Sir Henri Elzéar Taschereau, appointed Chief Justice of Canada.

APPEALS TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOL. 31 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Adams & Burns v. *The Bank of Montreal* (32 Can. S. C. R. 719). Leave to appeal refused (8 B. C. Rep. at page 337.)

Consumers Cordage Co. v. *Connolly et al.* (31 Can. S. C. R. 244.) Leave to appeal refused, (Canadian Gazette, vol. 37, p. 322) on an application by the Consumers Cordage Co. Leave to appeal was subsequently granted on an application by Connolly *et al.*

Dominion Cartridge Co. v. *McArthur* (31 Can. S. C. R. 392.) Leave to appeal granted August, 1902.

General Engineering Co. v. *The Dominion Cotton Mills Co.* (31 Can. S. C. R. 75.) Reversed July, 1902, (Canadian Gazette, vol. 39 ; pp. 368, 415.)

Imperial Bank of Canada v. *The Bank of Hamilton* (31 Can. S. C. R. 344) affirmed, 13th November, 1902, ([1903] A.C. 49.)

The King v. *The Algoma Central Railway Co.* (32 Can. S. C. R. 277.) Leave to appeal granted, July, 1902.)

The King v. *Chapelle ; The King* v. *Carmack ; The King* v. *Tweed* (32 Can. S. C. R. 586.) Leave to appeal granted, March, 1903.

McKelvey v. *The Le Roi Mining Co.* (32 Can. S. C. R. 664.) Leave to appeal refused, February, 1903.

City of Montreal v. *The City of Ste. Cunégonde, etc.* (32 Can. S. C. R. 135.) An application for leave to appeal made by the Town of Westmount was refused, July, 1902.

Ontario Mining Co. v. *Seybold et al.* (32 Can. S. C. R 1) affirmed, 12th November, 1902, ([1903] A.C. 73.)

Province of Quebec v. *Province of Ontario and Dominion of Caaada ; In re Common School Fund and Lands* (31 Can. S. C. R. 516.) Reversed, 12th November, 1902, ([1903] A.C. 39.)

Sinclair v. *Preston* (31 Can. S. C. R. 408.) Leave to appeal refused.

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OF THE

NAMES OF THE CASES REPORTED

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CASES

DETERMINED BY THE

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ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS,

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

THE ONTARIO MINING COMPANY (PLAINTIFF)..... } APPELLANT ;

AND

EDWARD SEYBOLD, EDMUND B. OSLER, JOHN W. MOYES, ELIZABETH JOHNSTON, EDWARD H. AMBROSE, JOHN W. BROWN AND JOHN S. EWART (DEFENDANTS) ..... } RESPONDENTS.

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*April 1.

*June 5.

ON APPEAL FROM A DIVISIONAL COURT OF THE HIGH COURT OF JUSTICE FOR ONTARIO.

Indian lands—Treaties with Indians—Surrender of Indian rights—Mines and minerals—Crown grant—Constitutional law.

The Supreme Court of Canada, Gwynne J. dissenting, dismissed an appeal from the judgment of a Divisional Court of the High Court of Justice for Ontario (32 O. R. 301) which had affirmed the judgment of the Chancellor (31 O. R. 386).

APPEAL by special leave (1), from the judgment of a Divisional Court of the High Court of Justice for

* PRESENT :—Sir Henry Strong C.J. and Taschereau, Gwynne, King and Girouard JJ.

NOTE.—This case is published by order of the Department of Justice.

(1) 31 Can. S. C. R. 125.

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Ontario (1) dismissing the plaintiff's appeal from the judgment of the Honourable, the Chancellor of Ontario (2), dimissing the plaintiff's action with costs.

The action was for a declaration that, under the circumstances stated in the report of the judgment at the trial (2), and by virtue of the letters patent of grant from the Government of the Dominion of Canada to the predecessors in title of the plaintiff, the latter was intitled to the lands in question in the case, forming part of Sultana Island, in the Rainy River District of the Province of Ontario, and also to set aside the letters patent from the Government of the Province of Ontario granting the lands to the defendants and for an injunction and other incidental relief.

At the trial the learned Chancellor dismissed the action (2) and on appeal to the Divisional Court his decision was affirmed by the judgment now under appeal (1).

Laidlaw K.C. and *Bicknell* for the appellant.

Biggs K.C. for the respondent, Johnston.

A. M. Stewart for the respondent, Osler.

R. U. McPherson for the respondent, Seybold.

J. M. Clark K.C. for the other respondents.

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

THE CHIEF JUSTICE (Oral.)—For the reasons given by the learned Chancellor in this case, and more particularly for the reasons given by the Judicial Committee of the Privy Council in *St Catherines Milling Co.* v. *The Queen* (3), by which we are bound, and which governs the decision in this case, the appeal must be dismissed with costs.

(1) 32 O. R. 301. (2) 31 O. R. 3.
(3) 14 App. Cas. 46.

GWYNNE J. (dissenting.)—The terms "Indian lands" and "the title" of the Indians to lands in the late Province of Upper Canada and in the late Province of Canada have always from the earliest period been well understood without any doubt or fluctuation of opinion whatever, to consist in this that by the pledge of the Sovereign no sale of lands should be, or ever has been, made by the Crown unless nor until the Indian title has been surrendered by a treaty entered into between the Sovereign and the Indian nations claiming title to the lands and upon surrender the Indian title consists in the honour of the Sovereign being pledged to a faithful observance of the conditions upon the faith of which the Sovereign procured each surrender to be made. This foundation of the Indian title to lands in British North America was originally designed perhaps as a reward for faithful services rendered in the early wars upon this continent by the Indian allies of the British Crown as certainly the tract of country known as the Grand River reservation was set apart for the Six Nations; but whether the concession be regarded as a reward for services rendered, or as proceeding *ex gratiâ et mero motu* of the Sovereign apart from any claim for services rendered all treaties entered into between the Sovereign and the North American Indians have always been regarded by the British Sovereigns and observed by them as inviolable as treaties entered into with foreign civilized nations, and the Indians themselves have always been regarded and treated as wards of the Crown and the management of their affairs was retained by the Imperial Government and was conducted through the Lieutenant Governor of the Province acting under instructions from the Sovereign and through an officer called the Chief Superintendent of Indian Affairs, appointed by the Lieutenant Governor,

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approved by the Imperial Government, to whom through the Lieutenant Governor the Chief Superintendent reported from time to time. In the case of lands surrendered by the Indians upon condition that they should be sold and the purchase monies invested for their benefit the sale of those lands has invariably been made by the Chief Superintendent of Indian Affairs and not by the Commissioner of Crown Lands, and the purchase moneys accruing from those sales were always received and invested by the Chief Superintendent and accounted for by him to the Lords Commissioners of the Treasury in England.

The distinction between the terms "public lands" and "Indian lands" has always been well understood and recognised in Acts of the Legislature. On the 17th of May, 1838, the royal assent pronounced by proclamation was given to an Act numbered chapter 118, of 7, Wm. 4th, intituled "An Act to provide for the disposal of the *public lands* in this province and for other purposes therein mentioned" which had been reserved by Sir Francis Bond Head, the then Lieutenant Governor of the late Province of Upper Canada for the royal assent. A reference to the several clauses of that Act clearly shews that the term "*public lands*" was applied solely to lands placed under the control of the Commissioner of Crown Lands for sale for the public purposes of the province consisting of Crown Lands, Clergy Reserves and School Lands, in all of which the province had an interest, but nothing in the Act had any relation to lands surrendered by the Indians *upon condition that they should be sold and the proceeds invested for their benefit*, the sale of which as already observed was maintained under the control of the Chief Superintendent of Indian Affairs, who as also already shewn was under the control of the Imperial Government exercised through the Governor as repre-

sentative of the Sovereign. The like distinction is maintained in the statutes 2 Vict. c. 14 and 15, passed in 1839, so also in the following statutes of the late Province of Canada, 4 & 5 Vict. ch. 100. intituled "An Act for the disposal of *public lands*," 12 Vict. ch. 200. intituled "An Act to raise an income of one hundred thousand pounds *out of the public lands* of Canada for Common School education," by which it was enacted that all moneys that should arise from the sale *of any of the public lands of the Province* should be set apart for the purpose of creating a capital which should be sufficient to produce a clear sum of one hundred thousand pounds per annum which said capital and the income to be derived therefrom should form a *public fund* to be called the Common School fund. It is clear that Indian lands came not under this Act, 13 & 14 Vict. c. 42 and 74, the former of which is intituled "An Act for the better protection of the *lands and property* of the Indians in Lower Canada", and the latter is intituled "An Act for the protection of the Indians of Upper Canada from imposition and the property occupied and enjoyed by them from trespass and injury;" 14 & 15 Vict. c. 59 and 106, 16 Vict. c. 159 intituled "An Act to amend the law for the sale and settlement of the *public lands*."

The distinction between "the public lands" of the provice and "Indian lands," the former of which were under the management of the Commissioner of Crown Lands, and the latter under the management of the Chief Superintendent of Indian Affairs is conspicuously apparent in this Act and also in 22 Vict. ch. 22 of the Consolidated Statutes of Canada, A.D. 1859.

Then in 1860 were passed two statutes which maintain the distinction in a most unequivocal manner. The first was passed on the 23rd of April, intituled

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"An Act respecting the sale and management of the *public lands*," and the second intituled "An Act respecting the management of *the Indian lands and property*" having passed both houses of the legislature were reserved by the Governor General, Sir Edmund Head, for the signification of Her Majesty's pleasure. The royal assent thereto was published by proclamation in the *Canada Gazette* of the 13th of October, 1860.

This Act was the outcome of negotiations which had been carried on for some years between the Imperial Government and the Governor General with the view of devising a measure whereby the Imperial Government should be relieved from the expense of maintaining the department for the management of Indian affairs, as it was thought that the Indian property had then reached such a value as to warrant its having imposed upon it the whole cost of the maintenance of the department having charge of its management. Accordingly a bill was prepared under the direction of Sir Edmund Head, and was submitted to, and passed by, both houses of the legislature and reserved for the signification of Her Magesty's pleasure and the royal assent was given thereto as above said.

This Act maintained the office of Chief Superintendent of Indian Affairs as formerly, but instead of the private secretary of the Governor General who had for some years filled that office it declared in its first section that in future the Commissioner of Crown Lands should be "Chief Superintendent of Indian Affairs." By the second section it was enacted that *all lands reserved for the Indians*, or for any tribe or band of Indians *or held in trust* for their benefit, should be deemed to be *reserved and held* for the same purposes as before the passage of the Act By section 3, that all moneys or securities of any kind,

applicable to the support and benefit of the Indians or of any tribe or band of Indians, and all moneys accruing or to accrue from the sale of any lands reserved or held in trust as aforesaid should (subject to the provisions of the Act) be applicable to the same purposes, and be dealt with in the same manner as they might have been applied to, or dealt with before the passing of the Act. Then by section 7 it was enacted that

> the Governor in Council might from time to time declare the provisions of the Act respecting the sale and management of the *public lands* passed in the present session, or of the twenty-third chapter of the Consolidated Statutes of Canada intituled "*An Act respecting the sale and management of timber and public lands,*" or any of such provisions to apply to *Indian lands* or to the timber on Indian lands, and the same shall thereupon apply and have effect as if they were expressly recited and embodied in this Act.

Now this Act declares the terms upon which Her Majesty the Queen assented to the transfer of the management of Indian affairs from under the direct supervision of the Imperial Government, and it is thus in plain terms declared upon the authority of an Act of the Legislature, that all lands reserved for the Indians, (and the ordinary mode of making such reservations was by treaty with the Indians) should after the passing of the Act be still held as reserved for the benefit of the Indians, as before the passing of the Act they had been by the pledged word of the Sovereign and that lands surrendered upon condition that they should be sold and the proceeds invested for the benefit of the Indians should after the passing of the Act be still held, as they always had been by the Crown, in trust for the benefit of the Indians. The title of the Indians which had been always rested upon the pledge of the Crown while the Imperial Government maintained control of the Indian Department was upon the transfer of that department to the provincial authorities

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made to rest upon an Act of the legislature which without the assent of the Crown could not be repealed. This Act clearly shews that Indian Reserves, or lands held by the Crown in trust for the Indians were never deemed to be "*public lands*" of the province, or land "belonging to the province," or lands in which the province had any beneficial interest or any power of interference, save as regards the legislative authority over the property of the purchaser of any of such lands.

This was the condition of things as existing between the Crown and the Indians in relation to Indian affairs and the Indian title to lands in Canada when the British North American Provinces of Canada, Nova Scotia and New Brunswick had conferred upon them by our Most Gracious Sovereign our late beloved Queen the previously unknown privilege of devising and framing their own constitution which after a thorough consideration and approval of its terms by the legislatures of the respective provinces and after a final agreement upon those terms concluded between delegates appointed by the Provincial Governments and Her late Most Gracious Majesty's Imperial Government was without alteration adopted by the Imperial Parliament and reduced into legislative form in the British North America Act.

In judicially construing a constitution so framed I feel myself bound, upon any question arising, to endeavour to arrive at a construction conformable to my conviction of what, having regard to the previous status and condition of the particular subject under consideration was the intention of the founders and framers of our constitution as expressed in the constitutional charter so framed by them, and with the greatest deference due to those from whom it is my misfortune to differ in the present case, I must say that

I cannot entertain a doubt that when the framers of our constitution provided, among other things, that the subject of "Indians and lands reserved for the Indians" should be within *the exclusive* jurisdiction of the Parliament of the Dominion they meant, and that the legislatures of the provinces, when deliberating upon and taking part in framing the constitutional charter of the Dominion, meant, that the word "exclusive" as there used, should have its precise ordinary meaning and should exclude all ideas of any right of interference direct or indirect being possessed by or vested in the legislatures or governments of any of the provinces of the Dominion in relation to the Indians or to their title to lands reserved for their benefit in any part of the Dominion; and that when in section 91 they provided that the legislative authority of the Parliament of Canada should be exclusive over "Indians and lands reserved for the Indians," and in section 109 that

> all lands, mines, minerals," &c., &c., belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union should belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate

their intention was thereby to maintain the distinction between "lands belonging to the several provinces" and "Indian lands," which in the Acts already referred to had always been maintained between the "Public lands" of the province and "Indian lands," and to preserve and maintain the Indian titles as secured, by parliamentary sanction first, in 23 Vict. ch. 151, so as to secure and maintain inviolate in all parts of the Dominion with perfect uniformity the rights of the Indians as had always been conceded in practice by the grace and pledge of the Sovereign and as had been secured by parliamentary sanctions to the Indians in the Province of

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Canada by 23 Vict. c. 151; thus maintaining the Indians in the enjoyment of the benefit and conditions of all treaties already entered into between them and the Sovereign or which should thereafter be entered into between them through the Governor General as representing the Sovereign.

That such was beyond all doubt the understanding of all parties concerned appears from an Act of the Parliament of Canada which has never been called in question passed in its first session, 31 Vict. ch. 42, intituled "An Act providing for the organization of the Department of the Secretary of State of Canada and for the management of Indian and Ordnance lands." In the fifth section of this Act it is enacted that:

> The Secretary of State shall be the Superintendent General of Indian Affairs and shall as such have the control and management of the *lands and property of the Indians in Canada.*

The sixth and seventh sections are identical with sections 2 and 3 of 23 Vict. ch. 151, as applied to this Act of 31 Vict. ch. 42.

Sections. 8, 9, 10 & 11 introduce into 31 Vict. ch. 42 the provisions of sections. 4, 5, 6, 7 and 8 of 23 Vict. ch. 151. In 1869, was passed by the Parliament of Canada 32 & 33 Vict. ch. 6, by the thirteen section of which the Governor General in council is authorised, on the report of the Superintendent General of Indian Affairs, to order the issue of letters patent granting life estates to Indians in certain cases in land allotted to them within a reserve.

On the 3rd May, 1873, was passed by the Parliament of Canada an Act intituled "An Act to provide for the establishment of the Department of the Interior." By the third section of that Act, 36 Vict. ch. 4, it was enacted that the Minister of the Interior shall be the Superintendent General of Indian Affairs, and, by sec-

tion eight, that the several clauses of 31 Vict. ch. 42 relating to the management of Indian affairs and lands, shall govern the Minister of the Interior in the matters to which they relate, and that wherever the words "Secretary of State," or "Department of the Secretary of State" occur in those clauses the words "Minister of the Interior," and "Department of the Interior" shall be deemed to be substituted therefor.

Now in October, 1873, a treaty, called the North-west Angle Treaty, was entered into between the Saulteaux Tribe of the Ojibbeway Indians and all other Indians inhabiting the country therein described, and Her Majesty the late Queen acting through the intervention of three gentlemen (of whom the Lieutenant Governor of the province of Manitoba and the North-west Territories was one) who were specially appointed as commissioners for that purpose by the Governor General in accordance with the practice which had always prevailed in making upon behalf of Her Majesty a treaty with the Indians; and, by that treaty, the Indians surrendered to Her Majesty a vast tract of country comprising about fifty-five thousand (55,000) square miles more or less. The treaty contains the following undertaking upon behalf of Her Majesty:

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians: *and also* to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada in such a manner as shall seem best, other reserves of land in the said territory hereby ceded, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band or bands of Indians, by the officers of the said Government appointed for that purpose, and such selection shall be made after conference with the Indians: Provided, however, that such reserve whether for farming or other purposes shall in no wise exceed in all one square mile for each family of five, or in that proportion for larger or smaller families; and such selection shall be made if possible dur-

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ing the course of next summer or as soon thereafter as may be found practicable, it being understood, however, that if at the time of any such selection of any reserves as aforesaid there are any settlers within the bounds of the land reserved by any band, Her Majesty reserves the right to deal with such settlers as she shall deem just so as not to diminish the extent of land allotted to the Indians; and provided also that the aforesaid reserves of lands or any interest or right therein or appurtenant thereto may be sold, leased or otherwise disposed of by the said Government *for the use and benefit of the said Indians* with *the consent of the Indians* entitled thereto first had and obtained.

The lands designated in the treaty as reserves have been marked out and set apart for the use and benefit of the Indians as provided in the treaty.

By a despatch from the Chief Commissioner the then Lt. Governor of the Province of Manitoba and the North-west Territories addressed to the Governor General accompanying the treaty, it appears that it was made a special condition upon the faith of the fulfilment of which the treaty was agreed to by the Indians that the Indians should enjoy the benefit of all minerals, if any should be found upon any portion of the tract reserved for their benefit.

It was, as appears by the despatch and papers containing a report of the proceedings at the negotiations with the Indians for the treaty, that it was upon the Indians' undoubting faith in the fulfilment of this pledge, promise or condition, whichever it may be called, that about thirty-four millions of acres of land were surrendered *unaffected by any trust or condition in favour of the Indians.* The Indians have, it is true, in the treaty the pledge of the Crown for the payment of certain annuities and other benefits annually to the Indians, but the pledge for the payment of these annuities and other benefits stands upon precisely the same foundation as the pledge as to the Indians retaining the benefit to accrue from all minerals, if any should be found in the lands reserved for them by the treaty.

As to those lands surrendered to the Crown unaffected by any trust or condition in favour of the Indians, it has been held by the Privy Council in the *St. Catharines Milling & Lumber Company* v. *The Queen* (1) that the Province of Ontario is bound to indemnify the Crown and the Dominion from all obligations assumed by Her Majesty in the treaty containing the surrender. That these lands so surrendered to the Crown unaffected by any trust or condition in favour of the Indians became vested in the Crown in trust for the public purposes of the Province of Ontario in so far as such lands were within the Province of Ontario is not a matter in dispute in the present action.

In view of the never violated pledge of the Crown that no lands should be sold until a surrender of the Indian title should be made by the Indians to the Crown, the Province of Ontario cannot be said to have acquired any usufructuary interest in these lands until the surrender, and a beneficial interest so acquired must more properly be said, I think, to rest upon the treaty of surrender than upon anything in the British North America Act, and for the benefit so obtained by the province by the treaty of surrender the province alone should in justice bear the burthen of the obligations assumed by Her Majesty and the Dominion to obtain the surrender of those lands as was held in the *St. Catharines Milling & Lumber Co.* v. *The Queen* (1) but as to the lands reserved for the Indians, the retaining of which, together with all the minerals therein, by Her Majesty forthe use and benefit of the Indians, having been a condition upon the faith of the fulfillment of which the thirty-four million acres of land, unaffected by any trust or benefit in favour of the Indians, were surrendered, those lands, and it is with a

(1) 14 App. Cas. 46.

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portion of them we are now dealing (unless the entering into a treaty with the Indians by Her Majesty through Her representative the Governor General in the serious, grave and earnest manner appearing in the report of the Lieutenant-Governor of Manitoba to the Governor General accompanying the treaty, is a delusive mockery), should be regarded, as all lands in like circumstances have always been regarded ever since the proclamation of 1763, namely as lands vested in Her Majesty in trust for the sole use and benefit of the Indians upon the terms and conditions agreed upon as those upon which the trust was accepted by Her Majesty; and, as I have already said it was, in my opinion, for the purpose of maintaining unimpaired a continuance of that condition of things that the subject "Indians and lands reserved for the Indians" was placed under the exclusive legislative authority of the Dominion Parliament.

In 1880 that parliament, in exercise of the authority thus vested in it, passed the Act 43 Vict. ch. 28, intituled "An Act to amend and consolidate the laws respecting the Indians," and in 1882, the Act 45 Vict. ch. 30, intituled "An Act to further amend the Indian Act, 1880," and in 1884 an Act 47 Vict. ch. 27, intituled "An Act further to amend the Indian Act of of 1880," and on the 2nd of June, 1886, an Act intituled "An Act to expedite the issue of Letters Patent for Indian Lands," all of which Acts are consolidated in ch. 43 of the Revised Statutes of Canada of 1886 intituled "An Act respecting Indians."

Now by these Acts so consolidated it was among other things enacted, that there should be a Department of the Civil Service of Canada called the Department of Indian Affairs, which should have the management, charge and direction of Indian affairs, presided over by a Chief Superintendent of Indian Affairs who

should be the Minister of the Interior or the head of any other department appointed for that purpose by the Governor in Council—that the expression "reserves" in the Act means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of, or granted to, a particular band of Indians, of which the title is in the Crown and which remains a portion of the said reserve *and includes all the trees, woods, timber, soil, stone, minerals, metals and other valuables thereon* or therein—that the Governor General might appoint a Deputy Governor who should have the power in the absence of or under instructions of the Governor General to sign Letters Patent for Indian Lands, and that the signature of such Deputy Governor should have the same force and virtue as if such Letters Patent were signed by the Governor General; sec. 8, s.s. 4. That all reserves for Indians or for any band of Indians, or held in trust for their benefit should be deemed to be reserved and held as before the passing of the Act 43 Vict. ch. 28, but should be subject to the provisions of the Act; sec. 14.

That if any railway, road, or public work should pass through or cause injury to any reserve belonging to, or in possession of any band of Indians or of any act occasioning damage to any reserve should be done under the authority of an Act of Parliament or of the legislature of any province compensation should be made to them therefor in the same manner as is provided with respect *to the lands or rights of other persons* and that the Superintendent General should, in any case in which an arbitration should be had, name the arbitrator on behalf of the Indians and should act for them in any matter relating to the settlement of such compensation, and that the amount awarded in any case should be paid to the Minister of Finance and Receiver General *for the use of the band of Indians for*

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whose benefit the reserve is held and for the benefit of any Indian who has improvements thereon; (sec. 35).

That no *reserve* or *portion of a reserve* should be sold, alienated or leased until released or *surrendered to the Crown for the purposes of the Act* (sec. 38), and no release or surrender of a reserve held for the use of the Indians of any band should be valid or binding except on condition;

1st. That it should be assented to by a majority of the male members of the band at a meeting or council of the band summoned for that purpose according to the rules of the band and held in the presence of the Superintendent General, or of an officer authorised to attend such council by the Governor General in Council or by the Superintendent General.

2ndly. That such release or surrender should be submitted to the Governor in Council for acceptance or refusal, (sec. 39).

That all Indian lands which are reserves or portions of reserves surrendered or to be surrendered to Her Majesty shall be deemed to be held for the same purposes as before the passing of the Act and should be managed, leased and *sold* as the Governor in Council should direct *subject to the conditions of the surrender and the provisions of the Act* (sec. 41).

That every patent for Indian lands should be prepared in the Department for Indian Affairs and should be signed by the Governor General or the Deputy Governor appointed under the Act for that purpose and should have the great seal of Canada thereto affixed as provided in sec. 45.

That the proceeds arising from the sale or lease of any Indian lands or from the timber, hay, stone, *minerals or other valuables thereon* or on a reserve shall be paid to the Minister of Finance and Receiver General to the credit of the Indian fund, (sec. 71).

There are many other sections of the Act which, clearly I think, show the title of the Indians to lands reserved for their use by treaty or otherwise, or surrendered by them to the Crown for the purpose of being sold for their benefit, to be real and substantial and not purely illusory, but the above sections seem to me to be sufficient for the purpose of the present appeal.

Now in the month of October, 1886, a band of the Indians who had signed the above north-west angle treaty in 1873 called the "Rat Portage Band of Indians" who were in possession of a portion of the reserves in the treaty mentioned as their allotment being desirous of surrendering the same to the Crown for sale for their use and benefit in accordance with the terms of the treaty in that behalf and with the special condition as above mentioned as to any minerals therein, and with the promise made in that behalf upon the faith of the fulfilment of which the treaty was made, by a deed duly executed in accordance with the above provisions of the statute in that behalf surrendered their said portion of said reserves to Her Majesty the then Queen, her heirs and successors

in trust to sell the same to such person or persons and upon such terms as the Government of the Dominion of Canada may deem *most conducive to the welfare of our people*, and upon the further condition that all moneys received from the sale thereof shall, after deducting the usual proportion for expenses of management be placed at interest, and that the interest money accruing from such investment shall be paid annually or semi-annually *to us and our descendants forever.*

This surrender was duly accepted by the Governor General upon the terms thereof in accordance with the above statutory provisions in that behalf.

Now by letters patent issued under the great seal of the Dominion of Canada in accordance with the provisions of the statute in that behalf above cited and bearing date the 29th day of March, 1889, thirty-five

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acres of the portion of reserve so surrendered by the "Rat Portage Band of Indians" to Her Majesty in trust for sale, together with all minerals, precious or base, which should be found therein, were in consideration of the sum $175.75 paid in hand to the Chief Superintendent of Indian Affairs by one Albert C. McMicken, and the reservation of a royalty of four per cent to be paid upon all minerals produced therefrom granted to the said Albert C. McMicken, his heirs and assigns forever; and by like letters patent bearing date the 30th April, 1889, thirty five other acres, other portion of the said reserve so surrendered by the "Rat Portage Band of Indians" to Her Majesty in trust for sale together with all minerals therein were in consideration of $175 paid in hand to the Chief Superintendent of Indian Affairs by one George Heenan, and of a like reservation of a royalty of four per cent to be paid upon all minerals produced therefrom, granted to the said George Heenan, his heirs and assigns forever; and by like letters patent bearing date respectively the 2nd day of September, 1889, and 23rd day of July, 1890, forty other acres, other part of the said portion of reserve so surrendered by the said "Rat Portage Band of Indians" to Her Majesty in trust for sale together with all minerals therein were, in consideration of the sum of $200 paid in cash to the Chief Superintendent of Indian Affairs by one Hamilton G. McMicken, and of the like reservation of a royalty of four per cent on all minerals produced therefrom, granted to the said Hamilton G. McMicken his heirs and assigns forever; and these several parcels of land were subsequently sold and conveyed by the said Albert C. McMicken, George Heenan, and Hamilton G. McMicken, respectively, to the appellants in fee simple.

The Government of the Province of Ontario on the 9th of January, 1899, assumed to grant by letters patent issued under the great seal of the Province of Ontario the said several parcels together with other lands and the minerals therein to the respondents as tenants in common in fee simple subject however to the condition following:

This grant is made and is accepted by the grantees subject to the rights, if any, of the Government of the Dominion of Canada in respect of the lands *or* the minerals, ore or metals thereon or therein contained, it being hereby declared that the said grantees, their heirs, executors, administrators and assigns *shall* have no recourse against us or our successors or against the Province of Ontario or the Government thereof *should our title* to the said lands, mines or minerals be found to be defective, or should these presents be found to be ineffectual to pass such title.

The respondents having asserted title under the said letters patent so issued to them, this action was instituted by the appellants in assertion of title under the letters patent so as aforesaid issued by the Dominion Government, which letters patent the courts below have held to be null and void—hence our present appeal.

Now unless the proclamation of 1763 and the pledge of the Crown therein that no lands in any of the colonies or plantations in America should be sold until they should be ceded by the Indians to, or purchased from them by, the Crown, are to be considered now to be a dead letter having no force or effect whatever; and unless the grave and solemn proceedings which ever since the issue of the proclamation until the present time have been pursued in practice upon the Crown entering into treaties with the Indians for the cession or purchase of their lands are to regarded now as a delusive mockery; and unless the provision in the constitutional charter of the Dominion that the Parliament of the Dominion of Canada shall have

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exclusive legislative authority over all matters coming within the subject "Indians and lands reserved for the Indians" is quite illusory and devoid of all significance; it does appear to me to be free from doubt that all the provisions of the statutes of the Dominion Parliament above cited in relation to the Indians and their property, the management of all their affairs, the maintenance of their revenues for their sole use and benefit, and the sale by the Crown of their reserves or of such parts thereof as should be surrendered to the Crown upon trust to be sold for their benefit are within the exclusive legislative authority of the Dominion Parliament.

The Province of Canada at the time of the Union had no property in any "lands reserved for the Indians." Neither the Canadian statute, 9 Vict. ch. 114, to which the royal assent was given in virtue of the Imperial statute, 10 & 11 Vict. ch. 71, nor the Imperial statute 15 & 16 Vict. ch. 39, intituled "An Act to remove doubts as to lands and casual revenues of the Crown in the Colonies and Foreign Possessions of Her Majesty" had the effect of vesting in the Province of Canada any property "in lands reserved for the Indians" so as to constitute them to be within section 109 of the British North America Act "lands belonging to Canada at the time of the Union."

The words in 9 Vict. ch. 114 for transferring the Crown revenues to the province are:

> All territorial and other revenues *now at the disposal of the Crown arising in the province.*

The words in the Imperial Act, 15 & 16 Vict. ch. 39, are contained in the first section of that Act as follows:

> 1. The provisions of the said recited Acts in relation to the hereditary casual revenue of the Crown shall not extend, or be deemed to have extended, *to the moneys arising from the sale or other disposition of the lands of the Crown in* any of Her Majesty's colonies or foreign posses-

sions, or in anywise invalidate or affect any sale *or* other disposition already made, *or* hereafter to be made of such lands, *or* any appropriations of the moneys arising from any such sales *or* other dispositions which might have been made if such Acts or either of them had not been passed.

Now as, by force of the proclamation of 1763, no sale could be made of any lands of the Crown in Canada until a cession or surrender of the Indian title therein should be made by the Indians to the Crown, it seems to follow that until such cession or surrender the Crown could have no territorial casual revenue arising out of such lands which, by force of either of the said acts, could have passed to the province so as to have become property belonging to the province at the union. It is for this reason that I have said that the title of the Province of Ontario to the lands surrendered by the North-west Angle Treaty of 1873 which are not subjected to any right or interest reserved and retained in the Crown for and on behalf of the Indians, seems to me to be due rather to the surrender than to any thing in the British North America Act.

But as to the lands in question in the present suit which are lands specially reserved by the treaty and retained by the Crown as lands reserved for the sole use and benefit ot the Indians to be dealt with by the pledge of the Crown in accordance with the terms agreed upon, and upon the Indians implicit faith in the fulfilment of which, the thirty-four million acres, or thereabouts, of lands unaffected by the reservation of any charge in favour of the Indians were surrendered, it appears to me to be free from doubt, that in the distribution of legislative jurisdiction between the Dominion Parliament and the Provincial Legislatures there is nothing whatever in the constitutional charter of the Dominion, which is also the charter of its provinces, which qualifies the exclusive legislative authority vested in the Dominion Parliament over "*lands reserved*

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for the Indians," which the lands under consideration in the present case undoubtedly are.

It has been contended that the judgment of the Lords of the Privy Council in the *St. Catharines Milling Company* v. *The Queen* (1) is conclusive upon the question now under consideration, but I have shewn, I think, that lands reserved by treaty with the Indians and retained by the Crown as the lands in question here were upon a trust accepted by the Crown for the exclusive benefit of the Indians in accordance with a practice instituted by the Crown from which there never had been any deviation are in a wholly different position from the lands under consideration in the *St. Catherines Milling Company's Case* (1) which were lands forming part of the thirty-four million acres surrendered by the Northwest Angle Treaty unaffected by any trust or interest therein reserved for the Indians.

Under these circumstances I can see no ground whatever for the contention that the judgment in the *St. Catharines Milling Company's Case* (1) governs the present case and I must say that I can see nothing in the judgment of the Privy Council in that case which would justify, much less which calls for, the withholding of the expression of my firm conviction that the maintaining of the judgment now under consideration in this appeal would be subversive of the scheme of Confederation as designed by the founders and framers of the constitution of the Dominion of Canada and of their clear intention, as expressed in sec. 91, item 24 of the British North America Act, the provision of which would thereby, in my opinion, be rendered wholly illusory and absolutely devoid of all significance.

The contention therefore of the appellants should, in my opinion, prevail and the appeal should be allo-

(1) 14 App. Cas. 46.

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wed with costs. The letters patent under which the appellants claim should be declared to be valid, and the letters patent under which the respondents claim should be declared to be null and void in so far as they purport to affect the said several lands and the minerals therein which are claimed by the appellants.

Appeal dismissed with costs.

Solicitors for the appellants: *Laidlaw, Kappelle & Bicknell.*

Solicitor for the respondent, Johnston: *S. C. Biggs.*

Solicitors for the respondent, Osler: *McCarthy, Osler, Hoskin & Creelman.*

Solicitors for the other respondents: *McPherson, Clark, Campbell & Jarvis.*

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CONRAD G. OLAND AND ETHELRED OLAND (PLAINTIFFS)..... } APPELLANTS; *Nov. 21, 22.

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AND *Feb. 20.

DANIEL McNEIL AND JAMES P. WALLACE (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of land—Conveyance absolute in form—Mortgage—Resulting trust—Notice to equitable owner—Estoppel—Inquiry.

The transferee of an interest in lands under an instrument absolute on its face, although in fact burthened with a trust to sell and account for the price, may validly convey such interest without notice to the equitable owners.

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* PRESENT:—Taschereau, Sedgewick, Girouard and Davies JJ.

[Mr. Justice Gwynne was present at the hearing but died before judgment was delivered.]

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APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* (1) allowing the appeal of the defendants against the decision at the trial by Mr. Justice Townshend and dismissing the cross-appeal of the plaintiffs with costs.

The plaintiffs by a written instrument, absolute on its face, transferred their interest in certain gold mining areas to McNeil, but subject, as found by the court below, to an unwritten trust to sell the mine and out of the proceeds to pay moneys due to McNeil and another creditor and then to account to them for the surplus, if any. McNeil sold to Wallace without notice to the plaintiffs.

The plaintiffs alleging that, at the time of the sale, Wallace had notice of the trust, brought the action for an account of the interest of Ethelred H. Oland, one of the plaintiffs, in the issues and profits of the mine to the extent of a one-third interest claimed by them, on the ground that the transfer to McNeil was in fact merely a mortgage and that the said interest could not be transferred without notice to the equitable owners. By their defences, McNeil denied the trust alleged and Wallace pleaded that he was a *bonâ fide* purchaser from the apparent owner and had acquired an absolute title.

The circumstances of the case and questions in issue on the appeal are more fully stated in the judgment of the court delivered by His Lordship Mr. Justice Sedgewick.

Borden K.C. for the appellants. Assuming the transfer to McNeil to have been made as security for McNeil's outlay and the debt of the McLaughlin Carriage Company, the making of the transfer for that purpose did not carry with it the power to sell without notice to the transferrors, or legal process. The

(1) 34 N. S. Rep. 453.

transfer to McNeil was only as security in an event which never happened. Wallace had notice of the equitable title of E. H. Oland, and was told by him that C. G. Oland and not McNeil had power to negotiate a sale on his behalf. Wallace was not a *bonâ fide* purchaser for value. Plaintiffs are entitled to an account of all gold mined from the areas since the transfer to McNeil, and, after McNeil's advances have been paid, to one-third of the proceeds of such gold. The mortgagee or pledgee cannot sell till after reasonable notice, or by judicial process. *In re Morritt* (1) per Cotton L. J. at page 232, and Fry L. J. at page 235; *France* v. *Clark* (2); *Pothonier* v. *Dawson* (3); *Pigot* v *Cubley* (4); *Donald* v. *Suckling* (5); *In re Richardson* (6); *Ex parte Hubbard* (7); *Jones* v. *Smith* (8); *Boursot* v. *Savage* (9).

If Wallace became a joint tenant with plaintiffs, they are entitled to recover as damages for ouster, or by means of an accounting, one-third of the value of the gold taken from the areas. Wallace, by purchasing plaintiffs' one third from McNeil, and therefore taking the whole proceeds of the mine, has ousted plaintiffs from their share. See Freeman on Co-Tenancy, secs. 223, 224, 235; *Kittredge* v. *Locks and Canals on Merrimack River* (10). The taking away of the gold is a destruction of the property, *pro tanto*, and of itselfs constitutes an ouster. *Wilkinson* v. *Haygarth* (11); *Dougall* v. *Foster* (12); *Goodenow* v *Farquhar* (13). It at all events gives an action of account; 4 & 5 Anne ch. 16, sec. 27; *Denys* v. *Shuckburgh* (14); *Bentley* v. *Bates* (15); *Jacobs* v. *Seward* (16); *Job* v. *Potton* (17).

(1) 18 Q. B. D. 222.
(2) 22 Ch. D. 830.
(3) Holt, N. P. 383.
(4) 15 C. B. N. S. 701.
(5) L. R. 1 Q. B. 585.
(6) 30 Ch. D. 396.
(7) 17 Q. B. D. 690.
(8) 1 Hare 43.
(9) L. R. 2 Eq. 134.
(10) 17 Pick. 246.
(11) 12 Q. B. 837.
(12) 4 Gr. 319.
(13) 19 Gr. 614.
(14) 4 Y. & C. 42.
(15) 4 Y. & C. 182.
(16) L. R. 5 H. L. 464.
(17) L. R. 20 Eq. 84.

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McNeil was trustee for plaintiffs, and, Wallace being a purchaser with notice, is, of course, in no better position than McNeil. *Christie* v. *Saunders* (1).

Where, in a mortgage to secure a pre-existing debt, no time is stipulated for payment, the mortgagees (even though they might sue or foreclose at once without demand), cannot, without demand or notice, destroy the right to redeem by exercising a power of sale unless there is an express agreement that such notice need not be given. *Moore* v. *Shelley* (2), at pages 289-291; Ashburner on Mortgages, pages 192, 193; 1 Robins on Mortgages, 236; Jones on Chattel Mortgages (4th ed.), 707; 2 Perry on Trusts (5th ed.), sec. 602 (*q*); Armour on Titles, 353, 357 359, 360; *Anon* (3).

A power of sale without notice is regarded as oppressive because it places the mortgagor at the mercy of the mortgagee. It will never be presumed in the absence of express agreement and in some cases is regarded as a ground for setting aside the contract of the mortgage.

No time was stipulated for the return of McNeil's advances (amounting to $60 or $70) made in the autumn of 1899. Indeed he was really a partner being interested in the profits. McNeil's subsequent advances did not become due before demand as Oland could not know of the payments made by McNeil to the Flawn estate or to Wallace. In the absence of express stipulation to the contrary in the agreement constituting the security the purchaser is bound to inquire as to default and as to notice, and inquiry of and statements by the mortgagee alone are not sufficient. 2 Robins on Mortgages, 893, 898 & 899; *Selwyn* v. *Garfitt* (4); *Re Thompson and Holt* (5). As

(1) 2 Gr. 670.
(2) 8 App. Cas. 285
(3) 6 Mad. 10.
(4) 38 Ch. D. 273.
(5) 44 Ch. D. 492.

to notice to Wallace, see *Severn* v. *McLennan* (1), at page 223; *McLennan* v. *McDonald* (2), at pages 509, 510; Lewin on Trusts (9 ed) 997 & 998; *Wigg* v. *Wigg* (3); *Saunders* v. *DeHew* (4); *Carter* v. *Carter* (5); Ashburner on Mortgages, 454 & 455. A sale of the properties by McNeil was not contemplated by the parties. Finally, the trial judge having found all the facts in plaintiffs' favour, the Court of Appeal should have sustained his judgment.

O'Connor for the respondent McNeil. McNeil had at the time of the sale to Wallace, a complete documentary title.

This is not a case where the trial judge has believed certain witnesses as against others. The decision on the trial turned upon the letter which is not reasonably capable of the meaning put upon it. *McNeil* v. *McDonald* (6); *Coghlan* v. *Cumberland* (7); *Home Life Association* v. *Randall* (8). If the reason is correct, and if the letter indicates inconsistency or contradiction in McNeil's defence, yet the appellants are attempting to cut down a title granted by themselves, and to oust the respondents from possession. The letter, if it states truth is fatal to the appellants' case, as it supports the theory either of an absolute sale to the McLaughlin Co. or to McNeil, or the existence in McNeil of a power of sale which he properly exercised. The trial judge has not made findings on contradictory testimony, and respondents being in possession with a clear legal title, the burden of proof on the appellants has not been satisfied, and this appeal should be dismissed. *Colonial Securities Trust Co.* v. *Massey* (9);

(1) 19 Gr. 220.
(2) 18 Gr. 502.
(3) 1 Atk. 382.
(4) 2 Vern. 271.
(5) 3 K. & J. 617.
(6) 25 N. S. Rep. 306.
(7) [1898] 1 Ch. 704.
(8) 30 Can. S. C. R. 97.
(9) [1896] 1 Q. B. 38.

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Coghlan v. *Cumberland* (1); *Home Life Association* v. *Randall* (2).

McNeil was entitled to succeed with costs, for two reasons:—(1) He was *quasi* in possession, entitled to raise every defence in argument without special plea, and he maintained that possession, succeeding upon the appellants' own evidence. (2) Appellants failed to prove their claim that they were entitled to a declaration that the mining areas should be retransferred to them. McNeil is unconcerned whether or not the testimony recognizing a power of sale in him, or of absolute sale by E. H. Oland to him, be accepted as true. In any event he is bound to account to his clients, the McLaughlin Carriage Co., and in either case, E. H. Oland will get the benefit.

Newcombe K.C. and *Drysdale K.C.* for the respondent, Wallace. The respondent Wallace was a *bonâ fide* purchaser from McNeil without notice and for value, and his title and position ought to be protected. The only information E. H. Oland gave Wallace was to state that he had transferred his interest to McNeil for the McLaughlin Carriage Co., and as he knew of Wallace's intention to purchase, and referred him to McNeil for that purpose, he is estopped from now setting up any claim as against Wallace under the contract of purchase made in good faith with McNeil. On the most favourable construction towards Oland the trust amounts to a trust for the benefit of creditors which would obviously carry with it an implied power of sale. 2 Perry on Trusts (5 ed.) sec. 602 (*g*), p. 179, note 4; sec. 766, p. 435; Burrill on Assignments (6 ed.) sec. 365, p. 505; *Wood* v. *White* (3); *Goodrich* v. *Proctor* (4). Wallace as the holder of the legal title and the *bonâ fide* owner of the whole equi-

(1) [1898] 1 Ch. 704.
(2) 30 Can. S. C. R. 97.
(3) 4 Myl. & Cr. 460.
(4) 1 Gray. (Mass.) 567.

table title without notice of the claim now made or any claim inconsistent with his right to purchase, should not be made to suffer by reason of any equities existing between the Olands and McNeil. The absolute transfer to McNeil under and through which Wallace purchased should not in any case be cut down, or his title affected by any trust, unless on clear, cogent and unmistakable evidence of the existence of such a trust at the time, proving the terms in detail. The alleged trust now sought to be affixed is stated in contradictory terms, oral in existence only, denied by McNeil, and so uncertain and indefinite that no reasonable conclusion can be arrived at as to what the alleged trust really is. In any event no accounting can be had as against Wallace. The statement of claim makes no case for an accounting, contains no allegation of facts entitling the appellants to an account and there is no proof to justify any accounting against Wallace.

We refer to *Henderson* v. *Eason* (1); *Jacobs* v. *Seward* (2); McPherson & Clark on Mines, at pages 139 and 140, and the cases there collected. *Job* v. *Potton* (3); *Kennedy* v. *De Trafford* (4); *Denys* v. *Shuckburg* (5); *Rice* v. *Rice* (6); *Sharpe* v. *Foy* (8); *Rayne* v. *Baker* (9); *Robinson* v. *Lowator* (10); Lewin on Trusts (10 ed.) pp. 532, 533; *Cordwell* v. *Mackrill* (11), and note.

The judgment of the court was delivered by:

SEDGEWICK J.—On the 31st of August, 1899, the administratrix of the estate of one Flawn was the owner of nine gold areas in the Harrington Cove Gold District, and on that date gave to one John G. Bishop

(1) 17 Q. B. 701.
(2) L. R. 5 H. L. 464.
(3) L. R. 20 Eq. 84.
(4) [1897] A. C. 180.
(5) 4 Y. & C. 42.
(6) 2 Drew. 73.
(8) 4 Ch. App. 35.
(9) 1 Giff. 241.
(10) 17 Beav. 592.
(11) 2 Eden 344.

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an option for the purchase of these areas for the sum of $1,500, $500 payable in four months from the date of the agreement, $500 within six months and the remaining $500 within eight months.

Between this and the 1st of January following (1900) Bishop's option or right of purchase had become the joint property in equal shares of himself, the appellant, E. H. Oland, and one George W. Gray, but no part of the proposed purchase money was then paid. E. H. Oland was then in financial distress owing $3000 or over to the McLaughlin Carriage Co., of St. John, N.B., to which company the appellant Conrad G. Oland had given his bond for $2000 in part security. An action was then pending in the Supreme Court to recover the amount of this bond, the respondent McNeill being the plaintiff's solicitor, and pressing in his client's interest for immediate payment. In the meantime (Sept. 18, 1899,) E. H. Oland had transferred, or purported to transfer, to his brother, Conrad, his one-third interest. From the statement of claim it appears that this was not intended to operate as a real transfer, but that E. H. Oland was to continue the beneficial owner. But both are parties (plaintiffs) here and we may assume without any detriment to them that up to this time either the one or the other or both had the interest referred to.

Towards the month of December, 1899, when the first instalment of $500 was becoming due to the Flawn estate, E. H. Oland approached the respondent McNeill with a view of raising money to pay the Oland proportion of that instalment. There were negotiations which resulted in a verbal agreement (the terms of which are a substantial matter in dispute here) and certain documents were written and transfers which were as follows: Conrad G. Oland writes McNeil:

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HALIFAX, N.S., Dec. 29, 1899.

MR. DANIEL MCNEIL, Barrister, Halifax.

DEAR SIR,—If you pay one third of the option of John G. Bishop for the purchase of nine gold areas at Harrington Cove, at present owned by the estate of the late George Flawn, I hereby agree to assign to you the entire interest of E. H. Oland and myself in said option and areas.

Yours truly,

(Sgd.) C. G. OLAND.

Mr. McNeil thereupon agreed (along with other things) to take over the interest of the Olands in the gold areas and paid one third of the purchase money then due, his transfer being in the words following:

In consideration of the payment of one third of the purchase price of the gold areas referred to in the foregoing instrument under a certain agreement made between John G. Bishop referred to in the said instrument and the personal representatives of G. L. Flawn, late of Halifax, deceased, made by Daniel McNeil, of Halifax, Barrister, I hereby assign all my interest in said areas to said Daniel McNeil, his executors, administrators and assigns, and all my interests in and under the foregoing instrument and all benefits to accrue from its provisions.

(Sgd.) C. G. OLAND.

E. H. Oland who had as above stated transferred his interest to his brother ratified and confirmed this instrument by giving McNeil the following document:

HALIFAX, January 4th, 1900.

I hereby acknowledge that the transfer of one-third interest in the gold areas of the estate of George L. Flawn, deceased, at Harrigan Cove, of which J. G. Bishop holds an option to purchase, made to Daniel McNeil today by him, conveys and assigns all interest and right I have in said areas.

E. H. OLAND.

The transfer from Bishop to McNeil here referred to being as follows:

HALIFAX, January 4th, 1900.

In consideration of certain payments made to me by Daniel McNeil, of Halifax, Barrister, under the above written instrument, I do hereby

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assign and transfer to the said Daniel McNeil, his executors, administrators and assigns, a one-third undivided interest in the areas enumerated in said instrument and in the profits and benefits thereof.

(Sgd.) J. G. BISHOP. (L.S.)

Witness—E. H. OLAND.

From the foregoing statement it will appear that on the 4th of January, 1900, McNeil became, so far as the documentary title showed, the absolute owner of all the interests which the Olands theretofore had in the areas in question, the title to the option or right of purchase being now vested in Bishop, Gray and McNeill. On the 28th of February McNeil paid $166.66 being the second instalment of his share of the purchase money.

The respondent, James P. Wallace, during the happening of these events was the owner of and engaged in developing and working certain areas adjoining and near to those in question here, and wishing to extend his operations and acquire the latter on the 4th of January purchased from Gray his one-third interest for the sum of $916.66. On the 11th of January he purchased Bishop's one-third interest for the sum of $100, and on the 14th of May following he agreed to purchase the remaining one-third interest from McNeill for the sum of $950. He then paid in cash $250, taking from McNeil the following receipt:

$250 HALIFAX, N.S., May 14, 1900.

Received from James P. Wallace $250 on account of purchase of my interest in nine Gold Mining areas at Harrington Cove at price of $950.

DANIEL McNEIL.

Wallace thereupon obtained from the administratrix of the Flawn estate a transfer of the areas in question thereby making him, so far as the records in the mines office shewed, the absolute and unconditional owner of the areas in question. He then went into possession of the areas so purchased, and as stated by the appel-

lants, realised from the mine during the nine months preceding the trial, 1906 oz. of gold of the value of about $38,000.

So far as I have stated the case, there is no dispute, I think, between the parties. But a controversy has arisen as to the unwritten understanding between the Olands and McNeil when they gave him the transfer of their interests above set out, they contending that though absolute in terms, it was, by agreement with McNeil, subject to certain trusts or equities of which Wallace the final purchaser had notice, and that he having purchased knowing of and subject to these equities, had to account to them as being the co-owners with him to the extent of a one-third interest. Their contention to the alleged understanding is stated in the 7th and 8th paragraphs of the statement of claim as follows:

It was mutually agreed between the plaintiffs herein and the defendant Daniel McNeil that the latter should advance to the plaintiffs the sum of $166.66, and that plaintiffs herein should transfer to defendant McNeil all the interest of the said plaintiff Ethelred H. Oland in the said gold mining areas and that said defendant McNeil should hold the said transfer as security for the repayment of the amount so advanced or of any further amounts which might thereafter be advanced to plaintiffs by said defendant McNeil. It was also further agreed between the said plaintiffs and defendant McNeil that defendant McNeil should begin negotiations with his clients the McLaughlin Carriage Company with a view of making some arrangements for the payment of the debt of the plaintiffs to the said McLaughlin Carriage Company out of the profits of the said gold mining areas, but that if no arrangement could be effected with the McLaughlin Carriage Company, the said defendant McNeil should hold the said areas until he should be repaid the sums so advanced by him, and then he should re-transfer the said areas to plaintiffs.

8. In pursuance of the agreement set out in the preceding paragraph of this pleading, the plaintiffs, on the 4th day of January, 1900, executed a transfer to the said defendant McNeil of the plaintiff E. H. Oland's interest in the said gold mining areas.

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The defendant McNeil's contention, as stated in the 6th paragraph of his defence is as follows:

6. The said defendant McNeil denies all and singular the allegations set forth in paragraph 7 of said statement of claim, and avers that he purchased the said gold areas absolutely upon the distinct agreement with the plaintiff Ethelred H. Oland, that he, the said McNeil, was to receive an absolute transfer thereof, and that he was not to be accountable to any person or persons whomsoever. Thereupon the plaintiff Ethelred H. Oland got the other plaintiff Conrad G. Oland, to enter into an agreement in writing with the said McNeil, dated the 29th day of December, 1899, whereby the said Conrad G. Oland agreed to assign to the said McNeil the entire interest of the plaintiffs in the said gold areas in consideration of the said McNeil paying one-third of the purchase price of the same, held under option of purchase by one John G. Bishop and the said Conrad G. Oland afterwards, accordingly executed an assignment to the said McNeil of the said plaintiffs' interest in the said gold areas, which assignment is dated the 6th day of January, 1900.

The defendant Wallace pleaded that he was a *bonâ fide* purchaser from the apparent owner, and thereby became the absolute owner of the property subject to the balance of purchase money due McNeil, $700, which he paid into court.

At the trial before Mr. Justice Townshend he found that the transfer to McNeil was not absolute, but in trust for securing the payment to McNeil of the moneys advanced by him for the purpose of keeping alive the Olands' interest. He directed an account to be taken of that amount and that upon payment to McNeil of the amount found due McNeil and Wallace should transfer the one-third interest in question to E. H. Oland. As to the defendant Wallace he found that he purchased with notice of Oland's rights, but that he was not liable to account for any part of the profits, not even for the one-third share which the Olands claimed. Both defendants appealed.

The appeal was heard before the Chief Justice and Weatherbe and Ritchie JJ., the two former holding

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that it was established by the evidence that the transfer of the plaintiffs' interest to McNeil was in trust, first, to pay McNeil's advances; second, to apply any balance remaining to the payment of the plaintiffs' debt to the McLaughlin Co., and that McNeil having acquired the legal title to the property for the purpose of carrying this intention into effect had the power of sale which he exercised in the transfer to Wallace. Mr. Justice Ritchie agreed with this, but thought that McNeil's appeal should be dismissed because he had failed in proving his defence. The court below has therefore found that both the plaintiffs and the defendant McNeil have failed to establish their respective claims and it is now for us to determine whether that conclusion is right, and what is the decree that should, under all the circumstances, be made.

I entirely agree with the views which all the learned judges have expressed as to the understanding upon which McNeil became the transferee from the Olands. The evidence conclusively establishes that there was a trust—not as the plaintiffs assert to hold the property as security until McNeil's debt as well as that of the McLaughlin's had been paid *out of the profits* of the mine and thereupon to retransfer it to the Olands, but a trust to *sell* the mine and from the proceeds to pay first the moneys due the trustee then those due the McLaughlin's with a resulting trust back to the Olands. And then the plaintiffs having failed to prove their case and it appearing that the trustee had not violated any right the plaintiffs might lawfully claim, the judgment given in refusing the relief claimed was the proper one.

Mr. Borden K.C. for the appellants, mainly based his right to relief upon the ground that assuming the transfer to McNeil to have been made as security for McNeil's outlay and the debt of the McLaughlin Car-

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riage Co., the making of the transfer for that purpose did not carry with it the power to sell without notice to the Olands, the transferors and curators of the trust.

I cannot agree with this contention. It is urged that the transfer to McNeil, though absolute in form, is in fact a mortgage or pledge in which case the subject of the transfer cannot be sold without notice to the equitable owner. That doubtless is true in the case of an instrument on its face of such a character. But the proposition does not apply where the instrument is absolute on its face and is made so for the very purpose of enabling the apparent legal owner to give to another the beneficial or equitable as well as the legal title. In the present case had the transfer to McNeil contained in express terms the trusts imposed upon the property by the verbal agreement of the parties no notice of sale would be necessary to transfer a perfect title. Does an assignee in bankruptcy or a trustee of property for the purpose of realising the assets and paying the insolvent's debts consult the insolvent before exercising his fiduciary duties? There, as here, there is a resulting trust back to the assignor after the objects of the transfer have been accomplished but in the absence of express agreement the law imposes no such duty upon the trustee.

In this view of the case it is immaterial whether Wallace the final purchaser had or had not notice of the trusts upon which McNeil held the property. As a matter of fact he was told in effect by E. H. Oland before he purchased that the person to give title was not either he nor his brother, but McNeil himself. The admissions in the statement of claim are conclusive that Ethelred and not Conrad was (if either of them was) the beneficial owner and this reference of his to McNeil as the proper person to deal with in the matter of the purchase conclusively estops both of

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them from now setting up McNeil's incapacity to sell.

One matter remains to be considered. Shortly after McNeil became the transferee of the property he wrote his clients, the McLaughlin Co.:

HALIFAX, January 8th, 1900.

THE MCLAUGHLIN CARRIAGE CO.,
St. John, N.B.

Re Olands.

DEAR SIRS,—We have in your interest thought it advisable, considering everything, to purchase the one-third of the Harrigan Cove gold areas. Our senior has taken the title to himself pending your decision as to whether you will take it or not. He is fully convinced that you will within a short time get sufficient out of this interest to pay off the claim against Oland. The other two-thirds have been sold for $1500 over the option price of the property. This we believe is a low price for the property, but the third our senior holds for you on account of Oland can be sold at least for $750 over its cost. Believing the acquisition of this property is the best in your interests, and that you will accept it, we have today drawn on you for the cash we have advanced. Please honour the draft. If you will not accept the property, our senior will refund the money and hold the property himself, paying you whatever price he and Oland can agree on for his interest. There is double the amount of the draft we have made on you to pay on this third interest on the option price. The next payment falls due on the end of February next, and the last payment in two months from that date. The party who has purchased the interest of Bishop and Gray, the other two-thirds owns about 120 areas adjoining the property referred to, known as the Flawn areas, and he sent word to us that he is going to call on us this week to make a proposition regarding the amalgamation of the interest we purchased with his interest in the latter areas and the 120 areas. Thus a large property is made and proportionately a larger price can be obtained. It is now established beyond doubt that the Harrington Cove gold areas are among the best in this province. Your Mr. Lawlor intimated in one of his letters that he expected to visit Halifax this month, and we will await his arrival before giving a final answer to the promised proposition.

In reference to Oland's assignment of life policy, it never was submitted to us. The agent of the company here says it was regularly assigned by Oland and his wife, but that the policy has since lapsed for non-payment of premiums. You had better send assmt. to us and we will endeavour to get it straight.

Yours truly,

McNEIL & CO.

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Afterwards the McLaughlin Co. wrote McNeil as follows:

HON. D. MCNEIL, Halifax, N.S.

DEAR SIR,—We are in receipt of your letter of the 9th instant in reference to the Harrigan Cove Gold Mining property, stating that you have an offer for the purchase of the same, and in reply we beg to state what we have previously told and written you, viz., that we will have nothing whatever to do with the Harrigan Cove Gold Mining property or any other mining properties of the Olands. We have no desire to put up money in connection with this property, and certainly will not do so. The writer feels it is the height of nonsense that propositions about such wild cat schemes should be allowed to delay our suit against Oland. We feel that all these parties are simply playing us for time, and we will have absolutely nothing to do with this property. We do not care whether you sell it or give it away, it is none of our business, and we will have nothing whatever to do with it.

Yours truly,
THE McLAUGHLIN CARRIAGE CO.
Eastern Branch,
Per pro J. W. V. LAWLOR, *Manager.*

There is the sum of $700 in court to be applied upon the trusts already referred to. After payment to McNeil of what is due him, a considerable balance may remain. It belongs either to the McLaughlin Carriage Co. or to E. H. Oland. The former were not made parties nor have they made any claim to the fund.

I think that notwithstanding their repudiation of what McNeil did on their behalf their title to the balance may be superior to that of the Olands. I express no opinion on the point, but it would seem fair that it should be a part of the final decree that the special referee before report should allow them to appear before him to assert and prove if they can their right to participate in the trust fund. In the event of their failure to appear after thirty days' notice, or in the event of their so appearing and not proving their

claim, the referee shall report accordingly. With this variation of the decree the appeal should be dismissed with costs.

With some hesitation I agree with the observations of the learned Chief Justice in the court below as to the disposition of the costs in regard to the respondent McNeil, but as the appeal has failed, and there is no appeal in the matter of costs alone, the costs must be disposed of in the usual way.

The money in court will be charged in the first place with the payment of the respondent's costs, the balance, if any, shall be payable as found by the master hereafter.

Appeal dismissed with costs.

Solicitor for the appellants: *C. P. Fullerton.*

Solicitor for the respondent, McNeil: *W. F. O'Connor.*

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

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WILLIAM H. HAWLEY, ADMINISTRATOR OF THE ESTATE OF MURDOCH L. HAWLEY, DECEASED (PLAINTIFF) ..... } APPELLANT;

AND

GEORGE WRIGHT (DEFENDANT) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Personal injuries—Use of elevator—Contributory negligence.

H. entered an elevator in a public building after inquiring of the boy in charge if a certain tenant was in his office and being told he was not. He remained in the elevator while it made a number of trips in response to calls, and had been in it over ten minutes when a call came from the fifth floor. The elevator went up and the passenger who had rung entered. H. at first making no attempt to get out, the operator then shoved to the door of the elevator and at the same time started the wheel which had to be completely turned around to move the elevator. The time required to turn the wheel would be sufficient to permit of the closing of the door if shoved simultaneously with the turning of the wheel. While it was being turned H., without giving warning, tried to get out through the door and, the elevator being then descending, he was caught between it and the floor and injured so that he died soon after. In an action by his administrator against the owner of the building:

Held, that the accident was entirely due to the conduct of H. himself, and the owner was not liable.

APPEAL from the decision of the Supreme Court of Nova Scotia (1) affirming the verdict at the trial for the defendant.

The material facts are stated in the above head-note and fully set out in the judgment of the court on this appeal.

*PRESENT:—Taschereau, Sedgewick, Girouard and Davies JJ.

[Mr Justice Gwynne was present at the hearing but died before judgment was delivered.]

(1) 34 N. S. Rep. 365.

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O'Connor for the appellant.

Harris K.C. for the respondent.

The judgment of court was delivered by:

SEDGEWICK J.—This is an action brought by the administrator of one Murdoch L Hawley against one George Wright, claiming damages by reason of the death of the former through the alleged negligence of Wright's servant in the operation of an elevator in a building in the City of Halifax, known as the "St. Paul's Building," in Halifax, N.S., and owned by the respondent.

The building has five stories or flats, and the elevator runs from the first floor to the fifth. On this floor, Mr. Russell, K.C., had an office, on the morning of the accident, the twenty-ninth of August, 1898.

The deceased came into the hallway of the building on the first or ground floor where the elevator and stairway are situated and asked the boy in charge of the elevator if Mr. Russell was in his office, and was told that Mr. Russell was not in. After that, he stepped into the elevator, which was stationary in the lower hall with the door open, and some three or four minutes after he did so the boy in charge of the elevator, in answer to a call, took the elevator up to one of the upper flats and brought down a passenger to the ground floor. The elevator remained standing some time at the ground floor with the door open, until another call took it up again to one of the upper floors. Another passenger was brought down to the ground floor, the door was again opened and the elevator remained standing with the door open for some minutes as before. This operation was repeated several times, the deceased standing in the elevator and riding up and down with the operator each time

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and making no request to be landed on the fifth or any other floor.

Some ten or fifteen minutes after the deceased entered the elevator, a call for the elevator came from the fifth floor and the operator took the elevator to that floor. When the elevator left the ground floor for this trip, the deceased was standing behind the operator in the right hand corner of the elevator as you enter it, that is to say, he was standing at the back of the elevator directly in front of the door. When the elevator reached the fifth floor, Mr. Hanright was there waiting and he entered the elevator and gave an order indicating his wish to be carried to the third floor. At this time the deceased was standing in the left hand corner of the elevator directly behind the operator, that is to say, he had, while the elevator was ascending from the first to the fifth floor, left his position in front of the door, and had stepped into the corner of the elevator which is furthest from the door.

Mr. Hanright says that he went into the elevator immediately that it had stopped at the fifth floor, while the operator says that Mr. Hanright waited a moment to see if any one got out of the elevator before he entered. As soon as Mr. Hanright entered the elevator and gave his orders to be conveyed to the third floor, the operator, not expecting the deceased to get out, shoved to the door of the elevator and at the same moment put his hand on the wheel to start it (that being the usual way of operating the elevator).

The evidence shows that before the elevator can be started this wheel must be turned completely around, and that, while the wheel is being so turned, the door, if not interfered with, would, if shoved to simultaneously with the starting of the wheel, be closed before the elevator started.

After Mr. Hanright entered the elevator and gave his orders and while the door was being closed and the wheel turned, the deceased, without giving any warning, passed around behind Hanright and sought to reach the landing. The cage, which was then descending, caught him on the shoulders and he was injured before the elevator could be stopped. He subsequently died, and this action is brought by his administrator against the owner of the building to recover damages.

The action was tried before the Honourable Mr. Justice Townshend with a special jury in October, 1900. The jury had a view of the premises and saw the elevator in operation. The questions submitted to the jury with their findings thereon are as follows:

1. Was the defendant guilty of negligence in respect—

(1) In the construction of the elevator?—Ans. No.

(2) In the operation of the elevator?—No answer.

2. Was the deceased, at the time of the accident, being carried in the elevator for business with a tenant in the building, or was he there, at that time, for his own pleasure, simply by permission of the operator?—Ans. Was loitering.

3. Was the operator an employee of the defendant for the purpose of operating elevator?—Ans. Yes, he was.

4. Did the deceased in ascending to the fifth floor request the operator to land him there?—Ans. No, he did not.

5. Was the accident due to the carelessness of the deceased in attempting to get out at the time he did?—Ans. Yes, it was.

6. Could the operator, at the time, have done any act more than he did to prevent the accident?—Ans. No, he could not.

7. Was it the duty of the operator to ascertain from the passenger his destination? If so, was the operator negligent in not doing so under the circumstances of this case?—Ans. No, it was not.

8. To what damages is plaintiff entitled?—Ans. $500.

9. In what proportion are the damages to be divided?—Ans. (1) Father, $250. (2) Mother, $250.

Upon these findings judgment was entered for the defendant. From these findings and the order for judgment the plaintiff appealed to the Supreme Court

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of Nova Scotia. The appeal was heard by Weatherbe J., Ritchie J. and Graham E. J. The majority of the court (Weatherbe J. dissenting), dismissed the appeal and affirmed the judgment of Mr. Justice Townshend. The plaintiff now appeals from this judgment to the Supreme Court of Canada.

The only persons present at the time of the accident were the deceased, the operator and Mr. Hanright. The two latter gave evidence as to what occurred. Blakeney, the operator, says:

The deceased came in about 11.30 in the morning, and asked me if Mr. Russell was in. I told him he was not. I was in the elevator and he in the hall when he asked me. After that he stepped into the elevator. After three or four minutes a ring came. I went up with elevator to get a passenger. Brought him down to ground floor. Deceased went up and came down in elevator. I stayed on ground floor till another ring came. I had opened the door when I reached the ground floor, and left it open for some minutes. I received another ring and went up again and brought down another passenger. Deceased went up and came down with me. I opened and left open the door when I came down, and deceased still remained in the elevator. I am sure of these two rings, but do not know how many more before I got ring from fifth floor, from Mr. Hanright. When I got Mr. Hanright's ring I went up from the ground floor. I was then waiting for orders. Deceased went up with me. When I reached the fifth floor I opened the door to let Mr. Hanright in. *He did not come in but waited to see if anybody came out.* It is customary for the person in the elevator to come out before the other comes in. Hanright came in. *I did not expect any one to get out at the fifth floor.* Hanright told me as he came in to take him to the third floor. He spoke as if in a hurry. *I put my hand on the wheel, and my other hand to shut the door at the same time. This is the usual way.* I shoved the door to close it, and next thing I heard was Hanright shouting. The elevator is worked by a wheel. *To start elevator the wheel must first be turned all the way round. During this time, if nothing interferes, the door would close to.* I then heard a second shout from Hanright. I then looked up and saw the deceased, and then stopped the elevator at once. I did not see the deceased till Hanright called the second time. Hanright entered cage on nearest side to me. To stop elevator, wheel must be turned all the way round. I stopped it as quickly as I could.

Again:

He made no request to me to take him up to the fifth or any other floor. * * * * *It was about ten or fifteen minutes from the time deceased first came in until I got the ring from Mr. Hanright.*

Hanright, a witness for the plaintiff, speaking of what took place after the elevator reached the fifth floor, says:

I went immediately into the elevator, and the boy and another person were in it as I entered. I was in a great hurry, and intended going to third floor below, and *as I was entering the elevator*, I said to the boy, "third floor," or to that effect. *The other person was standing behind the boy.* As I was entering I *first became aware* of another person being in the elevator, and *this person passed around me and made for the door of the landing*, which was then open. *As I entered I faced the door of the landing*, the boy standing as usual at the wheel, and facing the landing. *The moment I said to the boy "third floor" he turned the wheel to descend.* * * * * It all occurred in the fraction of a moment.

Again:

As the boy started to descend when I got in, he reached out his hand to shut the door in the landing. He did so simultaneously, and it came in contact with the deceased who was attempting to pass out. The door struck the deceased, who was trying to push it back with his arm in his struggles to get out.

It further appeared in evidence, that the deceased, immediately after the accident had stated that the operator was not to be blamed for the accident, as it was his own fault and this was repeated to the operator himself, when in the hospital shortly before he died.

Now upon this evidence, we are of opinion that the findings of the jury were correct.

The question of negligence in the matter of operation might have properly been withdrawn from the jury as there was no evidence of the operator's negligence at all. Whether the deceased was a licensee or invitee or a mere "loiterer" or trespasser, it does not in my view in the present case, make any difference, inasmuch as the deceased being in the cage with the

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assent of the operator, there was a duty on the latter's part to be as careful in regard to him as to any other passenger. But here, as the jury properly found, there was no failure to perform that duty.

It is a matter of common knowledge that where a railway train or a tram-car or an elevator having known terminal points, arrives at one of those points, those who are in must first go out, before those who are out get in. Convenience has made this a "rule of the road," just as much as in driving, in Nova Scotia, you pass by the left, while, in the upper provinces, you pass by the right. If one violates this rule and an accident happens to him in consequence, it is absurd to say that he has an action against the person with whose vehicle he came into collision. The jury must necessarily find that the fault was all his own.

In the present case, when the cage came to its destination on the fifth floor,—its upper terminal point,—it was the duty of the deceased, if he intended to alight to present himself for that purpose and to get out or to endeavour to get out, or at least to notify the operator of his desire to get out, before any one came in. Not having done this, or intimated to the operator his wish to alight, it was a proper conclusion on the part of the operator, that he did not intend to get out, and he was, therefore, justified in closing, (or attempting to close) the door and in starting the cage on its downward trip. It is perfectly clear to my mind that it was only after the operator was about to descend and after Mr. Hanright entered, that a sudden impulse moved him to rush to the then closing doors and madly attempt an exit.

This, as I regard it, is the reason why, after the accident, he took all the blame upon himself, wholly exonerating the boy. He knew that he had violated the ordinary recognised rule. He so expressed him-

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self and was apparently anxious that his mistake should not be attributed to or bring misfortune to another.

In my view of the case the judgment of the court below (as delivered by Mr. Justice Ritchie,) was right, and the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. F. O'Connor.*

Solicitor for the respondent: *W. E. Thompson.*

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

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*Nov. 27.

AND

JOSEPH A. LIKELY (SUPPLIANT)...RESPONDENT.

1902

*Feb. 20.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation of land—Damages—Valuation—Evidence.

The Crown expropriated land of L. and had it appraised by valuators who assessed it at $11,400 which sum was tendered to L. who refused it and brought suit by Petition of Right for a larger sum as compensation. The Exchequer Court awarded him $17,000. On appeal by the Crown.

Held, Girouard J. dissenting, that the evidence given on the trial of the petition showed that the sum assessed by the valuators was a very generous compensation to L. for the loss of his land and the increase by the judgment appealed from was not justified.

The court, which considering that a less sum than that fixed by the valuators should not be given in this case expressly stated that the same course would not necessarily be followed in future cases of the kind.

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* PRESENT:—Taschereau, Sedgewick, Girouard and Davies JJ.

(Mr. Justice Gwynne was present at the argument but died before judgment was given).

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THE KING v. LIKELY.

APPEAL from a judgment of the Exchequer Court of Canada awarding the suppliant $17,000 for land expropriated by the Crown.

The land expropriated was situate in the City of St. John, N.B., and was taken for wharf accommodation and other purposes in connection with the construction of elevators in the city. It consisted of water lots and other real estate used by the suppliant as a mill site for sawing lumber, a pond for storing logs and other purposes connected with the business of a saw mill.

The Crown had valuators appointed to determine the value of the land which they estimated at $11,400. This amount the suppliant considered too small and refused to accept it when tendered to him. He proceeded by Petition of Right to claim greater compensation and was successful in obtaining $17,000 or nearly $6,000 more than was tendered. The Crown appealed.

McAlpine K.C. for the appellant. In cases tried by a judge without a jury, the Appellate Court may deal with questions of fact as fully as the trial judge. *Phœnix Insurance Co.* v. *McGhee* (1). The loss of profits derivable from the prosecution of a certain business is of a personal character, and cannot be construed as a direct or consequent damage to property. *Lefebvre* v. *The Queen* (2). See also *Jones* v. *Hough* (3).

Stockton K.C. for the respondent. The Exchequer Court judge heard the witnesses, saw the manner in which they gave their evidence and was fully informed as to all the circumstances of the case. His judgment is as to a question of value, as if found by a jury, and and in that respect must be treated as a finding of fact not to be interfered with on appeal. There is

(1) 18 Can. S. C. R. 61. (2) 1 Ex. C. R. 121.
(3) 5 Ex. D. 115.

ample evidence to sustain the award. *The Queen* v. *Murphy* (1). This court should not reverse merely upon a balance of testimony. *The Picton* (2); *Ryan* v. *Ryan* (3); *Grasett* v. *Carter* (4); *Jones* v. *Tuck* (5); *Arpin* v. *The Queen* (6); *Bickford* v. *Hawkins* (7); *Solomon* v. *Bitton* (8); *The Metropolitan Railway Co* v. *Wright* (9); *Webster* v. *Friedeberg* (10); *Gray* v. *Turnbull* (11); S. S. "*Baku Standard*" v. S. S. "*Angèle*" (12).

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

DAVIES J.—In August, 1898, the Minister of Railways and Canals expropriated 28,100 feet of the respondent's land in the City of Saint John, N.B. The parcel expropriated was part of a lot of 80,000 square feet of land used by respondent as a timber pond.

The Minister of Railways appointed three valuators of experience and repute to value the lands expropriated, and they, after inquiring into all the facts necessary to enable them to form a judgment, awarded the owner, the present respondent, $11,410. The minister accepted this valuation and tendered the respondent the amount. He refused to accept and filed a Petition of Right in the Exchequer Court claiming the valuation to have been "greatly inadequate."

The Court of Exchequer, after hearing many witnesses, awarded the suppliant $17,000 for the 28,000 square feet taken and for all damages resulting therefrom and interest at six per cent from the 20th of August, 1898, the date of the expropriation.

(1) Cass. Dig. (2 ed.) 314.
(2) 4 Can. S. C. R. 648.
(3) 5 Can. S. C. R. 387.
(4) 10 Can. S. C. R. 105.
(5) 11 Can. S. C. R. 197.
(6) 14 Can. S. C. R. 736; Cass. Dig. (2 ed.) 21.
(7) 19 Can. S. C. R. 362.
(8) 8 Q. B. D. 176.
(9) 11 App. Cas. 152.
(10) 17 Q. B. D. 736.
(11) L. R. 2 H. L. Sc. 53.
(12) [1901] A. C. 549.

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Davies J.

We have not the advantage of knowing on what grounds the learned judge of the Exchequer Court increased the valuators' award, as no written judgment was given by him. This amount awarded by him is at the rate of about 60½ cents per square foot. From the evidence it appears that the suppliant was at one time the owner of the whole lot, embracing 80,000 square feet, as trustee for one Fisher, the beneficial owner. As such trustee after duly advertising the lands he caused them to be sold at public auction in 1894 for $2,100 being himself the purchaser. No evidence of any special appreciation in the value of these lands between 1894 and 1898 was given but a large mass of testimony was taken by the Exchequer Court with respect to such value. The Crown, having accepted the valuation of the valuators appointed by the Minister of Railways and tendered the amount to the respondent, we do not feel under all the circumstances of this case and the somewhat conflicting evidence, justified in awarding a less sum, though we wish to be distinctly understood as not laying down any rule which would prevent us going into similar valuations and awarding less.

After carefully weighing the evidence and the arguments submitted to us we have reached the conclusion that the amount given by the valuators was exceedingly generous.

The appeal will be allowed with costs and the judgment of the Exchequer Court reduced to the sum of $11,410, without interest from the time the amount was tendered by the Crown, the suppliant to pay all costs in the Exchequer Court and the costs of this appeal.

GIROUARD J. (dissenting.)—The Crown valuators valued the land expropriated and all damages at $11,400, which the Crown offered with interest, altogether

$12,000. The proprietor, not being satisfied with this tender, brought his Petition of Right, and the Exchequer Court judge, after hearing twelve or fifteen witnesses on each side, allowed $17,000.

As is usual in similar cases, there is great diversity of opinion. As I read the evidence, I think the weight of it is in favour of the respondent. The learned trial judge saw and heard the witnesses. In *The Queen* v. *Armour* (1), we decided that in a case where the Crown valuators valued the land and damages at $6,860, and the Exchequer Court judge increased the amount to $14,658,

> it would be necessary to demonstrate in the clearest possible way, by reference to the evidence in the case, that there was error in his judgment.

A recent decision in the Privy Council in SS. "*Baku Standard*" v. SS. "*Angèle*" (2) is in point. Sir Ford North said:

> Their Lordships are of opinion that, considering the evidence, and that the compensation for damage is dealt with separately, full justice would have been done by an award of less than £1,000 for salvage. But this is a question of amount only, and it is not the custom of this committee to vary the decision of a court below on a question of amount, merely because they are of opinion that, if the case had come before them in the first instance, they might have awarded a smaller sum. It has been laid down in "*The De Bay*" (3) (mentioned above) and other cases that they will only do so if the amount awarded appears to them to be grossly in excess of what is right, which is not the case here.

I would dismiss this appeal.

Appeal allowed with costs.

Solicitor for the appellant: *E. H. McAlpine.*

Solicitor for the respondent: *A. A. Stocton.*

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(1) 31 Can. S. C. R. 499. (2) [1901] A. C. 549.
(3) 8 App. Cas. 559.

1901
*Nov. 25.
1902
*Feb. 20.

JOHN PETERS & CO. (DEFENDANTS)...APPELLANTS;

AND

MARY WORRALL (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Action for account—Agent's returns—Compromise—Subsequent discovery of error—Rectification—Prejudice.

P. was agent to manage the wharf property of W., and receive the rents and profits thereof, being paid by commission. When his agency terminated W. was unable to obtain an account from him and brought an action therefor which was compromised by P. paying $375 giving $125 cash and a note for the balance and receiving an assignment of all debts due to W. in respect to the wharf property during his agency, a list of which was prepared at the time. Shortly before the note became due P. discovered that, on one of the accounts assigned to him, $100 had been paid and demanded credit on his note for that sum. This W. refused, and in an action on the note P. claimed that the error avoided the compromise and that the note was without consideration or, in the alternative, that the note should be rectified.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that as it appeared that P.'s attorney had knowledge of the error before the compromise was effected, and as, by the compromise, W. was prevented from going fully into the accounts and perhaps establishing greater liability on the part of P., W. was entitled to recover the full amount of the note.

APPEAL from the decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in so far as it allowed the defendant a deduction of $100 from the amount of the note sued on.

The action was on a promissory note given to settle a suit for an account as stated in the above head-note.

*PRESENT:—Taschereau, Sedgewick, Girouard and Davies JJ.

[Mr. Justice Gwynne was present at the argument but died before judgment was given.]

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PETERS v. WORRALL.

The defence set up was the error above stated and, by way of counterclaim it was asked that the action should be dismissed on the ground that the compromise was void and inoperative, and the note given without consideration, or, in the alternative, that the note be rectified by $100 being indorsed on it as a payment.

The trial judge held that the error was due to defendant's own carelessness but plaintiff could not take advantage of it to get $100 more than she was entitled to. Defendant appealed asking for dismissal of the action, or, at all events, for reversal of the judgment against him for costs. The plaintiff cross-appealed, claiming judgment for the full amount of the note. The appeal was dismissed and the cross-appeal allowed. The defendant then appealed to the Supreme Court.

Drysdale K.C. and *Mellish* for the appellant. A contract incapable of performance by reason of mutual mistake is void. *Durham* v. *Legard* (1); *Couturier* v. *Hastie* (2). If respondent was not mistaken she was guilty of fraud in undertaking to assign to appellant a debt which she knew did not exist. *Paget* v. *Marshall* (3); *New London Credit Syndicate* v. *Neale* (4); *Ward* v. *Wallis* (5); *May* v. *Platt* (6); *Wright's case* (7); Pollock on Contracts (4 ed.) Bl. Ser. p. 573.

Harrington K.C for the respondent. The fact that the note was given in compromise of pending litigation places this case in a category specially recognized by the law. *Paget* v. *Marshall* (3); Kerr on Mistake pp. 474, 475, 478; *Trigge* v. *Lavallée* (8); *Dixon* v. *Evans* (9); *Pickering* v. *Pickering* (10); *Beauchamp* v. *Wynn* (11).

(1) 34 Beav. 611.
(2) 9 Ex 102.
(3) L. R. 28 Ch. D. 255.
(4) [1898] 2 Q. B. 487.
(5) [1900] 1 Q. B 675.
(6) [1900] 1 Ch. 616.
(7) L. R. 7 Ch. App. 55.
(8) 15 Moo. P. C. 270.
(9) L. R. 5 H. L. 606.
(10) 2 Beav 31.
(11) 38 L. J. ch. 556.

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PETERS v. WORRALL.

Davies J.

The judgment of the court was delivered by:

DAVIES J.—I am of opinion this appeal should be dismissed. The alleged mistake of $100 was known to Worrall's attorney at the time the settlement was being negotiated. He communicated the knowledge to Peters's attorney with whom the negotiations were carried on. At any rate the fact that Peter's attorney had such knowledge at the time he agreed to the settlement was found by the learned Chief Justice who tried the cause and on evidence which I think fully justified the finding. With full knowledge therefore of the necessary facts on both sides, a settlement of outstanding accounts was proposed and accepted, and it is now contended that this settlement should be upset because the written memorandum in which the negotiations were conducted showed one of the accounts which Peters was to have had assigned to him to be $100 larger than it really was. It does not appear to me that this fact, known to the attorneys of the parties at the time and acted upon by both of them, should be allowed to operate to defeat the agreed settlement. In itself the settlement appears to be a fair one and if the $100 was deducted from the amount Peters agreed to pay he would be gaining an unjust advantage.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. F. Mathers.*

Solicitor for the respondent: *C. P. Fullerton.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF TWO MOUNTAINS, (NO. 2.)

1902

*Feb. 18.

JOSEPH A. C. ETHIER (RESPONDENT)...APPELLANT;

AND

JOSEPH LEGAULT (PETITIONER).....RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE H. T. TASCHEREAU.

Controverted election—Lost record—Substituted copy—Judgment on preliminary objections—Discretion of court below—Jurisdiction.

The record in the case of a controverted election was produced in the Supreme Court of Canada on an appeal against the judgment on preliminary objections and, in re-transmission to the court below, the record was lost. Under the procedure in similar cases in the province where the petition was pending, a record was reconstructed in substitution of the lost record, and upon verification as to its correctness, the court below ordered the substituted record to be filed. Thereupon, the respondent in the court below raised preliminary objections traversing the correctness of a clause in the substituted petition which was dismissed by the judgment appealed from.

Held, that, as the judgment appealed from was not one upon a question raised by preliminary objections, nor a judgment upon the merits at the trial, the Supreme Court of Canada had no jurisdiction to entertain the appeal, nor to revise the discretion of the court below in ordering the substituted record to be filed.

APPEAL from the judgment of the Superior Court, District of Terrebonne, rendered at Ste. Scholastique, Province of Quebec, by Mr. Justice H. T. Taschereau granting a motion by the respondent to dismiss objections filed by the appellant, entitled "Preliminary objections to the record as re-made under the authority of the court."

*PRESENT:—Sir Henry Strong C. J. and Sedgewick, Girouard, Davies and Mills JJ.

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TWO MOUNTAINS ELECTION CASE.

A former appeal in this case to the Supreme Court of Canada from a judgment dismissing preliminary objections was (on 29th October, 1901) dismissed (1), and, on the re-transmission of the original record from the office of the Supreme Court at Ottawa to the Prothonotary of the Superior Court at Ste. Scholastique, it was lost. Under the practice prevailing in the Superior Court in similar cases, a record was reconstructed from draft copies in the possession of the petitioner, verified as being substantially correct and was, (on 28th December, 1901), ordered by the court below to be filed in substitution of the lost record. This was done accordingly, and the respondent, within thirty days of the filing of the substituted record, took exception to the substituted petition, by way of preliminary objections to the effect following, viz.:—1. That a new petition could not be filed against the appellant more than a year after his election; 2. That the new petition was never verified with the original one or any certified copy thereof and could not be accepted by the court as the true original petition; 3. That the petition substituted of record was not a true copy of the original and contained allegations of facts which were not in the original petition, more specially certain words in one of the clauses; and, 4. That the new petition had not been sworn to by the respondent nor signed by him, and that he also neglected to establish his status as a petitioner.

On summary motion on behalf of the petitioner the objections so taken by the respondent were dismissed by the judgment from which the respondent now appeals.

Belcourt K.C. for the appellant.

Beaudin K.C. appeared for the respondent but was not called upon for any argument.

(1) 31 Can. S. C. R. 437.

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TWO MOUNTAINS ELECTION CASE.

The Chief Justice.

The judgment of the court was delivered by:

THE CHIEF JUSTICE (oral).—This appeal must be dismissed.

The judgment appealed from is neither one upon a question raised by preliminary objections, nor is it a judgment pronounced upon the merits at the trial of the election petition. When the objections were raised in the present case, the time for filing preliminary objections was long gone by, for we can make no distinction between the petition which was originally filed and that which was before the court, reconstructed in substitution of the original petition which had been lost and thus restored under the methods of procedure in the province in similar cases. This was a matter left entirely to the discretion of the Superior Court and there has been no appeal provided in such a case by the statute.

Secondly, but speaking extra-judicially, even if the case had been heard and adjudicated upon the appeal must nevertheless have been dismissed. The affidavit of Mr. Beaudin, verifying the correctness of the substituted petition, merely states that, with reference to the clause written in at the foot of the thirteenth printed clause of the form of petition used, the words as they were so written into the original petition have been substantially reproduced in the substituted copy, so that, if it were open to us to revise the order of the learned judge authorising the filing of the substituted petition, we should entirely agree with his decision.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. L. Perron.*

Solicitor for the respondent: *S. Beaudin.*

1901

*Nov. 19, 20.

1902

*Feb. 20.

MARY SKINNER.....APPELLANT;

AND

WILLIAM O. FARQUHARSON.....RESPONDENT.

In re ESTATE OF JOHN FARQUHARSON, DECEASED.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Capacity of testator—Insane delusion.

F. in 1890 executed a will providing generously for his wife and making his son residuary legatee. In 1897 he revoked this will and executed another by which the provision for his wife was reduced, but still leaving sufficient for her support, and the son was given half the residue, testator's daughter the other half. His wife was appointed executrix and guardian of the children. Prior to the execution of the last will F. had frequently accused his wife and son of an abominable crime, for which there was no foundation, had banished the son from his house and treated his wife with violence. After its execution he was for a time placed in a lunatic asylum. On proceedings to set aside this will for want of testamentary capacity in F.

Held, reversing the judgment of the Supreme Court of Nova Scotia (33 N. S. Rep. 26.) Sedgewick J. dissenting, that the provision made by the will for testator's wife and son, and the appointment of the former as executrix and guardian, were inconsistent with the belief that when it was executed testator was influenced by the insane delusion that they were guilty of the crime he had imputed to them and the will was therefore valid.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) reversing the judgment of the Judge of Probate for the County of Halifax and declaring

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*PRESENT:—Taschereau, Sedgewick, Girouard and Davies JJ.

(Mr. Justice Gwynne was present at the hearing but died before judgment was given.)

(1) 33 N. S. Rep. 261.

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void and inoperative a will of the late John Farquharson executed in 1897.

The will was attacked by the respondent on the ground that the testator, when he executed it, was influenced by an insane delusion as to the conduct of his wife and the respondent his son, and was therefore wanting in testamentary capacity. The material facts are sufficiently stated in the above head-note and in the judgments published herewith.

The appeal was argued in the February session of 1901 Mr. Justice King being then present. His Lordship having died before judgment was given the court ordered a re-hearing.

Borden K.C. for the appellant.

Harrington K.C. for the respondent.

TASCHEREAU J.—I fail to see on this record sufficient evidence to set aside the will in question. In the first place, it is not clear to my mind that the testator's belief that his wife had been guilty of the abominable crime in question was, at its origin, an insane delusion, however unfounded that belief was. A belief of that nature, whether founded or not, preying upon a man's mind is undoubtedly of a character to drive him ultimately to the mad house; but that he is from the beginning a madman and *non compos mentis* simply because his suspicions are unfounded seems to me an untenable proposition. But even if this erroneous suspicion constituted insanity in the testator in this case, I cannot see in the evidence that it was that insane delusion, if an insane delusion it were, that controlled his power of will and prompted him to execute the instrument in question and reduce the bequests to his wife and son that he had made by his prior will. The man was old and sickly, it is true,

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TaschereauJ.

and had lost some of his vigour of mind, but he was, apart from this delusion, perfectly sane and capable of administering his property. And it is not the law that no one but those in the prime of life can make a will. It is not the law that any one who entertains wrong-headed notions, capricious whims, or absurd idiosyncrasies, cannot make a will.

If by this new will, the deceased had revoked entirely the legacies to his brothers and sisters provided for by his first will and had bequeathed the whole of his estate to his wife and son, the brothers and sisters could not successfully have assailed it.

If the deceased's delusions had influenced the disposal of his property, the respondent's contention should perhaps prevail. But that is a question of fact. And twelve average men could not, reasonably, but come to the conclusion that if that had been the case, if he had had present to his mind, when he went to his solicitor, that his wife was the vile, loathsome creature that he intermittingly had believed her to be, if that had been the impulsive cause of his making a new will, he would not, by that new will, have appointed her guardian of his children and one of his executors, besides bequeathing to her and his son a substantial amount of his property. Such dispositions cannot have been the offspring or result of this delusion. On the contrary the inference from them is that the delusion cannot have been in actual operation at the time when he made them. Then this will cannot be said to be an inofficious one as regards the wife and the son. It was a rational act rationally done, according to the solicitor's evidence. The respondent's reasoning is, in my opinion, fallacious. This testator must have been insane, he argues, because, though under the belief of his wife and son's henious criminality, yet he did not disinherit them altogether, but

left them a considerable portion of his estate. But there is, in that theory, no compatibility between the efficient cause and the effect. It is *petitio principii*, it is assuming that the will was made because of that delusion. Now that is the very question to be determined. And I cannot but help thinking that if it were that delusion that had guided the mind of the testator when he made this will, he would not have given a cent to his wife and to his son. If he had disinherited them altogether, they would be justified in contending that it was an insane delusion that had influenced him to do so. But I cannot see that they can base such a contention on the ground that he left them a portion of his estate. What he left them, it is true, is less than what he had left them by the first will, but that he left them anything at all, that he appointed his wife one of his executors, that he appointed her guardian to his infant children, seems to me utterly irreconcilable with the proposition that he was, at that time, acting under the impulse of hatred or of vengeance and under the impression that he had suffered a most grevious tort at their hands.

I would allow the appeal with costs, and restore the decree of the Judge of Probate.

SEDGEWICK J.—Before the death of our late brother Mr. Justice Gwynne, he had prepared a full and exhaustive opinion on the subject matter of this appeal. It was delivered to all the judges who at the argument formed the court, and it so coincided with my views that I did not think it necessary to express them in writing. I adopt his judgment as my own and append it hereto for that purpose.

The question in this case is, whether the late John Farquharson, deceased, was of sound mind, memory, and understanding capable of disposing

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Sedgewick J.

of his property by the will which is impeached here, made upon the 9th of March, 1897. The learned judge of the Probate Court of Nova Scotia pronounced in favour of the will mainly upon the ground that there was nothing in the will to show that the testator was acting under the influence of any insane delusion, even admitting the fact (which however he did not think established by the evidence) that any insane delusion had existed in his mind prior to the making of the will. The learned judge thought the disposition of his property made by the will to be quite rational and he therefore pronounced judgment in favour of it.

The Supreme Court of Nova Scotia, consisting of three judges, unanimously reversed this judgment. From the judgment of the Supreme Court this appeal is taken.

The deceased was married in 1876, and he and his wife continued to live happily together until January, 1897. In January, 1894, he had a paralytic stroke from which he was confined to his bed for some time. A Dr. Cowie was then his medical attendant. Dr. Chisholm, who was also called in when deceased was suffering under the paralytic stroke, says that there was no difficulty in diagnosing his case. He had a disturbance of the circulation which destroyed the functions of the brain; the result was paralysis of mind and speech. There was nothing to be done for him but just carry on the treatment which Dr. Cowie had prescribed. Deceased, he says, began to recover from the paralysis, but not much. He began gradually to move about but it took him some months. Afterwards when attending deceased's son witness had an opportunity of observing the condition of deceased. He was then moving about better; this was in 1895.

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Sedgewick J.

Monomania, he says, does follow as a result from such injury as deceased was suffering from; delusions and hallucinations do exhibit themselves as phases of the brain trouble from which he suffered. The medical testimony upon this point further was that in the majority of cases of paralysis of the brain more or less mental defect is the result.

Now in the year 1890 the deceased had made a will whereby he devised the whole of his estate, real and personal, to his wife and his son and daughter, with the exception of $1,000 which he divided among two brothers, a sister and two nieces, and $500 to the poor of Halifax, and $500 to the Womans' Home.

From the evidence of a niece of the deceased who lived in the house with him from some time in the autumn of 1895 until April, 1897, it appears that until January, 1897, husband and wife lived happily together and deceased was never in the habit of using abusive, coarse or bad language, or of acting in a violent or excited manner towards his wife or son, but that between the 1st of January and the month of April, 1897, when witness ceased living with them, it was deceased's constant habit to use violent, abusive and bad language towards his wife and son. On different occasions upon witness coming into the room where deceased and his wife were alone together witness found deceased in an excited manner, abusing and ill-treating his wife, from which he would desist upon witness coming in. He would tell his wife at the table in the presence of his son and of witness that she would have to earn her own living; that she would have to do something after he was gone, for that he did not intend to leave her his money. Witness said that this occurred before the son had left the house to live with Mr. Allan, which took place on the 20th of February. She added that between the 1st of January

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and when she left in April there were frequent "outbursts" of this nature. That at first they occurred at intervals of three or four days and then the "outbursts" got to be more frequent. Mrs Farquharson testified that it was on the 31st of January, 1897, that deceased first made known to her the dreadful accusation which he made against her and her son, from the gross and utter absurdity of which she says she endeavoured, but in vain, to disabuse his mind. That during the month of February he got worse. He would rave at his son at table using language unfit for mother and son to hear; that on one occasion he threw a plate at his son and was proceeding to strike him when she interfered to keep the blow off from him, when deceased struck her with a slipper which he had in his hand. This occurred, she says, early in February. Deceased also early in February threatened her that he was going to change his will. He said he was going to give Mr. King (his solicitor), her character to have him change his will, and that she might keep boarders for a living or go to the poorhouse. At a subsequent time, but when in particular did not appear, he told her that he had changed his will and spoke in a very excited manner. In consequence of this conduct of her husband in the month of February, she some time in that month went to consult Dr. Chisholm and requested him to see her husband whom he had attended in 1894 when suffering under the paralytic stroke, and who also in the winter of 1895-96 had attended her son when suffering from an injury to his hip which kept him from college for two years.

A letter from the deceased, dated 25th of February, 1897, to his daughter at school, has been produced, which shows that the charge made by deceased against his wife and son had apparently become ineradicably planted in his mind, from which I make an extract as

having a bearing upon the main point to be considered in this appeal to which I shall have occasion to refer later on:

HALIFAX, February 25th, 1897.

DEAR MINNIE,—All days are alike to me now, since the trouble in this house. We have got Will out of it; he has gone to board near the college until the spring examination, and *then he must go out of the province and earn his living, otherwise I will put him in the Industrial School and let him learn to make shoes and split kindling wood.* The other associate is still in the house under close inspection; it makes life not worth living for, but fate has placed this heavy load upon my head, and I must bear it for a short time until death removes me; and the disgrace is something awful.

Sedgewick J.

Now Dr Chisholm said that Mrs. Farquharson came to him in February, but the precise day he did not say. It was he thought about the 20th of February. She complained that her husband had became dangerous to herself and her son, and from what the doctor said subsequently it appears that she had told him the charge made by her husband against herself and her son. She asked the doctor to visit her husband, but for some unexplainable reason, as the doctor said, he did not go to do so until after she had sent for him three times. At length, after more than a week had elapsed from the day she had called upon him he did go upon the 8th of March, and found deceased lying upon a sofa in his house. Witness examined him on that day as to his mental condition and tried to discover the traces or foundation of what Mrs. Farquharson complained without disclosing her complaint to him, but he failed to draw out anything to show the traces. The doctor thought that deceased was on his guard and so did not commit himself. He saw him again a day or two after, upon, he thinks, the 11th of of March. Upon that occasion he met deceased in the street, and having failed to draw him out as on the 8th he put to him the direct question in reference to his

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son, and said that it was a shame to send his son away from home and to think he was guilty of such an enormous crime. Deceased, he says, then came out with it and stuck to it that such was the case. He said that his wife and son had too intimate relations. Witness asked why he thought such relations existed, to which he answered that when at Rockingham the preceding summer he had heard noises in his son's room; he did not say what noises; and for another reason which it is not necessary to repeat, but which the doctor knew to be attributable to a disease common among women for which he was himself treating Mrs. Farquharson. The doctor endeavoured to disabuse the deceased of his delusion, but failed, and the doctor then came to the conclusion that the delusion was the result of the brain trouble from which the deceased had suffered. This conclusion he arrived at because of the character of the suspicion and that what the deceased relied upon as evidence in supporting it was outside of all proportion with common sense, and the accusation was unsupported by anything which could be characterized as rational evidence. Witness saw the deceased a day or two after again at his own house and prescribed some quieting medicine for him and continued to visit and prescribe for him off and on for some time.

Now it was in this month of February, 1897, that the deceased went to his solicitor, Mr. King, to have a new will made. Mr. King cannot give the precise date, for although he took down his instructions in writing he did not keep them. The only entry on the subject made in his books is under date of 11th March, 1897, as follows:

JOHN FARQUHARSON, DR.

To taking instructions and drawing your last will and testament and writing to your son..... ..... $10 00

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Mr. King however provides material from which we can approximate the date of his receiving his instructions. He says that he took a memorandum in writing of the changes deceased wanted, and that a couple of days after he showed deceased a draft he had made of the new will and read it to him; that deceased then directed witness to have it engrossed; that a day or two after the deceased called on witness again when witness read over to him a typewritten copy which he had had made. This copy witness gave to deceased and told him to take it home with him and to give it some consideration; that deceased took the copy home with him and in a week or ten days brought it back and said he wanted to execute it, and it was then executed by him. This took place on the 9th of March. Assuming then the periods above named to be nearly accurate, we can fix the date of Mr. King receiving his instructions to be about some day between the 17th or 18th and the 23rd of February. Now it was on the 20th of February that the son left the deceased's house, and on the 22nd that he went to live with Mr. Benjamin W. Allan, as testified by Mr. Allan, who was secretary-treasurer of the W. F. Johnson Piano Company, of which deceased was vice-president. Mr. Allan deposed that deceased's son came to live with him on Monday, the 22nd, and stayed with him about ten days. Witness had an interview with deceased in the office of the Johnson Company while the son was at witness's house. Witness asked the deceased why his son was going to board outside his house. He answered that the boy wanted to board outside and that his mother had sanctioned it. Witness replied that the boy was a good living boy and he ought to keep him at home. Deceased said then that the boy was a good moral boy and that he had never known him to tell a lie. *Inside of five minutes after*

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that he said that he should never allow him to enter his door again. Deceased seemed a little excited. The whole conversation did not take more than five minutes. It was on Friday, the 19th of February, at Woolrich's funeral that the son asked to come to witness's house, and he did come on the following Monday.

Now Mr. King's evidence was that he was familiarly acquainted with the deceased and was his solicitor for many years. That deceased was a very capable clear-headed and shrewd man of business and had a keen knowledge of all of his affairs. That when witness received his instructions for the will he did not notice anything peculiar about him, but that he seemed prejudiced against his son in some way. That witness in fact thought that they had had a quarrel by the way deceased had cut down the provision for his son; that nothing was said to indicate the reason for it. That up to the time of signing the will deceased had made no offensive remark about his wife and family; that when cutting down the provision made for his wife by the will of 1890 from $25,000 to $15,000 deceased said he thought $15,000 enough to make her a good income and he instructed witness to bequeath that to her only during widowhood. That witness discussed the matter with deceased when he directed the change but could not remember his giving any very satisfactory reason for it, *other than that he did not like the way things were going on.* Witness thought that deceased and the boy had had some misunderstanding. What he had against the wife was that she sided with the boy. That deceased said that she and the boy had things pretty much their own way and that he, deceased, was not satisfied the way things were going on. That the boy had not selected any occupation and that he (deceased) could not do anything with

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him because the wife sided with the boy. He repeated that the wife and the boy had things pretty much their own way and that the boy was not inclined to do anything for himself and had not selected his life work; that he thought he ought at his age to have some idea of what he was going to do; and he said that when he remonstrated with him the mother always sided with the boy, and that he was not satisfied the way things were going on; and that he added this remark, that he (deceased) had had hard enough work to make the money for them; and that he wanted to make some provision for his brothers and sisters, and that on account of the shrinkage of his estate he could not do so much for his wife and children as in his former will and give what he wanted to his brothers and sisters. Witness said that it was when saying that he would like to do something more for his brothers and sisters than he had done in his former will *that the deceased gave as a reason that his son did not indicate a desire to enter upon the earnest* duties of life, that he was *not taking life as seriously as the deceased thought he ought*, and that he feared that *leaving him too much money would not be* good for him; *that it did boys good to make them rough it* a little; *then it was he said that he did not like the way things were going on; that he was dissatisfied and that when he remonstrated the mother would side with the boy.* In fine witness said that when he received the instructions for the will and when it was executed witness had not heard of the criminal accusation against the wife and son, and that he had then no doubt that the deceased was fully competent to make his will. However he said that on the 11th of March, two days after the making of the will, the deceased came again to witness's office then in a very excited manner. Then he told witness the criminal accusation which until then the witness

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had not heard. Deceased then said that his son had been home the night before. What excited him was what he said had occurred the night before. That he then went over a lot of things which he said had happened before and culminated in what he said occurred the night before. He said that something important had then occurred and he was determined that his son should go away from the house and he wanted witness to write to the son and to get him to go away. This interview related to the criminal charge which deceased made against his wife and son, and this witness said that this was the first time he had heard of it. About three weeks or a month later deceased called again upon witness upon the same subject, and was then in a much more excited condition. He then wanted witness to get the son sent to the Industrial School. He was consulting with witness to see if he could do so. Witness dissuaded him from doing anything of the kind and told deceased, as he says, that the witness did not believe the accusation. Witness says that he then thought deceased was labouring under a delusion and that if deceased had acted before the making of the will as he was acting then, witness would have made inquiries as to the mental capacity of the deceased before drawing his will. Deceased's manner was then, witness said, irrational, and from what witness had heard from Dr. Chisholm and Mrs. Farquharson, and from witness's own observation, he believed deceased then to be insane on that subject, although he had in a most capable business-like and intelligent manner transacted many items of business with witness during the summer of 1897 before going to the asylum for the insane.

There are some singular discrepancies between the evidence of this witness and that of Dr. Chisholm as

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to a conversation which passed between them and as to the time of such conversation, and also discrepancies of a like character between the evidence of this witness and that of Mrs. Farquharson, and also between the evidence of the witness and that of young W. O. Farquharson as to the time of his receiving the letter written by King and Barss to him at the request of deceased, and of the young man's interview with Mr. King upon the receipt of that letter. I mention these discrepancies, not because they are upon material points, but because though not altogether immaterial, I think that the question raised on this appeal can be determined without determining the points in which these discrepancies occur. I do not think it necessary to refer further to the evidence in this painful case than to say that the deceased continued gradually to get worse until October, 1897, when from apprehension of violence to his wife he was upon medical certificate sent to the asylum where he remained in the care of a special attendant of his own until January, 1898, when he was moved from the asylum to his own house at Rockingham in charge of the same special attendant until September, 1898, when he was sent by medical advice south, and was taken care of by the son who was the subject of the criminal accusation. The special attendant William Rogers says that during all that time he was constantly with the deceased, dressing him in the morning, giving him his meals, walking about with him, putting him to bed at night, and going in to look at him at night. Deceased used to fancy that there were all kinds of noises in the house at night, people going about the house, also rats running about. When there were neither noises nor rats at times he would get up out of his bed and go round raving about the noises and calling to witness. Often in the asylum he used to

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complain in this manner of the noises at night, saying "all these things again last night. The man was rushing through the halls and knocking at the doors and shouting to the inmates." On these occasions he would get very excited and talk in an irrational manner; and he could not be reasoned out of these delusions. The same thing continued at Rockingham after he came out of the asylum. In August, 1898, he used to complain of all kinds of noises going on upstairs and of people being in the house. On one occasion he got out of his bed and was going to jump out of the window to get away from the noises. He used to write much, putting down on paper about the noises. On one of these papers he gave the date of the time he began to hear noises at his house in Brunswick Street in the year 1896. Another paper contained the criminal charge against his wife and son. He told the story of this several times to Rogers when in the asylum. He used also to tell it to the patients, and when speaking of this he used to work himself into a great state of excitement and say that he was going to make his wife keep boarders for a living, and that he would employ a lawyer to turn her and his son out of the house. Upon this subject and the noises he was quite irrational. He used to repeat the above a great many times both in the asylum and afterwards at Rockingham. From this testimony of the man who was in constant attendance upon the testator in the asylum and afterwards at his house in Rockingham, it seems pretty clear that his idea about hearing noises of every description in the house constituted part of the delusions under which he laboured, and in this circumstance and also in that of his habit of writing down the date of the times when he began to hear noises in his house in the year 1896 there seems to be grave significance, for from the

statements made by the testator on the 11th of March, 1897, to Dr. Chisholm when the doctor asked him why he entertained the idea which he did about his wife and son it seems that the delusion as to the charge made against his wife and son had its origin in noises which he said he heard in the summer of 1896 in his son's room upstairs. The origin of the noises and the accusation seems to be the same, namely, the morbid imagination of the testator.

In September, 1898, he was by medical advice taken down South in the care of his son. The delusions as to the noises and as to the criminal charge still continued. In the following spring these became less frequent, as the testator became more feeble in his mind and body. He was brought back by his son in May, 1899, and upon the 26th of that month he died, as testified by Dr. Chisholm, an imbecile, his mind a blank and physically a wreck.

It is quite unnecessary in the present case to advert to that portion of the learned judgment of the Privy Council in *Waring* v. *Waring* (1), delivered by Lord Brougham, wherein he characterizes the idea of what is called "partial insanity" as itself a delusion. It will be sufficient to rest upon the doctrine as laid down in the cases in which that judgment is criticized. In *Banks* v. *Goodfellow* (2), it is laid down at page 561 that where a delusion has had, or is calculated to have had an influence on the testamentary disposition it must be held to be fatal to the validity of the will. And at page 565 it is laid down that in order to the exercise of the capacity competent and required for the making of a will it is essential that no disorder of the mind shall poison the affections, prevent the sense of right of the testator, or prevent the exercise of his natural faculties, and that no insane delusion shall influence the testator's will in

(1) 6 Moo. P. C. 341. (2) L. R. 5 Q. B. 549.

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disposing of his property; that if insane suspicion and aversions takes the place of natural affection, if reason and judgment are lost and the mind becomes a prey to insane delusions *calculated to interfere with and disturb its functions* and to lead to a testamentary disposition due only to their baneful influence in such a case it is obvious that a will made under such circumstances should not stand. And at page 569 the court adopts the doctrine announced by the Privy Council in *Harwood* v. *Baker* (1), that though the justice or injustice of the disposition in a will may cast some light upon the question as to the capacity of the testator, still that if the testator had not the capacity required for making the will the propriety of the disposition of his property made by the will is a matter of no importance. Again at page 570 it is laid down that, where the fact that a testator has been subject to any insane delusion is established, a will should be regarded with great distrust and every presumption should in the first instance be made against it, and the presumption against a will made under such circumstances becomes additionally strong where the will is an inofficious one, that is to say, one in which natural affections and the claims of near relationship have been disregarded; but that where a jury are satisfied that a delusion under which a testator has been proved to be suffering has not had *and could not have had* any influence on the disposition made by the will as was the case in *Banks* v. *Goodfellow* (2), the will should be upheld, *but on the contrary that where a delusion is of such a nature as to be calculated to influence the testator in making the particular disposition a jury would not be justified in coming to the conclusion that the delusion* still existing was latent at the time so as to leave the testator free from any influence arising from the delusion.

(1) 3 Moo. P. C. 282.

(2) L. R. 5 Q. B. 549.

In *Smee* v. *Smee* (1), Sir James Hannen, following the doctrine as laid down in *Banks* v. *Goodfellow* (2) thus lays down the law:

> The fact that a man is capable of transacting business whatever its extent or however complicated it may be, and however considerable the power of intellect it may require, does not exclude the idea of his being of unsound mind.

And again he says:

> Any one who questions the validity of a will is entitled to put the person who alleges that it was made by a capable testator *upon proof that he was of sound mind at the time of its execution. The burden of proof rests upon those who set up the will and a fortiori when it has already appeared that there was in some particular undoubtedly unsoundness of mind, that burden is considerably increased.*

Then as to delusions he says:

> Upon the surface all may be perfectly clear and a man may be able to transact ordinary business or follow his professional calling, and yet there may be some idea through which, in the recesses of his mind, an influence is produced on his conduct in other matters.

He then lays down the duty of a jury upon a question as to the validity of a will impeached as having been made under the influence of an insane delusion, to be, to inquire and say

> whether or not the flaw or crack in the testator's mind *was of such a character that though its effect may not be seen on the surface of the will it had an effect upon him when dealing with the disposition of his property.*

And further to inquire and say:

> Whether the character of the unsoundness proved does or not show the *possibility and probability* of connection between the will and the delusion under which the testator suffered, and *unless the jury are satisfied that there is no reasonable connection between the delusion and the bequest in the will, those who propound the will do not discharge the duty cast upon them and the verdict must be against the will.*

Now it is obvious that the same duty is cast upon a judge or court when, as in the present case, they are invested by the law with the obligation to perform

(1) 5 P. D. 84. (2) L. R. 5 Q. B. 549.

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the functions of a jury. In *Jenkins* v. *Morris* (1), the same principle was applied to a contract *inter vivos* the rule being that when the existence of an insane delusion is once established the question to be determined is whether it had any, and if any what, influence upon the performance of the act or transaction which for the time being is under consideration. Now in *Waring* v. *Waring* (2) an insane delusion is defined to be a belief of things as realities which exist only in the imagination of the patient, and the incapacity of the mind to struggle against the delusion constitutes an unsound frame of mind. And in the 2nd edition of Am. & Eng. Cycl. vol. 9, p. 195 the definition of an insane delusion as enunciated by Sir J. Nicholl in *Dew* v. *Clarke* (3), followed by Sir James Hannen in *Boughton* v. *Knight* (4), is thus expressed in concise language:

> Delusion is insanity where one persistently believes supposed facts (which have no real existence except in his perverted imagination) against all evidence and probability and conducts himself however logically upon the assumption of their existence.

Reading now the evidence in the case in the light of the above authorities no doubt can be entertained that the idea of the unfortunate man's wife and son being guilty of the dreadful crime imputed by him to them first conceived (as would seem from his conversation with Dr. Chisholm on the 11th of March, 1897), some time in the preceding summer at his house at Rockingham, but developed and openly manifested in January, 1897, had no foundation whatever in fact, but that the unfortunate man's belief in the existence of the offence as charged by him existed only in his own morbid imagination caused by lesion of the brain

(1) 14 Ch. D. 674.
(2) 6 Moo. P. C. 354; 12 Jur. 947.
(3) 3 Ad. Ecc. 79.
(4) L. R. 3 P. & D. 68.

which was the consequence of the paralytic stroke which he had had in 1894, and that the delusion from the period of its manifestation in January remained ineradicably fixed in his mind until his death in May, 1899. In the argument before us this indeed was not disputed, but the contention of the propounders of the will was that the instructions for the will were given and the will itself was executed in the lucid interval. Now by the term "lucid interval," it was said by Lord Thurston in *Attorney General* v. *Parnther* (1), is not meant

> merely a cooler moment, an abandonment of pain or violence or of a higher state of torture, a mind relieved from excessive pressure *but an interval in which the mind having thrown off the disease had recovered its general habit.*

In *Waring* v. *Waring* (2) it is said that

> a lucid interval is not the mere absence of the subject of the delusion from the mind. By a lucid interval is not meant a concealment of delusions, but their total absence, their non-existence in all circumstances and a recovery from the disease and a subsequent relapse.

Such is the nature of the lucid interval which the propounders of the will have undertaken to prove in the present case, and the sole witness in support of it is the solicitor who prepared the will, who witnessed its execution, and who as executor of it propounds it.

Bearing in mind Mr. King's evidence that until the 11th of March, two days after the execution of the will, he had never heard of the accusation made by the testator against his wife and son, and bearing in mind Mr. King's knowledge of the testator's keen and clear ability as a business man, it is not surprising that he should have, as he says, seen nothing to cast any doubt upon the testator's testamentary capacity when giving instructions for the alterations in his will, or when it was executed; but we have to con-

(1) 3 Bro. C. C. (Belt) 444. (2) 12 Jur. 948, 952.

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sider the condition of the testator at those periods by the light of the knowledge which we now have and which Mr. King acquired on the 11th of March, and at an interview which he had with the testator about three weeks later when the testator's conduct clearly manifested that he was then labouring acutely under the influence of the insane delusion.

We have seen that in the early stage of the manifestation of the delusion the testator when acting towards his wife in a threatening manner and in a high state of excitement had nevertheless power to control and restrain himself upon the occasions when his niece, Florence Corbin, entered the room and found him so acting in a violent and excited manner. We can well understand therefore that he should have the power to restrain himself in like manner, though still retaining the delusion in his mind, when he went to his solicitor to transact the business of altering his will of 1890 which the solicitor had in his custody. His keen business ability would naturally induce him, though labouring under the delusion, to conduct himself on such an occasion in a cool, calm and temperate manner. Indeed his whole conduct when giving Mr. King instructions for altering his will is quite consistent with the fact of his being then acting for the purpose of concealing the delusion, which to him appeared a reality, from his solicitor. The skill and ability of persons labouring under insane delusions to conceal them successfully is not unknown to the courts. Of this skill and ability the two most notable illustrations are *Greenwood* v. *Greenwood* cited in *The Attorney General* v. *Parnther* (1); and in Lord Erskine's speech in *Rex* v. *Hadfield* (2), and in the case of one *Wood* also cited in the same page of 27 Howell and, in *Waring* v. *Waring* (3).

(1) 3 Bro. C. C. (Belt) 444. (2) 27 How. S. T. 1315.
(3) 12 Jur. 949.

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By the evidence of testator's niece, Florence Corbin, it has been established beyond doubt that the testator was under the influence of the delusion from some time in January until she left in April; that in February he threatened his wife that he would leave her nothing and that he would go to Mr. King and alter his will. And at a subsequent date he told his wife that he had been to Mr. King and had altered his will. He did not, it is true, fulfil his threat that he would leave her nothing, but as already said the clear business abilities which it is said that he possessed may have very possibly suggested to him that as to the value of her dower in his real estate he could not deprive her of it, and that if he should leave her nothing by his will that might defeat the object he had in view, which plainly was to punish her for the offence which he imputed to her, and that the best way for effecting his purpose was to cut down in the manner he did the provision he had made for her in his former will. Then as to the son it is evident that in the same month of February he exhibited an unnatural aversion to him explicable only by attributing it to the delusion in his mind as to the offence imputed to the boy and his mother Under the influence of that delusion he insisted upon his son, a youth of 19, leaving his house. The youth left on the 20th of February, and by the letter of the 25th of February, addressed to his daughter, we find the delusion had then its full influence upon the testator's mind. In it he exults over having got the son out of the house, and expresses the intention unless his son leaves the province *he will put him into the Industrial School and let him learn to make shoes and split kindling wood.*

Mr. King, in his evidence, admits that when he was receiving instructions for the alterations in the will he conceived the idea when he saw the way the father

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was cutting down the provision he had made for the son in the will of 1890, that he had quarrelled with his son and had taken a dislike to him. And when instructed to cut down the wife in the manner in which the provision for her was cut down, he says he asked the testator for his reason, and that the only answer he got, which he says was not very satisfactory, was, *that she and the son had things very much their own way, and that he did not like the way things were going on.* Then in the month of March we find the testator telling Mr. King the charge which as already shown he had made in January against his wife and son and instructing him to see the son and get him to leave the province, and consulting him as to his putting his son into the Industrial School, thus acting in perfect accord with the plan which he had formed, as stated in his letter to his daughter of the 25th of February. From this time forward until his death the evidence establishes that the testator was never free from the delusion, and that as his health grew worse he manifested more and more the inveteracy of the delusion, repeating the accusation to every one he met, repeatedly to the person who waited upon him at the asylum and to the patients there.

Now that the delusion under which the testator so laboured was calculated to affect the disposition of his property as made in the impeached will, does not admit of a doubt. The burthen therefore rested upon the propounders to prove that in point of fact it had no such effect and that the will was made during a lucid interval, that is to say, when the testator's mind was as absolutely free from the delusion as if it had never conceived the idea which constituted the delusion. No jury, upon the evidence appearing in this case would be justified in arriving at any such conclusion. The propounders of the will, therefore, have failed to

discharge the burthen imposed upon them. The judgment therefore of the Supreme Court of Nova Scotia voiding the will should be affirmed, and this appeal dismissed with costs.

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DAVIES J.—The sole question in this case is whether or not John Farquharson, the testator, was of sound mind so as to be capable of making his will, when about the middle of February, 1897, he gave instructions to his solicitor for the preparation of his will, and on the 9th March following when he executed it. The learned judge of Probate at Halifax, Nova Scotia, admitted the will to probate after hearing a great mass of testimony in support of and against its validity. The will was attacked by the testator's son, the respondent, and by his widow, and the ground of attack was the alleged existence in the mind of the testator of an insane delusion that his wife and son had incestuous intercourse with each other which so tainted and perverted his judgment and mind as to render him incapable of making a will. The learned judge of probate held from the evidence before him, and from the rationality of the will itself, that the testator was competent to make it when he did and that at the time he made it he was not the victim of the alleged insane delusion. The Supreme Court of Nova Scotia reversed this decree, Mr. Justice Eitchie however, while concurring with the rest of the court, expressing his doubts whether the delusion was operating on testator's mind at the time he made the will. After careful consideration of the evidence, I find myself in accord with the conclusions reached by the learned judge of probate who heard all the witnesses, and think therefore his decree should be restored and the appeal allowed.

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The facts may be stated within a reasonably short compass. The testator was a retired tradesmen residing in Halifax, Nova Scotia, who died in May, 1899, aged 74. He was an uneducated man, but had amassed a considerable estate which at his death was estimated at from $60,000 to $65,000. He had been married twice, but the first wife had left no children and his second wife was many years his junior. She survived him, also a son, W. O. Farquharson, the respondent, aged at his father's death 21, and a daughter, then aged 16.

Farquharson (testator) made a will on the 5th May, 1890, and on the 9th March, 1897, he revoked that will and made a new one. It is the will of 1897 which is in contest. The testator's nearest collateral relatives at the time of the making of the first will were his two brothers, Peter and James, and his sister Mary Skinner. When the second will was made, Peter had died, leaving a wife and children.

The second will, while substantially reducing the provision made for his wife, and altering somewhat the bequests made to his son and daughter, divided $15,000 of his estate between the testator's surviving brother and sister and the children of the deceased brother; with the exception of this $15,000 and some small legacies all of his estate was divided between his widow, son and daughter. While of course calling prominent attention to the reduction made in the bequests to the widow and the son, I do not understand it to have been contended, either in the court below or at the Bar, that the dispositions generally made of his property by the testator are in themselves irrational, unfair or unjust, or that any argument could be fairly drawn from the will itself that the testator's mind had become tainted by some delusion and perverted against his wife and son, but rather that

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the evidence outside of the will and notably that of the wife and son combined with the testator's letter to his daughter of the 15th February, showed his mind to have been imbued with an extraordinary delusion which incapacitated him from properly making a disposition of his property to his wife and son, or in any way properly fulfilling his duty towards them.

I am quite unable to follow the reasoning of the learned judges in the court below by which they reached the conclusion of the testator's incompetency. The simple question to be decided was whether or not the testator was capable of making a valid will when in the month of February he gave Mr. King instructions to prepare it and on the 9th day of March the day of its actual execution. I think altogether too little weight has been attached to the actual dispositions made of testator's property in his will and too much weight to his condition and conduct subsequently. General statements to the effect that the alleged delusions had so incapacitated him and perverted his mind as to render him incompetent to in any way fulfil his testamentary duty towards his wife and son are to my mind completely answered by the terms and dispositions of the will itself. Conclusions which are reached as to the testator's mental condition on the date of the will from the evidence chiefly of Mrs. Farquharson and her son are to my mind shown by it to be unfounded. There is no doubt that some suspicion must attach to the evidence given by those so deeply interested as the widow and the son, but giving to their evidence and that of the other witnesses produced by them, including the testator's letter of February 25th, every possible weight, I cannot in the face of the will itself reach a conclusion that at the time it was made the alleged delusions dominated, tainted or controlled testator's mind so as to render him incapa-

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ble of making a valid will. There is no doubt that early in February he had begun to harbour suspicions respecting the relations existing between his wife and his son. But these suspicions had not then developed into a fixed or permanent belief or delusion. On the contrary they were capable of being removed and were removed by reason and argument as shown by Mrs. Farquharson herself. They were intermittent and from time to time revived, but if the evidence of Mr. King, the solicitor who drew both wills and managed testator's business for thirty years is to be believed, were certainly not dominating, tainting or controlling his mind either when he gave instructions for his will or a fortnight afterwards when he executed it. Mr. King in his evidence says:

Q. If he gave you any reason for wishing to change his will, what was that reason?—A. First, he said his estate had been shrinking, he was not worth as much as he was when he made his former will. He said also that he would like to do something for his brothers and sisters more than he had done in the former will. And then he gave as a reason that his son did not indicate a desire to enter upon the duties of life, he was not taking life as seriously as he thought he ought to. He feared that leaving him too much money would not be good for him. He expressed an opinion that it did boys good to have to rough it a little. Then he said he did not like the way things were going on. He was dissatisfied, and that when he remonstrated, the mother would side with the boy. I think he was perfectly capable of making his will. I saw nothing and knew nothing to render him incapable of making a will. I told you he expressed dissatisfaction with his son. I cannot recall anything else but what I have mentioned. I cannot recall anything else at the time of taking the instructions for the will. Mr. Farquharson indicated to me that he was giving his reasons. Apparently there was nothing that he was keeping back. I had a long interview with him. Testator's brother Peter had died shortly before he gave instructions for the last will. Mr. Farquharson referred to that fact when he was giving instructions for making the will. I do not recall anything of the kind that he said Peter's children were not very well off. I was aware of it but I do not know whether I got it from him or not. In taking these instructions Mr. Farquharson

seemed to fully understand the matter and evidently had given it some thought. None of my suggestions were there at all. They were all his suggestions. He seemed to have a very intelligent idea of what he wanted to do. From the time he first gave instructions to the time the will was executed, was from a fortnight to three weeks, and Mr. Farquharson gave no sign whatever of changing his intentions during that time. There was not the slightest indication by Mr. Farquharson at the time he gave these instructions to make his will, of his having these charges against his wife or son. I had no suspicion of any such thing.

Q. You told us when you drew the last will that he displayed prejudice against his son?—A. I do not infer that from anything he said. I cannot recall anything of the kind. He said his son did not seem inclined to take hold of the earnest business of life, he must have his bicycle and his sports.

A great many authorities were cited as to the effect which a delusion in the mind of a testator may have in avoiding his will. In recent years the law seems to have been re-established more as it was understood before the case of *Waring* v. *Waring* (1), and *Smith* v. *Tebbitt* (2), were decided. These two cases laid down the doctrine that any degree of mental unsoundness however slight and however unconnected with the testamentary disposition in question must be held fatal to the capacity of the testator. But since the case of *Banks* v. *Goodfellow* (3), and *Smee* v. *Smee* (4) a different rule has prevailed, and the rule laid down by Sir James Hannen in the latter case at p. 92 may now be accepted as a safe one to adopt in determining these cases. He says:

The capacity required of a testator is that he should be able rationally to consider the claims of all those who are related to him and who according to the ordinary feelings of mankind are supposed to have some claim to his consideration when dealing with his property as it is to be disposed of after his death. It is not sufficient that the will upon the face of it should be what might be considered a rational will. You must go below the surface and consider whether the testator was in such a state of mind that he could rationally take into

(1) 6 Moo. P. C. 341.
(2) L. R. 1 P. & D. 398.
(3) L. R. 5 Q. B. 549.
(4) 5 P. D. 84.

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consideration not merely the amount and nature of his property but the interest of those who by personal relationship or otherwise had claims upon him.

In the case of *Banks* v. *Goodfellow*,(1) Lord Chief Justice Cockburn in delivering the judgment of a very strong court after reviewing the previous decisions as well as the jurisprudence of other countries, said at p. 565:

It is essential to the exercise of such a power (testamentary disposition) that a testator shall understand the nature of the act and its effects, shall understand the extent of the property of which he is disposing, shall be able to comprehend and appreciate the claims to which he ought to give effect, and with a view to the latter object that no disorder of the mind shall poison his affections, pervert his sense of right or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property and bringing about a disposal of it which, if the mind had been sound, would not have been made.

And again at 569, in commenting upon the judgment of the Privy Council in *Harwood* v. *Baker* (2) he says:

From this language it is to be inferred that the standard of capacity in case of impaired mental power is,to use the words of the judgment, the capacity on the part of the testator to comprehend the extent of the property to be disposed of and the nature of the claims of those he is excluding. Why should not this standard be also applicable to mental unsoundness produced by mental disease? It may be said the analogy between the two cases is imperfect; that there is an essential difference between unsoundness of mind arising from congenital defect or supervening infirmity, and the perversion of thought and feeling produced by mental disease, the latter being far more likely to give rise to an inofficious will than the mere deficiency of mental power. This is no doubt true but it becomes immaterial in the hypothesis that the disorder of the mind has left the faculties on which the proper exercise of the testamentary power demands unaffected and that a *rational will uninfluenced by the mental disorder has been the result.*

In *Jenkins* v. *Morris* (3) it was decided by the Lords Justices in Appeal, as stated in the head-note to the case, that

(1) L. R. 5 Q. R. 549. (2) 3 Moo. P. C. 382.
(3) 14 Ch. D. 674.

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the mere existence of a *delusion* in the mind of the person making a disposition or contract is not sufficient to avoid it even though the delusion is connected with the subject matter of such disposition or contract; it is a question for the jury whether the delusion affected the disposition or contract.

In that case the jury reached their conclusion that the delusion did not affect the capacity of the lessor to grant the lease (there in question) on the intrinsic evidence contained in several letters written by the lessor relating to the farm leased, at or about the time it was leased.

The question to be determined was, as put by Baggally L. J.:

What influence had the insane delusions by which Price (the lessor) was affected upon the particular transaction in respect to which it is alleged that he was incompetent to act? Upon that we have the five letters to which so much reference has been made; those letters were read to the jury, were proved to have had reference to the particular transaction, and from them the jury inferred, and the judge agreed with them, that they afforded abundant evidence that there was not that incompetency on the part of Price to deal with his own affairs which was alleged.

Now I am of opinion that these common sense principles, if applied to the case at Bar, solve the question in dispute. The will was as is shown by the evidence of Mr. King, the solicitor who prepared it and who had been for many years the testator's legal adviser, the latter's "own act entirely." Mr. King says:

In taking these instructions Mr. Farquharson seemed fully to understand the matter and evidently had given it some thought. None of my suggestions were there at all; they were all his suggestions. He seemed to have a very intelligent idea of what he wanted to do.

After the will was drawn Mr. Farquharson took it to read and think over, and brought it back about a fortnight afterwards and executed it. No suggestion is made that any one influenced or tried to influence him. When the will itself is examined it seems to be

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a very fair and rational one, uninfluenced by the mental disorder charged. Here is a man possessing real and personal property of the value of about $65,000 including his furniture. He has a wife and two children nearly of age, and two brothers and a sister, one of the brothers being dead, leaving a family. In 1890, at a time when his mental capacity is not questioned, he made a will leaving to his wife in lieu of her dower, the income of $25,000 for her life, a life interest in one of his houses to be selected by her and his household furniture. To his daughter he gave $200 per annum until she attained 21, and then $10,000 and the balance of the accumulated income thereof. To his son he gave $200 per annum until he attained the age of 24, then to receive the residue of the estate. He left legacies to the amount of $2,000 including $250 to each of his brothers and sisters, and he provided that in case his son died in his lifetime intestate and leaving no issue, the residue should be disposed of as follows: $15,000 to be divided between his brothers and sisters, and the balance between his wife and daughter.

This will be revoked by the one now in dispute in March 1897. By this latter will he gave to his wife, in lieu of dower, during widowhood, the dwelling house in which he resided, which was said to be his most valuable house, and the income of $15,000, also the household furniture absolutely, except the piano which went to his daughter. To his daughter he gave $200 per annum until she attained 21, then $8,000 and the balance of accumulated income, also the piano. To the son he gave $200 per annum until 24 then $5,000 and the balance of accumulated income. $15,000 he left to be divided between his brother and sister and the children of his deceased brother, *and the residue of his estate he divided between his son and his*

daughter. He left legacies to the amount of $250 each to his brother and sister and the children of his deceased brother and other legacies to the amount of $700. His former charitable legacies he reduced from $1,000 to $450. *He appointed his wife co-executor of his will with his solicitor Mr. King, and appointed his wife the guardian of his children;* substantially, with the exception of some small legacies and $15,000 which he gave to his two brothers and his sister, he divided his whole estate between his wife and his son and daughter.

It is this will, making such dispositions as those in favour of his wife and children, that is now attacked on the ground that at the time he made it he was labouring under an insane delusion which dominated and controlled his mind and poisoned and perverted it against his wife and son. So far from the provisions of the will affording any evidence that his mind was tainted, perverted, dominated or controlled by the existence of an insane delusion against his wife and son at the time he made the will, they satisfy me beyond reasonable doubt that such was not the case, but that on the contrary he was in full possession of his faculties, still retained his confidence in his wife whom he appointed both executrix and guardian, made generous provision for both his son and daughter for whom he ought naturally to provide, and a not unreasonable disposition generally of his estate. There cannot be gathered from the provisions of the will the slightest indication of the existence of the "insane delusion" which we are asked to declare existed and which as a consequence would void the will.

Interesting questions might well be argued as to whether under or not the evidence the existence of such a belief as Mr. Farquharson entertained of the relations between his son and wife constituted in law an insane

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delusion. A belief based upon imperfect evidence, or evidence which I might hold altogether insufficient would not constitute an insane delusion. I prefer, however, to relieve the case so far as I am concerned of that inquiry, and to deal with it on the hypothesis that the suspicions which he at first harboured subsequently developed into an unfounded belief which amounted to an insane delusion. The question, however, which we have to decide, is not whether the testator was sane or insane six months after the will was made when he was placed in an asylum, or whether at any time subsequently to the making of the will his suspicions had developed into this insane delusion, tainting, perverting and dominating his mind, but whether that condition existed at the time he gave the instructions on which the will he subsequently executed was drawn. *Perera* v. *Perera* (1). To my mind the evidence as to the circumstances and conditions under which it was made, together with the contents of the will itself, is the best answer that they had not. Is it conceivable that a mind perverted and dominated by the delusion that his wife was guilty of incestous intercourse with his son could have made the reasonable provision for her support and comfort given by the will? Is it conceivable that such a mind could have appointed such a woman as the co-executor of his will and the guardian of his two children, one of them being the very boy with regard to whom he entertained the horrible delusion? Is it conceivable that such a mind should have made such reasonable and liberal provision for this very son, leaving him an annuity till he was 24, $5,000 with accumulated earnings when he reached that age, and after leaving $15,000 to his own sister and brothers, together with a few small legacies, dividing between

(1) [1901] A. C. 354.

his son and his daughter *the residue of his estate?* I frankly say that to my mind it is not. I am willing to admit that during the month of February he showed evidence that this dreadful suspicion had entered his mind. But it had not effected a permanent lodgment there. It appears from time to time intermittently, but was capable, as Mrs. Farquharson in her evidence showed, of being reasoned away. It cropped up conspicuously in the letter of the 25th February, written by him to his daughter. It was again notably absent so far as we can gather when he gave these instructions to his solicitor, a most important if not a controlling date; (see *Perera* v. *Perera*(1)); and while it may have returned for a period, or periods more or less lengthy during the fortnight he had the will which had been prepared in his possession, it must to my mind have been absent when he executed that solemn document. It must be remembered that Mr. Farquharson was not by any means satisfied, apart altogether from the alleged delusion, with the conduct and life of his son, complained that he did not seem inclined to take hold of the earnest business of life, gave up too much time to sports and would not bend his mind in any way to earn his own living, and that in all this his mother encouraged him. As Mr. King says, when giving the instructions for his will,

> he said he would like to do something for his brothers and sister, more than he had done in the former will. And then he gave as a reason that his son did not indicate a desire to enter upon the earnest duties of life, he was not taking life as seriously as he thought he ought to. He feared that leaving him too much money would not be good for him.

All this affords ample and sufficient reason and justification for the change made in the benefactions to the son, without resorting to the harsher, and, in my judgment, unjustifiable conclusion, that testator was insane,

(1) [1901] A. C. 354.

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as the result of a dreadful and horrible delusion with respect to his son and his wife.

Then again it must be remembered that there never was at any time any judicial investigation into the mental condition of Mr. Farquharson in his lifetime. It was true that in the autumn of 1897 he was confined for a few months in an asylum, but no judicial investigation preceded his confinement, nor does it appear that any was sought when, or after, Mrs. Farquharson and his children knew he had made a new will. Such an investigation would without doubt have been immeasurably more efficacious in determining the true condition of his mind at the time when it is necessary we should come to a conclusion upon it than the one held after his death and on the application to prove the will.

Applying to this will, therefore, the different tests laid down by the authorities I have quoted, I am of opinion that it should be upheld. While I agree that the evidence, taken by itself alone, apart altogether from the will, might justify the presumption that at the time it was made the insane delusion had dominated his mind, I am of opinion that the will itself, with its manifestly fair dispositions recognising fully the claims upon him of both his wife and son and vesting in her the powers and responsibilities of an executor and guardian over this very son, is a complete rebuttal of such presumption. It was not only a rational will, that would not be enough, but going below the surface and considering the circumstances and conditions under which it was made, the amount and nature of the property he had to dispose of, the interest of those who by personal relationship had claims upon him, I cannot find anything in it to show me that any disorder of his mind had poisoned his affections, perverted his sense of right, or prevented

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the exercise of his natural faculties, much less that any insane delusion had brought about a disposal of his property which he otherwise would not have made.

The appeal should be allowed with costs to the appellant in this court and in the Supreme Court of Nova Scotia, to be paid out of the estate, and the decree of the Surrogate Judge of the Probate restored.

Appeal allowed with costs.

Solicitor for the appellant: *A Cluney.*

Solicitors for the respondent: *Harrington & Fullerton*

WILLIAM BROWN (PLAINTIFF). .....APPELLANT;

AND

JOHN R. MOORE (DEFENDANT)..... .RESPONDENT.

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*Feb. 18.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Statutory prohibition—Penal statute—Wholesale purchase——Guarantee—Validity of contract—Forfeiture—Nova Scotia Liquor License Act—Practice.

An agreement guaranteeing payment of the price of intoxicating liquors sold contrary to statutory prohibition is of no effect.

The imposition of a penalty for the contravention of a statute avoids a contract entered into against the provisions of the statute.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* (1) reversing the judgment by Graham J., at the trial, and dismissing the plaintiff's action against the defendant Moore, with costs.

The action was against one Jenkins, as principal debtor and the respondent Moore, as surety, under a written agreement to guarantee payment of the price

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(1) 33 N. S. Rep. 381.

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of intoxicating liquors sold by wholesale to Jenkins who carried on business as a hotel-keeper and kept a bar where he sold liquors by retail at Truro, in the county of Colchester, Nova Scotia, without the license required by the Nova Scotia Liquor License Act of 1895, in force in the county of Colchester, at the time of the sale. The trial court entered judgment in favour of the plaintiff for the amount guaranteed, but on appeal by Moore, this decision was reversed by the full court which held that, as the sale had been illegally made without a license, there could be no recovery.

The appeal came on for hearing before the Supreme Court of Canada on the 25th day of February, 1901, but after some arguments on behalf of the appellant. it became apparent that constitutional questions were involved similar to those raised in the appeal then pending before the Judicial Committee of the Privy Council in the case of the *Attorney-General of Manitoba* v. *The Manitoba License Holders' Association* (1), and the court accordingly ordered that further hearing of the present appeal should stand over until the decision of the Manitoba case in the Privy Council. On the final hearing of this appeal, the constitutional questions raised by the appellant were abandoned, the point having been settled by the decision of the Privy Council in the case above mentioned.

J. J. Ritchie K.C. for the appellant. Unless, reading the whole statute, the intention was to strike down the contract altogether, the plaintiff is entitled to recover. Roscoe, *Nisi Prius* (16 ed.) p. 638; Maxwell on Statutes p. 490; Endlich an Statutes, secs. 276, 458; Hardcastle on Construction of Statutes (2 ed.) p. 267. The courts will not be astute to construe an Act so as to avoid a contract or so as to bring it within the prohibition of the statute. The legislature pro-

(1) 13 Man. L. R. 239; [1902] A. C. 73.

vided penalties for sale without license but has not declared the purchase to be illegal. The provisions as to license are primarily for the regulation of the venders' trade and the security of the license fee. The sales guaranteed were not within the provisions of the statute, each sale being of a large amount—thirty gallons or more.

The object of sections 56 and 74 of the statute is to inflict penalties for the doing of the Act in an unauthorized manner and not for the purpose of prohibiting the sale itself. The purchase is not illegal and the purchaser is not subject to penalties. The statute singles out as the object one particular person, or class of persons, and does not declare that contracts involving disregard or breach of its provisions shall be affected with illegality, especially where the effect would be to prejudice honest claims and permit dishonest defences. *Bailey* v. *Harris* (1); *Smith* v. *Mawhood* (2); *Brown* v. *Duncan* (3); *Gremare* v. *Le Clerc Bois Valon* (4); *Wetherell* v. *Jones* (5); *Johnson* v. *Hudson* (6); Addison on Contracts, 99, and cases there cited This is not a statute to prohibit, it is a statute to regulate. *Danaher* v. *Peters* (7). There was nothing illegal in the purchase of the goods and neither party knew that it was necessary to have a license. The court should not declare contracts not expressly dealt with to be avoided by implication. *Waugh* v. *Morris* (8).

The court will not add to the penalties imposed by the statute, a forfeiture of the right to recover on the contract unless it is apparent on the face of the statute that the legislature so intended. *Wright* v. *Horton* (9); *Learoyd* v. *Bracken*; (10). A statute forbidding

(1) 12 Q. B. 905.
(2) 14 M. & W. 452.
(3) 10 B. & C. 93.
(4) 2 Camp. 144.
(5) 3 B. & Ad. 221.
(6) 11 East 180.
(7) 17 Can. S. C. R. 44.
(8) L. R. 8 Q. B. 202.
(9) 12 App. Cas. 371.
(10) [1894] 1 Q. B. 114.

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sales without license and imposing recurring penalties on such sales does not necessarily render the contract of sale void. *Foster* v. *Oxford, etc., Railway Co.* (1).

The Nova Scotia decisions shew that the limitation imposed by the statute is the only one ever recognized. *McGowan* v. *Holden* (2); *Smith* v. *McEachren* (3); *Smyth* v. *O'Neil* (4).

Borden K.C. for the respondent. The sales to Jenkins were illegal, because made in violation of the Act. *Smith* v. *Mawhood* (5); *Melliss* v. *Shirley Local Board* (6); per Bowen L.J. at page 454.

The said goods were sold to Jenkins for resale in the county of Pictou in violation of the provisions of the Canada Temperance Act. *Bensley* v. *Bignold* (7); *Fergusson* v. *Norman* (8); *Tyson* v. *Thomas* (9); *McKinnell* v. *Robinson* (10); *Buck* v. *Buck* (11); *Langton* v. *Hughes* (12); *Cope* v. *Rowlands* (13); *Gallini* v. *Laborie* (14); *Barton* v. *Piggott* (15); *Ritchie* v. *Smith* (16). If the sales were illegal, any guarantee in respect of them is also illegal. *Morck* v. *Abel* (17), per Lord Alvanley C.J. at page 38. If the contract be illegal no action can arise out of it. *Ribbans* v. *Crickett* (18); *Duvergier* v. *Fellows* (19); Decolyar on Guarantees (3 ed.) pp. 34, 210; *The Queen* v. *McNutt* (20).

The judgment of the court was delivered by:

THE CHIEF JUSTICE (oral.)—This appeal as originally taken involved the decision of an important question

(1) 13 C. B. 200.
(2) 15 N. S. Rep. 266.
(3) 9 N. S. Rep. 279; 7 N. S. Rep. 299.
(4) 6 N. S. Rep. 75.
(5) 14 M. & W. 452.
(6) 16 Q. B. D. 446.
(7) 5 B. & Ald. 335.
(8) 5 Bing. N. C. 76.
(9) McC. & Y. 119.
(10) 3 M. & W. 434.
(11) 1 Camp. 547.
(12) 1 M. & S. 593.
(13) 2 M. & W. 149.
(14) 5 T. R. 242.
(15) L. R. 10 Q. B. 86.
(16) 6 C. B. 462.
(17) 3 B. & P. 35.
(18) 1 B. & P. 264.
(19) 10 B. & C. 826.
(20) 33 N. S. Rep 14.

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of constitutional law but that has now been settled by authority of the court of last resort* and does not come before us upon this argument. The only question that remains for us to decide is as to the effect of the provisions of the statute upon the validity of the contract.

It is settled law that contracts entered into in the face of statutory prohibition are void and the prohibition of sales of liquor without license provided by the statute in question has, therefore, the effect of rendering the contract here of no effect.

It is also settled that the imposition of a penalty for the contravention of a statute avoids a contract against the statute.

In the present case, we have both the prohibition in express terms and a penalty provided for.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *H. A. Lovett.*

Solicitor for the respondent: *Charles E. Tanner.*

*REPORTERS' NOTE.—See *Attorney-General of Manitoba* v. *Manitoba License Holders' Association* ([1902] A. C. 73.

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THE COMMERCIAL BANK OF WINDSOR (PLAINTIFF)..... } APPELLANT;

AND

ANGUS J. MORRISON (DEFENDANT)...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Banking—Bills and notes—Conditional indorsement—Principal and agent—Knowledge by agent—Constructive notice—Deceit.

A promissory note indorsed on the express understanding that it should only be available upon the happening of a certain condition is not binding upon the indorser where the condition has not been fulfilled. *Pym* v. *Campbell* (6 E. & B. 370) followed.

The principal is affected by notice to the agent unless it appears that the agent was actually implicated in a fraud upon the principal, and it is not sufficient for the holder to shew that the agent had an interest in deceiving his principal. *Kettlewell* v. *Watson* (21 Ch. D. 685), and *Richards* v. *The Bank of Nova Scotia* (26 Can. S. C. R. 381) referred to.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc*, affirming the judgment of the trial court against the defendant, Morrison, present respondent, and ordering a new trial of issues submitted to the jury by the fourth question and by questions answered by their sixth and eleventh findings at the trial.

The action was for the recovery of the amount of three promissory notes for $1,000, $4,000 and $4,000 respectively, given to the bank as collateral security for the debt of one Smith, and was defended by the respondent, Morrison, an indorser on one of the notes and joint maker with Smith on the others. On the answers to questions submitted to the jury the learned

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trial judge (Graham J.), ordered judgment for the plaintiff to be entered for the amount with interest, of the two first notes, and for the defendant on the last note.

The questions involved on appeals by the plaintiff and by the defendant Morrison from the trial court judgment arose principally upon the findings of the jury on the 3rd, 4th, 5th, 6th, 9th, 10th, 11th, 14th, 15th and 16th questions submitted to them which, with the answers, were as follows:

3rd. Did A. E. Lawson, the agent of the plaintiff bank at Middleton present to George Smith for payment the note for $1,000 sued on herein on or about the 16th day of November, 1897, at the office of the Commercial Bank of Windsor, Middleton?—Ans. No.

4th. Did Morrison put his name on the $1,000 note upon the condition that before it was delivered to Marshall, the agent of the bank, Smith would obtain the additional signature thereon of Robert Smith and that it was not to be used until then?—Ans. Do not agree.

5th. If so, had Stuart Marshall, the agent of the plaintiff bank at Middleton, while he was such agent, knowledge and notice of the said condition?—Ans. Yes, according to evidence.

6th. If he had such knowledge and notice of the said conditions, was it in the course of the business of the said agency at Middleton and at the time or before the said note was delivered to him as such agent for the plaintiff?—Ans. Eight say no.

9th. Did Morrison put his name on the note for $4,000 of 20th February, 1896, upon the condition that before it was delivered to Marshall, the agent of the bank, Smith would obtain the additional signature thereon of C. S. Harrington and that it was not to be used until then?—Ans. Eight say yes.

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10th. If so had Stuart Marshall, the agent of the plaintiff bank at Middleton, while he was such agent, knowledge and notice of said condition?—Ans. Yes, according to Andrew's evidence.

11th. If he had such knowledge and notice of the said condition, was it in the course of the business of the said agency at Middleton and at the time or before the said note was delivered to him as such agent for the plaintiff?—Ans. Eight say no.

14th. Did Morrison put his name on the note of $4,000 of 4th December, 1896, upon the condition that before it was delivered to Marshall, the agent of the bank, Smith would obtain the additional signature thereon of C. S. Harrington and that it was not to be used until then?—Ans. Eight say yes.

15th. If so, had Stuart Marshall, the agent of the plaintiff bank at Middleton, while he was such agent, knowledge and notice of the said condition?—Ans. Yes, according to evidence.

16th. If he had such knowledge and notice of the said conditions, was it in the course of the business of the agency at Middleton, and at the time or before the said note was delivered to him as such agent for the plaintiff?—Ans. Yes, according to the evidence.

The plaintiff's appeal was so far as the third note was concerned and to set aside the 5th, 9th, 10th, 14th, 15th and 16th findings; and that of the defendant, Morrison, as to the first two notes, and to set aside the 3rd, 6th and 11th findings.

On these appeals, the Supreme Court of Nova Scotia dismissed the application of the plaintiff to set aside the 5th, 9th, 10th, 14th, 15th and 16th findings, and confirmed the order as to the third note; it also dismissed the application of the defendant, Morrison, on appeal from the order for judgment of the first two notes and ordered that the 6th and 11th findings

should be set aside, the 3rd of the findings to stand and a new trial of the issues submitted to the jury by the questions answered in the said 6th and 11th findings, and by the 4th question, and that the judgment for the plaintiff for the two first notes should be set aside with costs.

The present appeal is asserted on behalf of the bank against the latter judgment.

J. J. Ritchie K.C. for the appellant. The agent, in order to cover up his breach of duty to the bank in respect to the credit without adequate collateral security, took part in obtaining the note so that he could report to the head office that he held it, and did not disclose its date to the bank. If there was a condition attached, it is evident that the agent must have been a party to it to save himself with the bank for having given credit to such an extent without adequate security, and there is ground for the jury finding as they have done. *Richards* v. *Bank of Nova Scotia* (1); *In re Hampshire Land Company* (2); Bowstead on Agency, p. 335. Under the circumstances the ordinary rule as to constructive or imputed notice, if applicable at all to commercial transactions, does not apply. This is a well recognized exception to the general rule. The agent is party or privy to the commission of a fraud or misfeasance, or irregularity upon or against his principal, and his knowledge of such fraud, misfeasance or irregularity, and of the facts and circumstances connected therewith, are not to be imputed to the principal. It would be a presumption contrary to truth, and which the judge knows to be contrary to the truth. Notice to an agent is not notice to the principal, where it would be quite certain that the agent would not disclose the matter. *In re Fitzroy*,

(1) 26 Can. S. C. R. 381. (2) [1896] 2 Ch. 743.

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Bessemer Steel Co. (1); *Cave* v. *Cave* (2); *Ex parte Oriental Commercial Bank* (3); *Kennedy* v. *Green* (4); *Espin* v. *Pemberton* (5); *Dovey* v. *Cory* (6).

The courts do not now extend the artificial doctrine of constructive or imputed notice, but restrict it, particularly in regard to commercial matters as distinguished from real estate transactions. *Manchester Trust* v. *Furness* (7); *London Joint Stock Bank* v. *Simmons* (8); *Allen* v. *Seckham* (9); *English and Scottish Mercantile Investment Co.* v. *Brunton* (10).

Both on the pleadings and evidence the case has been dealt with on a wrong basis, and the authorities cited in the judgment of Ritchie J. have, therefore, no application. The sole point is whether or not the knowledge of the agent can, by means of the artificial doctrine of constructive or imputed notice, be fastened upon the bank, and this point is not dealt with.

The 9th and 14th findings, in respect to the special agreement or condition, should have been set aside as, in view of the inherent improbability of the evidence, the findings should not stand. The 6th and 11th findings should not have been set aside. The jury had ample evidence from which they could draw the inference that the information was not obtained by the agent in the course of the business of the bank.

Roscoe K.C. for the respondent. In granting a new trial the court had ample power to give judgment on the issues properly found by the jury and to send back the remaining issues improperly found or undetermined for a new trial without ordering a new trial as to all the issues. Order 37, Rule 6, N. S. Jud.

(1) 50 L. T. 144.
(2) 15 Ch. D. 639.
(3) 5 Ch. App. 358.
(4) 3 My. & K. 699.
(5) 3 DeG. & J. 547.
(6) [1901] A. C. 477.
(7) [1895] 2 Q. B. 539.
(8) [1892] A. C. 201.
(9) 11 Ch. D. 790.
(10) [1892] 2 Q. B. 700.

Act. *Nash* v. *The Cunard S. S. Co.* (1); *Marsh* v. *Isaacs* (2); *McGuiness* v. *Dafoe* (3); *Hesse* v. *St. John Railway Co.* (4). Where a material issue is left undetermined by reason of a disagreement of a jury the case must go back for a new trial of that issue. *Imperial Loan Co.* v. *Stone* (5).

The note indorsed for accommodation upon the condition that it should not be used or issued as such until another person became a party thereto as additional surety is at best a mere escrow and not a complete instrument, and a payee or indorsee with notice of such condition cannot enforce payment in default of fulfilment of the condition. Byles on Bills (15 ed.) 113; Chalmers Bills of Exchange (5 ed.) 56; McLaren on Bills (2 ed.) 117; Daniels on Negotiable Instruments (2 ed.) 60; *Bell* v. *Ingestre* (6); *Daggett* v. *Simonds* (7); *Awde* v. *Dixon* (8); *Chandler* v. *Beckwith* (9).

The agency of the bank has no separate existence, as a bank, but simply is agent of the principal and the person in charge is the agent conducting the business of the corporation. *Prince* v. *Oriental Bank Corporation* (10).

Notice to an agent in the course of the principal's business and knowledge of an agent in the course of the principal's business is the knowledge of the principal. *Atlantic Bank* v. *Merchants Bank* (11); *Blackburn, Low & Co.* v. *Vigors* (12); *Boursot* v. *Savage* (13); *Innerarity* v. *Merchants' National Bank* (14); Bowstead on Agency, 335; Byles on Bills (15 ed.) 143. This is so, even if the agent makes representations to his

(1) 7 Times L. R. 597.
(2) 45 L. J. C. P. 505.
(3) 23 Ont. App. R. 704.
(4) 30 Can. S. C. R. 218.
(5) [1892] 1 Q. B. 599.
(6) 12 Q. B. 317.
(7) 173 Mass. 340.
(8) 6 Ex. 869.
(9) 2 N. B. Rep. 423.
(10) 38 L. T. 41.
(11) 10 Gray (Mass.) 532.
(12) 12 App. Cas. 531.
(13) L. R. 2 Eq. 134.
(14) 139 Mass. 332.

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principal at variance with his knowledge and a contract is made on such representations. *Bawden* v. *London, Edinburg and Glasgow Assurance Co.* (1); *Re Weir*; *Hollingworth* v. *Willing* (2).

It was the agent's duty to communicate the circumstances as to the condition on which he held the notes to his principal and the court should hold that he did communicate it. *Kettlewell* v. *Watson* (3), per Frye J. at p. 705; *Allen* v. *South Boston Railroad Co.* (4). It must be made out that distinct fraud was intended in the very transaction so as to make it necessary for the agent to conceal facts from his principal in order to defraud him; *Rolland* v. *Hart* (5); and this must be made out independently of the transaction itself; *Cave* v. *Cave* (6). The mere fact that the agent has an interest in suppressing his knowledge is not sufficient to prevent such knowledge being imputed to the principal if it is the duty of the agent to communicate it. *Thompson* v. *Cartwright* (7); *Bradley* v. *Riches* (8). When a bank acts through an agent the bank must be deemed to know what the agent knows. *Atlantic Cotton Mills* v. *Indian Orchard Mills* (9); *Bank of United States* v. *Davis* (10); *Blackburn, Low & Co.* v. *Vigors* (11); *Barwick* v. *English Joint Stock Bank* (12); *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* (13); *Mackay* v. *Commercial Bank of New Brunswick* (14); *Collinson* v. *Lister* (15); *Re Halifax Sugar Refining Co.* (16); *National Security Bank* v. *Cushman* (17); *Twenty-Sixth Ward Bank* v. *Stearns* (18).

(1) [1892] 2 Q. B. 534.
(2) 58 L. T. N. S. 792.
(3) 21 Ch. D. 685.
(4) 150 Mass. 200.
(5) 6 Ch. App. 678.
(6) 15 Ch. D. 639.
(7) 33 Beav. 178.
(8) 9 Ch. D. 189.
(9) 147 Mass 268.
(10) 2 Hill (N.Y.) 451.
(11) 17 Q. B. D. 553.
(12) L. R. 2 Ex. 259.
(13) 18 Q. B. D. 714.
(14) L. R. 5 P. C. 394.
(15) 7 DeG. M. & G. 634.
(16) 7 Times L. R. 293.
(17) 121 Mass. 490.
(18) 148 N. Y. 515.

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The Chief Justice.

The judgment of the court was delivered by:

THE CHIEF JUSTICE (oral).—The only title that the bank had to the notes in question was through Marshall, its agent, and it is impossible that they can be used by the bank except subject to the terms upon which the notes were delivered to the agent through whom it derived its title. It was known to Marshall that it had been agreed between Morrison and Smith that the notes should be available only upon condition that some other responsible person should also become surety. The agent took the notes subject to this condition and it must be assumed that the bank also agreed to these terms. So far as the pleadings are concerned, they are sufficient to raise this issue. The case is governed by the principle laid down in *Pym* v. *Campbell* (1).

Of course, it has been decided that the principal is not affected where the agent has been guilty of fraud, but it is not sufficient for the bank to show merely that the agent had some interest in deceiving his principal. It must be shown that the agent was actually implicated in a fraud on his principal. Marshall could not have recovered upon the notes if he had sued in his own name as he accepted them conditionally and it is not sufficient to show that he was interested in not communicating this condition to his principal. I refer to the remarks of Mr. Justice Fry in the case of *Kettlewell* v. *Watson* (2), and also to those of Mr. Justice King in the case of *Richards* v. *The Bank of Nova Scotia* (3) decided by this court.

So far as the facts of the case are concerned they are sufficiently settled by the findings of the jury to the questions put to them, except as regards the fourth,

(1) 6 El. & B. 370. (2) 21 Ch. D. 685.
(3) 26 Can. S. C. R. 381.

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sixth and eleventh questions as to which a new trial has been ordered.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. G. Parsons.*

Solicitor for the respondent: *O. T. Daniels.*

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*Feb. 19.

MELISSA McCLEAVE, ADMINISTRATRIX OF THE ESTATE OF DAVID McCLEAVE (PLAINTIFF) ..... } APPELLANT;

AND

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

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Principal and agent—Police constable—Negligent performance of duty—Liability of municipal corporation.

A police officer is not the agent of the municipal corporation which appoints him to the position and, if he is negligent in performing his duty as a guardian of the public peace, the corporation is not responsible.

APPEAL from a decision of the Supreme Court of New Brunswick setting aside a verdict for the plaintiff at the trial and ordering judgment to be entered for the defendant.

The plaintiff kept a hotel in the City of Moncton, N.B., and, in 1899, was convicted by the Police Magistrate of an offence against The Canada Temperance Act which was in force in the city. The conviction was quashed on *certiorari* on the ground that one Belyea, a police

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officer and constable, had laid the information and, afterwards, illegally executed the search warrant issued thereon. The plaintiff brought an action against the city claiming damages for an unlawful entry into his hotel and carrying away liquors therefrom, and for the value of the liquor which was destroyed under the provisions of the Act.

The plaintiff obtained a verdict at the trial with $300 damages. On motion by the defendant to the court *en banc* to have this verdict set aside and a verdict entered for the defendant or, failing that, for a new trial or, failing both, for reduction of the damages, the court ordered the verdict to be set aside and a verdict entered for defendant, holding that the city was not liable for the act of the police officer in executing the warrant issued on his own information. The plaintiff appealed.

Teed K.C., for the appellant, cited *Henly* v. *Mayor of Lyme* (1); *Borough of Bathurst* v. *Macpherson* (2); *Cowley* v. *Mayor of Sunderland* (3); *Mersey Docks Trustees* v. *Gibbs* (4); *Gilbert* v *Corporation of Trinity House* (5); *McSorley* v. *City of St. John* (6).

Chandler K.C. for the respondent. The city did not authorize nor direct the acts of which the plaintiff complains, nor could it legally give any authority to commit such acts. The general principle governing this case is found in *McSorley* v. *The City of St. John* (6). The police officer acted independently as a public officer enforcing a statute and his acts and proceedings were beyond the control of the respondent. A municipal corporation is not liable, where the acts complained of were done by officers

(1) 5 Bing. 91.
(2) 4 App. Cas. 256.
(3) 6 H. & N. 565.
(4) L. R. 1 H. L. 93.
(5) 17 Q. B. D. 795.
(6) 6 Can. S. C. R. 531.

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whose powers and duties were enjoined and granted, for the benefit of the general public, and delegated as a convenient method of exercising a function of general government. *Bailey* v. *The Mayor, &c. of New York* (1); *Main* v. *St. Stephen* (2); *Hill* v. *City of Boston* (3), and cases there discussed; *Buttrick* v. *City of Lowell* (4); *Hafford* v. *City of New Bedford* (5); *Rousseau* v. *Corporation of Levis* (6); *Winterbottom* v. *London Police Commissioners* (7). The maxim "*respondeat superior*" has no application under the circumstances of this case.

The judgment of the court was delivered by:

THE CHIEF JUSTICE (Oral).—We are all of opinion that the judgment appealed from is right and that the proper distinction has been drawn by Mr. Justice Gregory in coming to the conclusion that the city cannot be held liable for the acts of the constable Belyea in his effort to secure the observance of the statute.

In a case cited by Mr. Justice Gregory, *Buttrick* v. *The City of Lowell* (4) Chief Justice Bigelow, in delivering the judgment of the Supreme Court of Massachusetts, whose decisions are justly entitled to the greatest respect, says:

> Police officers can in no respect be regarded as agents or officers of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted are derived from the law, and not

(1) 3 Hill (N. Y.) 531.
(2) 26 N. B. Rep. 330.
(3) 122 Mass. 344.
(4) 1 Allen [Mass.] 172.
(5) 16 Gray [Mass.] 297.
(6) 14 Q. L. R. 376.
(7) 1 Ont. L. R. 549.

from the city or town under which they hold their appointment. For the mode in which they exercise their powers the city or town cannot be held liable. Nor does it make any difference that the acts complained of were done in an attempt to enforce an ordinance or by-law of the city. The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, police officers act in their public capacity, and not as agents or servants of the city.

And again he says:

If the plaintiff could maintain his position that the police officers are so far agents or servants of the city that the maxim "*respondeat superior*" would be applicable to their acts, it is clear that the facts agreed would not render the city liable in this action, because it plainly appears that, in committing the acts complained of, the officers exceeded the authority vested in them by the by-law of the city.

This language is in effect repeated by Dillon in his work on Municipal Corporations (4 ed.) sec. 974, in discussing the applicability of the maxim "*respondeat superior*." He says:

When it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is, whether they are the servants or agents of the corporation * * * * If * * * * they are elected or appointed by the corporation in obedience to a statute, to perform a public service, not peculiarly local, for the reason that this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, if they are independent of the corporation as to the tenure of their office and as to the manner of discharging their duties, they are not to be regarded as servants or agents of the corporation for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the state confers upon them, and the doctrine of "*respondeat superior*" is not applicable.

I quite agree upon the question of fact with the court below that Belyea held his appointment from the corporation for the purpose of administering the general law of the land, and that the wrong complained

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of in this case was not committed by him while in the exercise of a duty of a corporate nature which was imposed upon him by the direction or authority of the corporation merely.

It must, however, be added, in order that there may in future be no misunderstanding as to the effect of this decision, that in respect to torts, the law of Quebec may be quite different and that, therefore, the decision in this case ought not to bind this court in any cases of a similar nature occurring in the Province of Quebec. We have here to apply the common law as to torts as administered by the English courts solely, while in Quebec such matters are governed wholly by the provisions of the Civil Code. I make these observations in consequence of what fell from my brother Girouard during the argument.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *R. W. Hewson.*

Solicitor for the respondent: *W. B. Chandler.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF BEAUHARNOIS.

1902

*Feb. 18,20.

GEORGE M. LOY (RESPONDENT)..... APPELLANT;

AND

JOSEPH EMERY POIRIER (PETITIONER)..... RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF BELANGER AND PAGNUELO JJ.

Controverted election—Trial of petition—Extension of time—Appeal—Jurisdiction.

On 25th May, 1901, an order was made by Mr. Justice Belanger for the trial of the petitition against the appellant's return as a member of the House of Commons for Beauharnois thirty days after judgment should be given by the Supreme Court on an appeal then pending from the decision on preliminary objections to the petition. Such judgment was given on 29th October and on 19th November, on application of the petitioner for instructions, another order was made by the said judge which decided that juridical days only should be counted in computing the said thirty days, stating that such was the meaning of the order of 25th May, and that 6th December would be the date of trial. On the petition coming on for trial on 6th December appellant moved for peremption on the ground that the six months limit for hearing had expired. The motion was refused and on the merits the election was declared void. On appeal to the Supreme Court.

Held, Davies J. dissenting, that an appeal would not lie from the order of 19th November; that the judge had power to make such order, and its effect was to extend the time for trial to 6th December, and the order for peremption was, therefore, rightly refused.

APPEAL from the judgment of Mr. Justice Belanger and Mr. Justice Pagnuelo sitting for the trial of a

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petition against the return of the appellant as a member of the House of Commons for the electoral district of Beauharnois, who on admission by the appellant of the commission of corrupt acts by his agent set aside the return and declared the election void and the seat vacant.

The facts are sufficiently stated in the above headnote and in the judgments given in this appeal.

Béique K.C. and *Brossoit K.C.* for the appellant.

Bisaillon K.C. and *Laurendeau* for the respondent.

THE CHIEF JUSTICE (oral).—The majority of the court are of opinion that this appeal should be dismissed. In so far as it is an appeal from the order of the 18th of November, 1901, we have no jurisdiction to entertain it. It appears that an order was made on May 25th last providing that the trial of this election petition should take place thirty days after judgment was given in an appeal then pending in this court from the decision on preliminary objections to the petition. Judgment was pronounced in such appeal on October 29. Application was then made to Mr. Justice Belanger, the judge of the Superior Court at Beauharnois, who had made the before mentioned order of May 25, asking him to explain whether or not non-juridical days should be taken into consideration, or whether the usual computation should be applied according to which, as provided by the Interpretation Act, first and last days of any delay if non-juridical are not counted but intervening non-juridical days are counted. Mr. Justice Belanger on November 18, made an order explaining his previous order of May 25, by which he directed that all non-juridical days should be rejected in computing the thirty days from October 29, when the judgment of this court

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was given on the appeal from the decision on the preliminary objections. This order it appears to us Mr. Justice Belanger had power to make, and at all events his decision was not one from which the statute gives an appeal to this court. It is provided by the Controverted Elections Act that every election petition shall be brought to trial within six months from the date of the polling. December 6 was fixed by Mr. Justice Belanger as the day for the trial of this petition. That date was beyond the six months so fixed by the Act, but the effect of the order of November 18 was to enlarge the time of trial to the day on which the trial was actually proceeded with.

Therefore upon the ground that the order made by Mr. Justice Belanger of November 18 is not susceptible of appeal to this court as it is neither an appeal from a judgment on preliminary objections nor from a judgment on the trial of the merits of the petition; and on the ground that by the order of the 18th of November the trial was fixed for December 6 by the judge who had power to make such an order; and also for the reason that the motion for peremption made to the trial judges was properly dismissed, and that the judgment on the trial on the merits proceeding on an admission by the sitting member of corrupt acts by agents was right; the appeal is dismissed with costs.

SEDGEWICK, GIROUARD and MILLS JJ. concurred.

DAVIES J. (dissenting).—In my opinion this appeal should be allowed on the ground that the trial took place after the expiration of the six months within which the statute declares the trial of every election petition shall be commenced, and there had not been any enlargement of the time as provided for in its 33rd section.

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Davies J.

Objection was taken to our jurisdiction to hear the appeal, but I think the objection baseless. This court has already decided in the *Glengarry Election Case* (1), that the decision of a judge at the trial of an election petition overruling an objection taken by respondent to the jurisdiction of the judge to go on with the trial on the ground that more than six months had elapsed since the date of the presentation of the petition, is appealable to this court.

That determines the right of appeal here. At the opening of the election court on the 6th December, respondent's counsel moved for peremption of the election petition on the ground that the six months had elapsed and that there had been no enlargement of the time. The court dismissed the motion and proceeded with the trial. There is no dispute as to the fact that on the 6th day of December more than six months had elapsed from the time of the filing of the petition. The only question is whether there had been an enlargement of the time so as to embrace this date, 6th December.

The respondent had fyled preliminary objections to the election petition which were dismissed by the Superior Court in April, 1901. From this judgment he appealed to the Supreme Court of Canada which subsequently dismissed the appeal.

On 22nd May, 1901, after the taking of said appeal to the Supreme Court, the trial of the petition was fixed for the *10th of June*, 1901.

On the 25th day of May, 1901, the appellant presented a motion to the Superior Court alleging that the said appeal had been taken and that it was in the interest of justice that all proceedings in the case should be suspended till after the judgment of the Supreme Court thereon and praying that the com-

(1) 14 Can. S. C. R. 453.

mencement of the trial be continued from the 10th day of June, 1901, to the 30th day after the judgment to be rendered by the Supreme Court, etc.,

au 30e jour après le jugement à être rendu par la Cour Suprême, etc.

The court granted the motion in the following words:

Accorde la dite motion, dépens réservés, et en conséquence ajourne le commencement de l'instruction (trial) de la pétition d'élection en cette cause qui a été fixée au dixième jour de juin prochain, au trentième jour juridique après le jugement à être rendu par la Cour Suprême du Canada, sur l'appel interjeté du jugement rendu par cette Cour le 27 avril dernier, renvoyant les objections préliminaires du défendeur.

(Grants the said motion, costs reserved, and consequently adjourns the beginning of the trial of the election petition in this case which was fixed for the 10th day of June next to the 30th juridical day after the judgment to be rendered by the Supreme Court of Canada, on the appeal taken from the judgment rendered by this court on the 27th April last, dismissing the defendant's preliminary objections.)

The meaning of this order or judgment for the enlargement of the trial is perfectly clear and I understand this court is unanimous in holding that it extends the time till the 29th day of November, that being the 30th juridical day after the judgment of the Supreme Court dismissing the appeal on the preliminary objections was given.

The 30th juridical day meant and could only mean the 30th day after the judgment on which the trial court could legally sit. About this there is no difference of opinion in this court.

On 18th November, 1901, respondent (Poirier) moved the Superior Court suggesting that doubts had arisen as to whether the words, "30e jour juridique après le jugement à être rendu par la Cour Suprême" contained in the judgment of 25th May, 1901, meant the 29th day of November or the 6th day of December, and asking for an interpretation of said judgment on said point.

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The motion was disposed of as follows:

Considering that the court in rendering the said judgment of the 25th of May, 1901, meant that the twenty-nine intermediate days between the pronouncing of the judgment of the Supreme Court and the 30th juridical day fixed for beginning the trial in this cause should be juridical days, that is to say that to arrive at the 30th juridical day after the judgment of the Supreme Court, all the non-juridical days must be eliminated; that it results from this operation, that the 30th juridical day after the judgment of the Supreme Court falls upon and in fact is the 6th of December next; and the court declares that such was its intention in fixing as above the 30th juridical day for the commencement of said proceeding, grants the said motion, costs reserved.

Appellant fyled an exception to this judgment, and at the trial, on December 6, made a motion for peremption on the ground that the trial day, (the 29th November, 1901) having passed the proceedings lapsed, which was dismissed on the ground that the judgment of the 25th of May, 1901, was susceptible of the interpretation put upon it by the judgment of the 18th of November, 1901, and that said interpretation is final.

The substantive question of this appeal is whether this judgment of the trial court was correct or whether the Superior Court by its interpretation judgment of the 18th November, 1901, had further extended the time till the 6th December.

The first branch of the question I do not think open to argument. The order postponed the trial to a day which meant the 29th November and not the 6th December. As to the interpretation judgment, I think it is perfectly clear that it was not intended to enlarge and did not enlarge the time fixed by the previous order. It merely declared what was in the judge's mind when he gave the judgment, but which was something entirely different from what the order or judgment declared. This motion of the 18th November did not purport to be an application for an enlargement of the time under 33rd section of The Contro-

verted Elections Act. It was not made upon affidavit as the section requires. There was nothing in the language of the statute to make it appear to the court or judge that the requirements of justice rendered such enlargement necessary.

All that the judge did or pretended to do upon that occasion was to declare that in rendering the judgment of the 29th May, 1901, the court meant that, in counting the twenty-nine intermediate days;

all the non juridical days must be eliminated, and, that it results from this operation that the 30th juridical day fell on the 6th December, and that such was its intention when it made the first order.

But this interpretation judgment as I have said so far as it pretends to interpret the previous order is clearly wrong. The 30th juridical day did not fall on the 6th December but on the 29th November, and a wrong interpretation cannot alter its legal meaning.

By the express words of the statute the trial of every election petition must be commenced within six months from the presentation of the petition. Under certain defined conditions the time occupied by a session of Parliament intervening may not be counted. If the interests of justice require it a judge may enlarge the time for the commencement of the trial on an application supported by affidavit. But such an enlargement must be actually made and not simply exist in the judge's mind. Whether it has been made or not must be determined by the words and language of the order or judgment given on the application. If any proper application had been made in this case to enlarge the time to the 6th December, and any language had been used in the judgment or order which could possibly be construed so to enlarge it I should be glad under the circumstances to give them full effect, and think we should be astute to find them if possible. But as no such application was made and

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Davies J.

no such enlargement was granted or as it seems to me intended to be granted, I feel myself bound to hold that all the trial proceedings were *ultra vires* and that the appeal should be allowed.

Appeal dismissed with cost.

Solicitor for the appellant: *Thos. Brossoit.*

Solicitor for the respondent: *J. G. Laurendeau.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF RICHELIEU.

1902

*Feb. 18, 20.

JEAN BAPTISTE VANASSE (PETITIONER)..... APPELLANT;

AND

A. A. BRUNEAU (RESPONDENT).....RESPONDENT.

ON APPEAL FROM THE DECISION OF MR. JUSTICE FONTAINE.

Appeal—Controverted election—Judgment dismissing petition.

An appeal does not lie to the Supreme Court of Canada from a judgment dismissing an election petition for want of prosecution within the six months prescribed by sec. 32 of The Dominion Controverted Elections Act (R. S. C. ch. 9).

MOTION to quash an appeal from the judgment of Mr. Justice Fontaine, on the 24th of December, 1901, dismissing, with costs, the petition of the appellant against the return of the respondent as member for the Electoral District of Richelieu in the House of Commons of Canada.

The motion was to quash the appeal for want of jurisdiction in the Supreme Court of Canada to enter-

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tain the same on the ground that the judgment appealed from was merely one dismissing the petition as peremptied, according to the practice in ordinary causes in the Province of Quebec, for want of prosecution within the period of six months as provided by the 32nd section of "The Dominion Controverted Elections Act," (R.S.C. c. 9).

Fitzpatrick, K.C. for the motion.

Bisaillon, K.C. contra.

The judgment of the court was delivered by:

GIROUARD J.—Il s'agit de savoir s'il y a appel à cette cour d'un jugement de la cour du district déclarant périmée la pétition d'élection. Le 9 décembre dernier, le défendeur faisait motion pour péremption et trois jours après le pétitionnaire demandait la fixation d'un jour pour l'instruction de la cause. Le 24 décembre, le juge accordait la première motion et renvoyait la pétition. Il ne s'agit donc pas d'un jugement sur des objections préliminaires ou sur une question de fait ou de droit durant le procès. Or, nous avons décidé en maintes occasions, durant le présent terme même dans les causes de Beauharnois (1) et des Deux-Montagnes, (2) qu'il n'y a appel à cette cour que dans ces deux cas, S.R.C. ch. 9, s. 50. Nous avons décidé la même chose au sujet d'un jugement accordant la péremption dans des circonstances entièrement semblables à celles de la présente cause. *The Quebec County Election Case* (3) and *The Glengarry Election Case* (4).

L'appel est annulé avec dépens.

Appeal quashed with costs.

Solicitors for the appellant: *Brousseau, Ethier & Lefebvre.*

Solicitor for the respondent: *A. A. Bruneau.*

(1) 32 S. C. R. 111.
(2) 32 S. C. R. 55.
(3) 14 S. C. R. 429.
(4) 14 S. C. R. 453.

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*Mar. 3.

RICHARD DALLAS (PLAINTIFF).....APPELLANT;

AND

THE TOWN OF ST. LOUIS (DEFENDANT).....RESPONDENT.

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

Negligence—Personal injuries—Drains and sewers—Liability of municipality—Officers and employees of municipal corporation—59 V. c. 55, s. 26, s.s. 18 (Que.)

The Act incorporating the Town of St. Louis, Que., gives power to the council to regulate the connection of private drains with the sewers, "owners or occupants being bound to make and establish connections at their own cost, under the superintendence of an officer appointed by the corporation."

Held, affirming the judgment appealed from, that the municipality cannot be made liable for damages caused through the acts of a person permitted by the council to make such connections, as he is neither an employee of the corporation nor under its control.

APPEAL from a judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Montreal, and dismissing the plaintiff's action with costs.

The plaintiff's action was for damages sustained by him through alleged negligence of the employees of a property owner, named Niquette, in carrying on blasting operations while sinking trenches to connect his private house-drains with the main sewer of the Town of St. Louis under permits granted by the municipal corporation, according to the provisions of the town charter, 59 Vict. ch. 55, sec. 26, sub-sec. 18 (Que), and the municipal regulations in respect to making such

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connections. The permits were granted on condition that the private owner should conform with the requirements of the law and of the corporation regulations, and that he should be responsible for all damages resulting from the construction of the works which might arise either directly or indirectly against the corporation.

Lafleur K.C. and *Hibbard* for the appellant, cited Smith on Negligence (2 ed) page 40; Tiedman on Municipal Corporations, secs 345, 347; Shearman & Redfield on Negligence (3 ed.) sec. 400; 24 Am. & Eng. Enc. (1 ed.) page 99; *City of Indianapolis* v. *Doherty* (1); *Deane* v. *The Inhabitants of Randolph* (2); *Normandin* v. *City of Montreal* (3); *Gallery* v. *City of Montreal* (4); *Prévost* v. *City of Montreal* (5); *Forget* v. *City of Montreal* (6).

Bisaillon K.C. and *Mignault K.C.* for the respondent were not called upon for any argument.

The judgment of the court was delivered by:

THE CHIEF JUSTICE (oral).—We are all of opinion that this appeal cannot be maintained. We have an elaborate judgment of the Court of Appeal with clear and plain *motifs* in the body of it, and also the notes of Mr. Justice Bossé which show the principle on which the judgment proceeded. It lies upon the appellant to shew that this judgment was wrong. This he has failed to do.

The only ground on which it was sought to make the municipality liable was that Niquette was under its control and that the municipality was responsible for his acts. It appears to us that there was not any such responsibility. The statute under which the

(1) 71 Ind. 5.
(2) 132 Mass. 475.
(3) Q. R. 7 S. C. 278.
(4) Q. R. 8 S. C. 166.
(5) Q. R. 15 S. C. 39.
(6) M. L. R. 4 S. C. 77.

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municipality acted, 59 Vict. ch. 55, sec. 26, s.s. 18 says in so many words that where a landowner desires to connect his private drain with the main drain of the municipality, he may do so at his own cost under the "*surveillance*" of an officer appointed by the corporation. That does not constitute the private owner an employee of the municipality nor under its control.

So far as I can see the judgment appealed from was well founded according to the law of Lower Canada, without resorting to English decisions, which are abundant, or to American or Ontario authorities. If these were referred to there would be still less doubt in the case, but I do not profess to act on any law except that of Quebec, namely, the statute referred to, which requires the "*surveillance*" referred to only in the interest of the municipality in order that the main drain may be protected from injury during the work of connecting the private drain with it and not for the purpose of otherwise controlling the private owner in the work. The reasons to this effect given in the judgment appealed against are, we think, in all respects a correct interpretation of the law.

The conclusion is that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Hibbard & Glass.*

Solicitors for the respondent: *Bisaillon & Brossard.*

WILLIAM PRICE (DEFENDANT)... .....APPELLANT; 1902

AND *Mar. 3, 4.

DAMASE TALON, *ès-qual* (PLAINTIFF) ..RESPONDENT.

ON APPEAL FROM THE COURT OF REVIEW FOR THE PROVINCE OF QUEBEC.

Negligence—Sawmill—Injury to workman—Opening in floor—Fencing—Appeal—Findings at trial—Contributory negligence.

T. was working in a sawmill at a time when the saws were stopped in order to change any requiring to be replaced. One only, the butting saw, was left running, being near the end of a board 12 feet long used to measure the planks before they were cut. While the saws were stopped several of the workmen set on this table, and T. going towards the end to find a seat slipped and fell into an opening in the floor where the deal ends were dropped on being cut off. On slipping he threw out his left arm which came against the saw in motion and was cut off. In an action for damages against the mill-owners the trial judge held that the latter was negligent in not protecting the opening and in not stopping the butting saw with the others. On appeal from the decision of the Court of Review confirming the judgment at the trial:

Held, affirming said judgment, that the want of protection of the opening was negligence for which the owner was responsible.

Held also, Strong C. J. *hesitante*, that if T. was guilty of contributory negligence he was sufficiently punished by a division of the damages at the trial.

Held, per Sedgewick, Davies and Mills JJ. that negligence could not be attributed to the owner from the fact that the butting saw was not stopped with the others.

APPEAL from a decision of the Court of Review sitting at Quebec affirming the judgment of the Superior Court at Montmagny in favour of the plaintiff.

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*PRESENT:—Sir Henry Strong C. J. and Sedgewick, Girouard, Davies and Mills JJ.

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PRICE v. TALON.

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

Stuart K.C. and *Bender K.C.* for the appellant.

Belcourt K.C. and *Martineau* for the respondent.

THE CHIEF JUSTICE (oral).—I had during the argument and still have, a doubt on one point, namely, whether or not the plaintiff had a right to be where he was when the accident happened, and, therefore, whether there was any negligence proved, but I do not think it right to withhold the judgment, and would not do so even though my doubt was much stronger than it is, since four members of the court have made up their minds that the case need not be reserved for consideration.

As regards the point on which I doubt there is a good deal to be said on both sides.

I think the plaintiff was guilty of contributory negligence, but that has been dealt with by the learned judge in assessing the damages according to the rule in the Province of Quebec.

We are all agreed that there was an obligation on the appellants to guard the hole for the protection of persons whose duty required them to pass near it, and it is clear that if it had been fenced or otherwise protected the accident would not have happened.

The appeal is dismissed with costs.

SEDGEWICK J. (oral).—I agree with the judgment appealed from except in its reference to the circular saw. I cannot see that there was negligence in not stopping the saw when the accident happened.

GIROUARD J. (oral).—Assuming that Talon had no business to be where he was, yet he is paying heavily

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for his imprudence as he suffers half the damages. As to the fencing of the hole, one witness at least, Jobin, the provincial inspector, says that he has seen it in several similar establishments. This case is therefore very different from the Corcoran case. Finally the facts in this case were found in the same way by both courts below and on several occasions we have refused to interfere unless they were clearly wrong. In *The George Matthews Co.* v. *Bouchard* (1) we held that we would not interfere where there is some evidence for the jury which is the case here.

DAVIES and MILLS JJ. concurred in the opinion of Mr. Justice Sedgewick.

Appeal dismissed with costs.

Solicitor for the appellant: *A. T. Bender.*

Solicitors for the respondent: *Vidal & Martineau.*

(1) 28 Can. S. C. R. 580.

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*Mar. 7.

HENRY WARMINGTON (PLAINTIFF). APPELLANT;

AND

J. J. PALMER AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Negligence—Work in mine—Entering shaft—Code of signals—Disregard of rules—Damages.

A miner was getting into the bucket by which he was to be lowered into the mine when owing to the chain not being checked his weight carried him rapidly down and he was badly hurt. In an action for damages against the mine owners the jury found that the system for lowering the men was faulty; the man in charge of it negligent; and that the engine and brake by which the bucket was lowered were not fit and proper for the purpose. Printed rules were posted near the mouth of the pit providing among other things that signals should be given, by any miner wishing to go down the mine or be brought up, by means of bells, the number telling the engineer and pitman what was required. The jury found that it was not usual in descending to signal with the bells; and that the injured miner knew of the rules but had not complied with them on the occasion of the accident. On appeal to the Supreme Court of Canada from a judgment setting aside the verdict for plaintiff and ordering a new trial.

Held, reversing said judgment (8 B. C. Rep. 344) and restoring the judgment of the trial judge (7 B. C. Rep. 414), that there was ample evidence to support the findings of the jury that defendants were negligent; that there was no contributory negligence by non-use of the signals the rules having, with consent of the employees and of the persons in charge of the men, been disregarded which indicated their abrogation; the new trial should therefore, not have been granted.

Held further, that as the negligence causing the accident was not that of the persons having control of those going down the mine, it

*PRESENT:—Sir Henry Strong C. J. and Sedgewick, Girouard, Davies and Mills JJ.

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WARMINGTON v. PALMER.

was not a case of negligence at common law with no limit to the amount of damages, but the latter must be assessed under the Employees' Liability Act ([1897] R. S. B. C. ch. 69.)

APPEAL from a decision of the Supreme Court of British Columbia (1), setting aside the verdict for the plaintiff at the trial (2) and ordering a new trial.

The action is brought by the plaintiff to recover damages from the defendant for injuries sustained by the plaintiff in falling down a shaft in the defendant's mine. Damages were claimed under the Employees' Liability Act and also at common law.

The plaintiff was employed at the defendant's mine with five other men working underground, two men being employed working on top, namely, Frank Viles, the engineer, and Edward Prendergast, the foreman, the foreman performing the duties of both blacksmith and topman.

The accident happened on the 7th day of May, 1900, the employer having commenced operations in the mine on the 2nd of May. The work done in the mine antecedent to the 2nd of May had been performed by a man named Prendergast under a contract with the defendants. The same man Prendergast was also, at the time of the accident, employed by the defendants as foreman, topman and blacksmith. The mine was under the superintendence of one Macready. The services of the plaintiff, who had been working for the contractor, were continued by the defendants, so that from the 2nd to the 7th day of May the plaintiff was in the service of the defendants.

No ore, refuse or dirt of any description was being hoisted from the mine at the time of the accident or during that day, and there was only one shift working, namely, the day shift, the mine being only a pros-

(1) 8 B. C. Rep. 344. (2) 7 B. C. R. 414.

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pecting mine, and but few men employed either underground or on top.

The method of hoisting and lowering was by means of the bucket, which was hoisted by an engine. It was a simple drum friction hoisting engine which had been supplied to the company two and a half or three years before the action. It had been recently overhauled, and was in good order in every respect.

The engine was placed about 75 feet from the pit-head. The engineer when directing his engine was facing the pit-head and could see men come up and enter bucket going down. The man in descending stood with his back or his side to the engineer, and could see the engineer if he chose to look.

The brake when the bucket was on top was held in place by a block of wood placed under the end of the brake beam, the block of wood being 6 in. x 8 in. x 12 in. The brake when so held by the block would sustain 300 pounds, and was not intended to hold this weight with the additional weight of a man or men in the bucket. The engineer held the weight of the men by his foot on the other end of the brake-beam, and as many as three men have safely descended by this means.

Certain rules had been provided by the employer for the management and working of the mine, which were sufficiently posted in different parts, in order to give ample notice of their provisions. The plaintiff had read these rules. Among the rules are a set of signals by ringing of bells to the engineer when any man was going down into the mine or coming up. It would appear as if these rules had not received, during the time that the work was being carried on by the contractor, that attention that should have been given to them, and that with respect to the lowering of the men in the shaft they had not been in the habit of

giving the signals required, their custom having been to intimate to the engineer that they were about to descend, thereupon immediately going down.

On the day of the accident the plaintiff came up from the shaft in the performance of his duties, to get powder and fuse. Having supplied himself with the material that he needed he started to go down and on passing through the engine room he gave notice to the engineer, not by ringing the bells as the rules required, but telling him, "I am going down now, Frank."

Having passed through the engine room and given this notice to the engineer that he was about to go down, he walked to the pit-head, and with his back to the engineer put his foot in the bucket, and the engineer not being at his post, his attention being momentarily diverted, the bucket with the man in it went down the shaft. The engineer heard the humming of the machinery and was quick enough to stop the bucket, either immediately that it touched the platform at the bottom of the shaft or shortly before, and possibly saved the man's life, or at least from having any bones broken. The only injury sustained by the plaintiff was from the shock occasioned by the fall.

The following questions were put to and answered by the jury:

1. Were McCready, Viles and Prendergast, or any of them, competent persons to fill the positions which they respectively occupied?—A. Yes.

2. Was the defendant Palmer personally aware of the condition of the engine, hoisting engine and apparatus?—A. Not sufficient evidence to show that he was.

3. Was the system adopted for lowering the men and the machinery used for that purpose fit and proper?—A. System faulty. (See clause 6.)

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4. Was Prendergast negligent in the exercise of his superintendence as topman?—A. Yes.

5. Was Viles negligent in the exercise of his superintendence as engineer?—A. Yes.

6. Was the hoisting engine defective in not having the catches (or at least one of them) which were put on after the accident?—A. Yes.

7. Is the plaintiff's statement that he said to the engineer, "Frank, I am now going down," correct?—A. Yes.

8. Did the plaintiff do anything which a person of ordinary care and skill would not have done under the circumstances, or omit to do anything which a person of ordinary care and skill would have done under the circumstances, and thereby contribute to the accident?—A. No.

9. Was it usual for the miners, when descending from the surface, to signal the engineer by means of the bells?—A. No.

10. If the defendants were guilty of negligence, did the accident result therefrom?—A. Yes.

11. The amount of damages, if any?—A. $4,000.

12. Was the engine and brake then, as a whole, reasonably fit for the purpose for which it was applied?—A. No.

13. Would the accident have been avoided if the plaintiff had exercised ordinary care?—A. No, we believe he did exercise ordinary care.

14. Did the plaintiff voluntarily undertake the employment with the knowledge of its risks?—A. He undertook the employment with the knowledge of an ordinary miner's risk.

15. Was the plaintiff acquainted with the printed rules of the mine including the bell signals?—A. Yes, in a general way.

16. Did he fully comply with the said printed rules on the occasion of the accident?—A. No.

On these findings a verdict was entered for plaintiff, with $4,000 damages. This amount was larger than the sum ($3,000) claimed by the plaintiff in his statement of claim and an amendment was ordered to make the statement conform to the verdict.

The full court set aside the verdict and ordered a new trial. The plaintiff appealed to this court.

Davis K.C. and *Macdonald K.C.* for the appellant.

Clute K.C. for the respondents.

The judgment of the court was delivered by:

THE CHIEF JUSTICE (oral).—This appeal must be allowed.

I think that there is ample evidence of negligence. The only doubt I have is whether or not there was negligence at common law. This is of importance, for if the case is to be regarded as one of negligence at common law, that is, a case in which the negligence was that of the employers themselves, there is no limit to the amount of the damages. But the view seems to prevail that it was the negligence of the persons having control of those going down the mine. The effect of this is to limit the damages to three thousand dollars.

As to contributory negligence, I do not agree with the court below. I think there was none whatever. It was shewn that there was a course of conduct which indicated that the rules had been abrogated. With the consent of the persons having control of the men, and with the consent of the employers, they had been disregarded.

Therefore, non-observance of the rules was not contributory negligence. On the whole I agree with Mr.

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Justice Martin that there was no proof of contributory negligence.

As to the damages, we are all of opinion that they must be treated as damages recovered under the statute and should therefore be reduced to three thousand dollars.

As to costs, as the plaintiff has succeeded on all points raised, except the amount of the damages, we think plaintiff should have his costs as well here as below.

Appeal allowed with costs.

Solicitors for the appellant: *Davis, Marshall & Macneill.*

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

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*March 4.

CHARLES L. HIGGINS (DEFENDANT) ..APPELLANT;

AND

GEORGE W. STEPHENS, JUNIOR (PLAINTIFF) ..... } RESPONDENT

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

Partnership—Account—Action pro socio—Procedure—Art. 1898 *C. C.*

The judgment apppealed from held that in an action *pro socio*, it was sufficient for the plaintiff in his statement of claim to allege facts that would justify an inquiry into all the affairs of the partnership and for the liquidation of the same, without producing full and regular accounts of the partnership affairs.

Held, that the appeal involved merely a question of procedure in a matter where the appellant had suffered no wrong and, therefore, that the appeal should be dismissed.

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*PRESENT:—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills JJ.

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HIGGINS v. STEPHENS.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, reversing the judgment of the Court of Review and restoring the judgment of the Superior Court, District of Montreal, maintaining the plaintiff's action with costs.

The questions at issue upon this appeal sufficiently appear from the judgment reported.

Martin and *Demers* for the appellant.

Atwater K.C. and *Stephens K.C.* for the respondent, were not called upon for any argument.

The judgment of the court was delivered by:

GIROUARD J.—This appeal involves only a point of procedure The question is whether a partner can sue his co-partner for an account in an action *pro socio*, without alleging and producing a full and regular account according to the practice followed in the Province of Quebec.

Article 1898 of the Civil Code says:

> Upon the dissolution of the partnership, each partner or his legal representative may demand of his co-partners an account and partition of the property of the partnership, such partition to be made according to the rules relating to the partition of successions, in so far as they can be made to apply.
>
> Nevertheless, in commercial partnership these rules are to be applied only when they are consistent with the laws and usages specially applicable in commercial matters.

This article leaves a great deal of discretion with the court.

The Superior Court held that the production of such regular and complete account was not necessary, and that, especially under the latter part of article 1898, it was sufficient for the plaintiff to lay statements sufficient to open an inquiry into all the affairs and business of the partnership and liquidate the same. For that reason the court referred the whole case to a

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skilful accountant, to whose competency no exception or objection was taken by either of the parties. This accountant opened a full inquiry, looked into the books of the firm, examined the partners and their witnesses, and finally made a report which deals fully with the whole case. No serious defect, in fact, no defect whatever is alleged against this report. No injustice is shown. The court adopted it, and entered judgment according to its conclusions. In review, the action was dismissed, because no regular account had been offered by the plaintiff before returning his action. In appeal this judgment was reversed by the majority of the court who held that sufficient statements had been produced to do justice to all the parties, and, for that reason, reversed the judgment of the Court of Review and restored the judgment of the Superior Court

This appeal involves only a question of procedure in an action where no wrong or injustice has been suffered by the party appealing.

The appeal is, therefore, dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Demers & Demers.*

Solicitors for the respondent: *Stephens & Hutchins.*

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

AND

THE CITY OF STE. CUNÉGONDE DE MONTREAL (DEFENDANT)..... } RESPONDENT.

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*Feb. 28,
Mar. 1, 3.
*May 6.

THE CITY OF STE. CUNÉGONDE DE MONTREAL (PLAINTIFF IN WARRANTY)..... } APPELLANT ;

AND

THE CITY OF ST. HENRI (DEFENDANT IN WARRANTY)..... } RESPONDENT.

THE CITY OF STE. CUNÉGONDE DE MONTREAL (PLAINTIFF IN WARRANTY) ..... } APPELLANT ;

AND

THE TOWN OF WESTMOUNT (DEFENDANT IN WARRANTY) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH (APPEAL SIDE) THE PROVINCE OF QUEBEC.

Contract—Drainage—Inter-municipal works—Damages—Guarantee—Continuing liability.

The city of Montreal, having a sewer sufficient for all its purposes within its limits and through lands lying on a lower level than those of the adjoining municipalities of Ste. Cunégonde, St. Henri and Westmount, entered into an agreement in writing with Ste. Cunégonde by which the last named city was permitted to connect its sewers with the Montreal sewer in question for drainage purposes, and by the same agreement, the city of Montreal consented that the City of Ste. Cunégonde should allow the two other municipalities to make connections with its sewers, so con-

*PRESENT :—Sedgewick, Girouard, Davies and Mills JJ.

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nected, in such a manner that waters coming from such three higher municipalities should be drained through the Montreal sewer. The privilege was granted on condition that the connection with the Montreal sewer should be made by Ste. Cunégonde at its own cost and to the entire satisfaction of the Montreal engineers; that Ste. Cunégonde should guarantee Montreal against all "damages which might result whether from the connection of said sewers or works necessary" in connection therewith, as well to the City of Montreal as to other persons or corporations, and Ste. Cunégonde bound itself to pay and reimburse to the said City of Montreal all sums of money that the latter might be "called upon and condemned to pay on account of such damages and the costs resulting therefrom." In case of the Montreal sewer becoming insufficient, and its capacity requiring to be increased, or a new sewer constructed, it was provided that Ste. Cunégonde should contribute proportionately to the cost of constructing the new works. The Ste. Cunégonde sewer was accordingly connected, and the other municipalities, upon entering into similar agreements with the City of Ste. Cunégonde, were permitted by Ste. Cunégonde to make connections with its sewers whereby their lands were also drained through the Montreal sewer, the agreements of the two last municipalities binding them as the *arrière-garants*, respecively, of the City of Ste. Cunégonde. In an action by the City of Montreal to recover from Ste. Cunégonde damages which it had been compelled to pay for the flooding of cellars by waters from the sewer in question, the *arrière-garants* were made parties by the principal defendant on demands in warranty:

Held, that the guarantee in question bound the several higher municipalities for all damages resulting not only from the act of making the actual connection of the sewers, but also for damages that might be subsequently occasioned from time to time on account of the user by them of the Montreal sewer for drainage purposes.

Held, also, that, as the City of Montreal had not obliged itself to construct additional or new works within any fixed time in case of insufficiency, the adjoining municipalities were not relieved from any of their liabilities on account of postponement of construction of such works by the City of Montreal.

Held, further, that the judgment awarding damages against the City of Montreal being a matter between third parties and not *res judicata* against the other municipal corporations interested, the said City of Montreal was only entitled to recover by its suit against Ste. Cunégonde, such damages as might be shewn to have resulted

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from the connection and user of the sewers under the agreement; that the City of Montreal, when sued, was not obliged to summon its warrantor into the action for damages, but could, after condemnation, recover such damages by separate action under the contract; that it was not, by the terms of the contract, a condition precedent to action by the City of Montreal, that it should first submit to a judicial condemnation in liquidation of such damages; and that, as between the City of Ste. Cunégonde and the *arrière-garants*, their contracts bound them, respectively, to pay such damages, with interest and costs in proportion to the areas drained by them respectively into the Montreal sewer.

APPEALS by the principal plaintiff, the City of Montreal, from the judgment of the Court of Queen's Bench, rendered on 18th January, 1901, reversing the judgment of the Superior Court, District of Montreal, which had maintained the principal plaintiff's action against the City of Ste. Cunégonde de Montréal with costs, and by the City of Ste. Cunégonde de Montréal from the judgments of the Court of Queen's Bench, on the same date, dismissing the actions in warranty by the said City of Ste. Cunégonde de Montréal against the City of St. Henri and the Town of Westmount, respectively, with costs.

The circumstances under which the several actions were taken, and the issues on the present appeals, are stated in the judgment reported. The appeal was, by consent, heard by four judges.

Atwater K.C. and *Ethier K.C.* for the appellant, the city of Montreal.

Adam K C. and *Mathieu* for the respondent, the City of Ste. Cunégonde de Montréal, on the principal appeal, and appellant on the appeals against the City of St. Henri and the Town of Westmount.

Coderre for the respondent, the City of St. Henri.

Dunlop K.C. and *Macpherson* for the respondent, the Town of Westmount.

GIROUARD J.—Le vaste territoire, qui, aux yeux de l'étranger entrant à Montréal par aucune des lignes

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de chemin de fer ou envisageant le panorama qui se déroule du sommet de la montagne de Montréal, paraît appartenir à une seule et même cité, est réellement gouverné par six ou sept différents corps municipaux formant tous des cités ou villes considérables ayant chacune des milliers d'habitants.

La cité de Montréal, la mère de toutes, est au centre sur le fleuve Saint-Laurent, et par l'étendue de son territoire et de sa population de 267,730 d'après le dernier recensement, commande la situation, les autres villes avoisinantes n'étant que ses créatures de date assez récente, et dépendant d'elle à plusieurs égards. La cité de Sainte-Cunégonde avec une population de 10,912 et la ville de Westmount ayant une population de 8,856, la touchent à l'ouest, la ligne de division n'étant que sur leurs chartes et cartes respectives. Encore plus à l'ouest se trouve la cité de Saint-Henri, ayant une population de 21,192, qui est aussi voisine, au nord, de la ville de Westmount, cette dernière touchant Ste-Cunégonde par un coin, au sud-est. La cité de Montréal, par sa situation inférieure, se trouve assujettie à la servitude de la surface des eaux provenant de toutes ces villes, et comme Westmount occupe un plateau élevé au pied de la montagne, cette servitude est naturellement très onéreuse aux municipalités inférieures de St-Henri, Ste-Cunégonde et Montréal.

Dans ces circonstances, la cité de Montréal, possédant un rayon parfait d'égouts, comprit après quelques contestations en justice, qu'il était de son intérêt de faire des concessions aux villes environnantes tendant à diminuer, sinon à éviter entièrement les dangers de la servitude des lieux et à venir au secours des villes supérieures qui ne pouvaient s'égoutter qu'en passant sur son territoire. Elle fit d'abord un contrat, moyennant considération pécuniaire, avec la cité de Ste-Cunégonde, sa voisine immédiate, particulièrement intéressée non

seulement à l'écoulement de ses propres eaux mais aussi à celles de St-Henri et tout particulièrement de Westmount. Ce contrat fut signé par la cité de Montréal et la ville, depuis la cité de Ste-Cunégonde, le 27 novembre 1885, dans lequel on trouve les stipulations suivantes :—

La cité de Montréal susdit concède et accorde à "La ville de Ste-Cunégonde" ce acceptant, le droit et le privilège de relier ses canaux d'égout avec celui de la dite cité de Montréal, dans la rue St-Jacques (ci-devant Bonaventure), aux conditions suivantes, savoir :—

1. La dite ville de Ste-Cunégonde fera faire à ses frais et dépens tous les ouvrages de liaison et de connexion des dits canaux d'égout sous la surveillance de l'inspecteur de la cité de Montréal ou de ses assistants et à leur entière satisfaction.

2. La dite ville de Ste-Cunégonde sera responsable de tous les dommages qui pourront résulter soit de la connexion des dits canaux soit des travaux qu'elle nécessitera tant à la dite cité de Montréal qu'à toute autre corporation ou personne quelconque, et en conséquence la ville de Ste-Cunégonde promet et s'oblige par les présentes de payer et rembourser à la dite cité de Montréal toutes sommes de deniers que cette dernière pourrait être appelée et condamnée à payer par suite de tels dommages et des frais en résultant.

5. Il sera loisible à la dite ville de Ste-Cunégonde de permettre à la ville de St-Henri et à la corporation du village de la Côte St-Antoine, deux municipalités légalement constituées et avoisinant la dite ville de Ste-Cunégonde, de relier leurs canaux d'égout, avec ceux de la dite ville de Ste-Cunégonde, et partant d'égoutter et assécher les dites municipalités dans et par les dits canaux.....

6. Si le canal construit par la dite cité de Montréal dans la dite rue St-Jacques (ci-devant Bonaventure) venait à être trop petit et d'une capacité insuffisante et qu'il deviendrait nécessaire d'augmenter telle capacité ou d'en faire un nouveau complètement, la dite ville de Ste-Cunégonde sera tenue dans chaque tel cas de contribuer pour sa part à la confection des dits travaux en payant et remboursant sa proportion du coût à la dite cité de Montréal.

Munis de ces pouvoirs, la cité de Ste-Cunégonde, non seulement relia son système d'égouts à celui de la rue St-Jacques de Montréal, aux limites à l'ouest de la cité de Montréal, mais elle fit de pareils arrangements, également moyennant considération pécuniaire, d'abord avec la ville, depuis appelée la cité

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de St-Henri, le 5 juillet 1888, et plus tard, le 13 juin 1890, avec la ville de Westmount, alors connue sous le nom de ville de la Côte St-Antoine. Ces deux derniers contrats contiennent la même stipulation au sujet de la responsabilité pour le paiement des dommages qui pourraient résulter du raccordement des égouts. Comme elle est la base des actions en garantie que nous avons aussi à décider, il vaut peut-être mieux d'en rappeler le texte même. Elle se lit comme suit au contrat avec St-Henri :—

3. La dite ville de St-Henri sera de même responsable de tous dommages qui pourraient résulter soit de la connexion des dits canaux, soit des travaux que telle connexion nécessitera tant à la dite ville de Ste-Cunégonde ou à la cité de Montréal qu'à toute autre corporation ou personne quelconque, et en conséquence la dite ville de St-Henri promet et s'oblige par les présentes de payer et rembourser à la dite ville de Ste-Cunégonde toutes sommes de deniers que cette dernière pourra être appelée ou condamnée à payer par suite de tels dommages et des frais en résultant.

Voici celle qui oblige Westmount :—

2. The said Corporation of the Town of Côte St-Antoine shall be liable and responsible for all losses, damages and costs that may arise either to the City of Montreal, the said Towns of Ste-Cunégonde and St-Henri or to any other person or corporation, from the connection of the said sewers and from the works to be made for that purpose or from any cause whatever resulting from the existence of the said connection of drains, and the corporation of the said Town of Côte St. Antoine do hereby guarantee and promise to indemnify the said Town of Ste. Cunégonde of any amount or sums of money that the said Town may have to pay on account of such damages or of any costs deriving therefrom.

Il nous semble évident que la responsabilité d'aucune de ces municipalités à rembourser des dommages à la cité de Montréal ou à la cité de Ste-Cunégonde, doit résulter " de la connexion des dits canaux."

Pour la première fois, paraît-il, l'égout de la rue St-Jacques devint insuffisant durant le printemps de 1891. La preuve établit, hors de doute, qu'à l'époque où la cité de Montréal permit à la cité de Ste-Cunégonde et

aux deux autres villes de raccorder leurs égouts à celui de la rue St-Jacques, ce dernier était amplement suffisant, et tous les contrats qui furent signés admettent ce fait, puisqu'ils pourvoient au cas où il deviendrait " trop petit et d'une capacité insuffisante." Jusqu'au printemps de 1891, l'égout parût suffisant pour égoutter toutes les municipalités intéressées. Mais à cette époque et pendant quelques années avant, ces dernières avaient toutes introduit un nouveau système de pavage des rues, l'asphalte et un macadam perfectionné et très résistant, qui eut pour effet de doubler et même tripler le volume des eaux de la surface qui arrivaient aux égouts. Voilà la principale cause de l'insuffisance de l'égout de la rue St-Jacques qui s'est toujours fait sentir depuis.

A cette cause, on doit ajouter le développement rapide et extraordinaire que toutes ces villes prirent à la même époque, dans la construction des bâtisses, l'ouverture de rues nouvelles, parcs, etc. En l'année 1891, Montréal avait une population de 216,644, Ste-Cunégonde 9,291, St-Henri 13,413, et Westmount 3,076, Mais ce n'est pas à l'augmentation de la population qu'il faut attribuer les inondations des caves, mais aux eaux de la surface du sol qui ne peuvent s'écouler à raison de l'insuffisance de l'égout de la rue St-Jacques. Elles n'ont lieu en effet qu'aux grands dégels ou abats de pluie, malheureusement trop fréquents dans cette partie du pays à toutes les saisons de l'année.

Ste-Cunégonde a prétendu que, dans ces circonstances, Montréal aurait dû construire un égout additionnel qu'elle fait actuellement construire et que l'on appelle le *Relief Drain.* Mais cette municipalité, pas plus qu'aucune autre intéressée, n'a pas demandé cette amélioration qui va coûter $75,000 à $100,000, et Montréal ne s'est jamais obligée de la faire dans un temps déterminé. Comme l'observe M. le juge Langelier,

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c'était autant la faute de ces municipalités que de Montréal si ce nouvel égout n'a pas été entrepris plus tôt. Par conséquent, elles n'ont pas raison de se plaindre de ce chef.

Durant le mois d'août 1893, le 29, un orage violent, accompagné d'une pluie torrentielle, non imprévue à cette saison, est venu fondre sur cette partie de l'île de Montréal, gonflant l'égout de la rue St-Jacques, ses bouches et même les caves des particuliers. Des dommages, se montant à plusieurs milliers de piastres, s'en suivirent, et en particulier à des épiciers du nom de Vanier et Montpetit. Ces derniers, entr'autres poursuivirent en dommages la cité de Montréal, qui après plusieurs mois, se contenta de dénoncer la poursuite à la cité de Ste-Cunégonde sans l'appeler en garantie, et cette dernière suivit le même procédé à l'égard des villes de St-Henri et Westmount. Après enquête, la cité de Montréal fut condamnée à payer $3,000, intérêt à compter du jour de l'institution de l'action et les frais tant à raison du raccordement des égouts de Ste-Cunégonde que par sa propre faute sans déterminer néanmoins la part dûe à cette dernière cause.

Le juge de la Cour Supérieure devant laquelle la cité de Montréal demanda le remboursement de ce jugement, capital, intérêts et frais (Langelier J.), a jugé que ce jugement n'était pas chose jugée entre la cité de Montréal et la cité de Ste-Cunégonde et condamna cette dernière à rembourser le montant du jugement, en capital, intérêt et frais, moins $200 qu'il déduisit comme étant due à la négligence de Vanier et Montpetit, déduction que la cité de Montréal a acceptée, puisqu'elle n'a pas appelé de ce jugement, soit en tout $3,040.95. Cette somme comprend aussi et avec raison les intérêts, et les frais d'action de Vanier et Montpetit que la cité de Montréal a été obligée de payer,

puisque, par son contrat, la cité de Ste-Cunégonde s'était obligée de rembourser ces frais.

La majorité de la Cour d'Appel, Lacoste J. C., Blanchet et Wurtele JJ., décida que la cité de Montréal n'a pas d'action en remboursement, à moins de produire un jugement constatant que le dommage a été causé uniquement par le raccordement de l'égout, Bossé et Ouimet JJ. différant :—

Considérant qu'aux termes de l'acte du 27 novembre 1885, la ville de Ste-Cunégonde ne s'oblige à indemniser la cité de Montréal des dommages causés à des tiers, résultant de la connexion de ses canaux avec l'égout de la rue St-Jacques, qu'à condition que la responsabilité de la cité de Montréal, relativement à ces dommages, aura été au préalable déterminée par les tribunaux, et qu'elle ne s'oblige en conséquence à rembourser à la cité de Montréal que les sommes de deniers que cette dernière aura été appelée et condamnée à payer par suite de tels dommages et des frais en résultant.

Nous partageons sur ce point l'opinion du juge Langelier et des deux juges formant la minorité de la Cour d'Appel, et nous ne croyons mieux faire que de reproduire leur raisonnement à ce sujet. M. le juge Bossé dit :—

Quand, dit-on, des dommages ont été causés à d'autres qu'à la corporation de Montréal, Ste-Cunégonde n'est tenue de payer que s'il y a eu au préalable, un jugement déclarant Montréal responsable et la condamnant comme telle.

Il s'agit encore là de l'interprétation de la clause du contrat qui se lit comme suit :—

"La dite ville de Ste-Cunégonde sera responsable de tous les dommages qui pourront résulter, soit de la connexion des dits canaux soit des travaux qu'elle nécessitera, tant à la dite cité de Montréal qu'à toute autre corporation ou personne quelconque, et en conséquence la ville de Ste-Cunégonde promet et s'oblige de payer et rembourser à la dite cité de Montréal toutes sommes de deniers que cette dernière pourrait être appelée et condamnée à payer par suite de tels dommages et des frais en résultant."

Qu'est-ce à dire ? Sinon que, aux termes mêmes de cette convention, Ste-Cunégonde sera responsable de tous les dommages qui pourront résulter du fait de la connexion.

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Voilà l'obligation bien définie et bien contractée, et "en conséquence," continue la clause, "Ste-Cunégonde remboursera toutes les sommes que Montréal pourrait être appelée et condamnée à payer."

Cette dernière partie n'ajoute rien à la première, elle n'ajoute rien à l'obligation, et il me parait impossible de l'interpréter de manière à lui faire dire que cette obligation stipulée par la première partie de la clause, ne serait cependant exécutoire que si, au préalable et comme condition précédente, Montréal s'est laisser condamner.

Il aurait été singulier, comme il aurait été sans but, de stipuler que Ste-Cunégonde, tout en se reconnaissant responsable des dommages qui pourraient résulter des avantages que lui assure la connexion des égouts, ne pourrait être appelée à les payer, qu'après leur liquidation dans une action intentée, par la personne qui les aurait souffertes, contre la corporation de Montréal.

Un litige entre tiers ne constituant pas chose jugée, une condamnation contre Montréal n'enlèverait pas à Ste-Cunégonde le droit de contester soit le fait que les dommages ne provenaient pas de la connexion des égouts, soit le montant accordé, soit tout autre considérant du jugement rendu contre Montréal. Et cela aurait pour conséquence d'empêcher tout règlement à l'amiable et de forcer Montréal dans chaque cas, à subir les frais d'une action et d'une contestation,—position anormale que seule une stipulation claire et sans ambages nous permettrait d'adopter.

C'est aussi notre sentiment. Une action en garantie de la part de la cité de Montréal aurait probablement été le procédé le plus sûr, mais comme dans tous les cas de garantie, si la cité de Ste-Cunégonde n'est pas appelée, elle n'est pas libérée de sa responsabilité ; elle reste sujette à une action pour le recouvrement des dommages qui seront prouvés contre elle, et même des intérêts et frais d'action d'après les termes du contrat. On peut même dire qu'il était impossible d'établir la responsabilité de la cité de Ste-Cunégonde dans une action prise par un citoyen de Montréal contre la cité de Montréal, sans au moins prendre l'action en garantie. Les citoyens des Montréal, souffrant des égouts de la cité, n'ont rien à voir aux effets de raccordements accordés par la cité aux municipalités voisines, et voilà pourquoi le jugement rendu en faveur de Vanier et Montpetit ne peut avoir l'autorité de la chose jugée

entre les différentes municipalités, parties aux contrats de raccordement.

L'appel de la cité de Montréal contre la cité de Ste-Cunégonde est donc accordé, et le jugement de la Cour Supérieure rétabli avec dépens devant toutes les cours.

Restent les deux actions en garantie de la cité de Ste-Cunégonde contre la cité de St-Henri et la ville de Westmount, et au sujet desquelles la Cour d'Appel ne s'est pas prononcée, ayant renvoyé l'action principale. M. le juge Langelier considère que la ville de Westmount est seule en faute, car, dit-il

"si ses égouts n'eussent pas été raccordés, il n'y aurait pas eu de dommages."

Cette conclusion est loin d'être établie par la preuve. Il n'est pas prouvé que Ste-Cunégonde et St-Henri, ou l'une de ces villes seule, n'aurait pas pu produire l'inondation qui a causé les dommages. Evidemment ici, l'on entre dans le domaine des incertitudes et des théories. Ce qu'il y a de certain c'est qu'à l'époque de l'inondation, l'égout de la rue St-Jacques était insuffisant pour servir toutes ces municipalités intéressées, et qu'à défaut de négligence particulière de la part de l'une d'elles, il est impossible d'attribuer l'inondation à l'un des raccordements plutôt qu'à un autre. Elle provient certainement du raccordement des égouts des trois municipalités et il est raisonnable et équitable de faire supporter les dommages par les trois municipalités, chacune dans la proportion de la superficie du sol égoutté. C'est cette superficie du sol qui a servi de base à l'estimation de la considération pécuniaire payée pour l'octroi des raccordements. Nous croyons donc devoir diviser ces dommages d'après le plan produit, comme suit : Ste-Cunégonde 72 arpents ; St-Henri 147 arpents, et Westmount 222 arpents.

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Ste-Cunégonde contribuera donc pour $\frac{1}{6}$, ou $506.83; St-Henri $\frac{2}{6}$, ou $1,013.65, et Westmount $\frac{3}{6}$, ou $1,520.47. Les actions en garantie de Ste-Cunégonde contre St-Henri et Westmount sont maintenues dans cette proportion et jusqu'à tel montant, avec intérêt du jour de l'institution de l'action principale, et les frais en cour de première instance. Comme toutes les défenderesses en garantie ont nié la garantie et que la cité de Ste-Cunégonde a également refusé de reconnaître aucune part de responsabilité, nous croyons devoir refuser à toutes ces parties aucun frais tant devant cette cour que devant la cour du Banc du Roi.

Appeal of the City of Montreal allowed with costs; appeals of the City of Ste. Cunégonde de Montréal partly allowed without costs.

Solicitors for the City of Montreal, appellant: *Ethier & Archambault.*

Solicitors for the City of Ste. Cunégonde de Montréal, respondent and appellant: *Adam & Mathieu.*

Solicitors for the City of St. Henri, respondent: *Primeau & Coderre.*

Solicitors for the Town of Westmount, respondent: *Dunlop, Lyman & Macpherson.*

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK (DEFENDANT) ..... } APPELLANT;

AND

WILLIAM MOWAT AND ANOTHER (PLAINTIFFS) ..... } RESPONDENTS.

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*Mar 11, 12, 13.

*May 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Life insurance — Terms of contract — Delivery of policy — Payment of premiums.

A contract of life insurance is complete on delivery of the policy to the insured and payment of the first premium.

Where the insured, being able to read, has had ample opportunity to examine the policy, and not being misled by the company as to its terms nor induced not to read it, has neglected to do so, he cannot, after paying the premium, be heard to say that it did not contain the terms of the contract agreed upon.

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

The action was brought by the plaintiff Mowat for reformation of a policy issued to him by the defendant company or for return of the premiums paid therefor with interest. The facts are stated by Mr. Justice Maclennan in the Court of Appeal as follows:

MACLENNAN J. A.—This action relates to a policy of life insurance on the life of the plaintiff, issued by the defendants, bearing date the 23rd of March, 1891, for the sum of $3,000, in respect of which the plaintiff has paid seven annual premiums of $124.50 each; and the relief sought is that the defendants may be ordered

*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

(1) 27 Ont. App. R. 675.

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to make good certain representations alleged to have been made to him by them, or to refund to him the premiums paid by him with interest. The judgment is for the repayment of the premiums with interest, and the present appeal is from that judgment.

The learned Chief Justice finds that the plaintiff was induced to enter into the contract of insurance by the representation of one Slaght, an agent of the defendants, that the yearly premium payable by him during his life for the insurance would be $41.50 for each $1,000 insured, and that the amount of such premium would not vary; and that the defendants are bound by that representation. He also finds that the defendants are bound by a representation made by one Matson, the general manager for Canada of the defendants, as to the surrender value of the policy. This last representation was contained in a letter of the 2nd May, 1891, written by Matson to Slaght intended to be and in fact communicated to the plaintiff, in which he says: "I fancy Mr. Mowat will not require to call for a paid up policy, or the cash surrender value; however, in order to satisfy him I beg to say that the cash surrender value of the policy at the end of five years should be about $275, paid up policy should be about $500, or extended insurance about four years. This is as near as I can judge without going into lengthy calculations. If Mr. Mowat needs anything further from me direct I shall be pleased to communicate with him."

In March, 1898, the defendants refused to renew the policy for another year, without an increased premium of $155.63, and refused a tender of the former rate of $124.50. They also refused to issue a paid up policy, or to pay anything for a surrender of the existing one. Thereupon the plaintiff brought his action on the 5th July, 1898.

The application for the policy was signed on the 20th of March, and the policy is dated on the 23rd of the same month, but it was not delivered to or accepted by the plaintiff until some time after the 2nd of May. In the meantime there had been discussion and correspondence on the subject between the plaintiff and the agents, culminating in the letter of the 2nd May written by the agent Matson already referred to. The application was sent forward by Mr. Slaght to Matson in a letter dated the 18th of April, and along with it was enclosed a slip written by the plaintiff asking, as the writer says, for a statement to be attached to his policy shewing the surrender values at the end of the fifth and subsequent years. This slip has not been produced, but the plaintiff in his evidence states the substance to have been, as near as he can remember it, as follows: "The agent of your company, Mr. Slaght, has called upon me with the view of inducing me to effect insurance in your company, and he states at my age, 60, the premium per thousand dollars would be $41.50 per year, that at the end of five years Mr. Slaght states that there will be a large increase in cash value, a large increase of extended insurance value and a large amount of paid up policy."

He adds that perhaps he made a mistake in using the word "*increase*," "a large amount of cash value, large amount of insurable value and extended insurance, without naming any definite amount, and that if I continued my policy the amounts would increase."

He adds: "And I said that if so, if these statements are correct, then I will take a policy for $2,000, and I will insist upon getting a statement in writing to be attached to the policy, setting forth the value of the policy at the end of five years, ten years and so forth."

He says further that in the slip it was stated that the length of time the $41.50 was to be paid was for

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life. This slip or memorandum was sent with the application to Mr. Matson, and was probably also sent by him to the head office of the company in New York. The only response to it, however, came from Mr. Matson in a letter of the 20th of April, in which he states the great difficulty of estimating the cash value at the end of five years and the paid up value, etc., and adding: "We will issue the policy in the meantime, send it to our Mr. Slaght, and I think you will find the conditions to your satisfaction."

The plaintiff answered this by letter on the 22nd April, in which he says: "My intention is to take the $3,000 policy (instead of $2,000 as had been talked of) and you can therefore fill out one for that amount. As for my wanting to know the cash value and paid up value of the policy at, say five years, if you give an approximate that will do."

The policy was accordingly prepared and sent to Slaght by Matson on the 29th April and saying he would rather not make estimates of surrender value, &c, but would try to frame something to suit the plaintiff. The letter of the 2nd May followed and the plaintiff says these letters "to some extent, to a great extent" met his requirements, and he paid the premium. He says he attached the letters of the 20th April and 2nd May to the policy and filed them away.

There is no reference in the letters to the premium as being a fixed rate for life or otherwise. The plaintiff says he got nothing in writing on that subject but took it for granted that in that respect the policy was right.

The application, which is signed by the plaintiff and a copy of which is indorsed upon the policy, so far as material is as follows: "I hereby apply to the Provident Savings Life Association Society of New York for an insurance of $3,000 payable after my death

upon the L. R. renewal term plan, with surplus left with company to keep premiums level; participating premiums payable annually; on behalf of and for the benefit of Jane Mowat, my wife."

And the application has indorsed upon it the following note: "Please note fully the kind of policy desired, as for instance, renewable term with participating premiums (largest annual dividends) or renewable term with surplus applied towards keeping the premiums level (L. R.) or ten or twenty years renewable term, &c."

By the policy, the company, in consideration of the stipulations and agreements in the application therefor and upon the next page of the policy, all of which are part of the contract, and in consideration of $124.50, being the premium for the first year, promises to pay Jane Mowat $3,000 within sixty days after acceptance of satisfactory proofs of the death of W. Mowat, provided such death shall occur on or before the 23rd of March, 1892. And the said society further agrees to renew and extend this insurance, upon like conditions, without medical re-examination, during each successive year of the life of the insured from date hereof, upon the payment on or before the 23rd day of March in each year of the renewal premiums in accordance with the schedule rates less the dividends awarded thereon. The second page of the policy contains, among other things, a schedule of yearly renewable rates of premium required to renew each $1,000 of insurance. The schedule gives the rate for renewal, for all ages from 16 to 60, being that paid by the plaintiff. It is stated, however, that no policy is issued at an age higher than sixty years, and that schedule rates on the same basis as above for renewal above that age, subject to reduction by dividends, will be furnished on request. The second page of the policy

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also contains a stipulation for applying the premium income of the company, after deduction for expenses and death claims, towards off-setting any increase of premium on the policy from year to year, or under certain circumstances after five years, towards extending the insurance, or if applied for to purchase paid up insurance.

There is also a stipulation that no agent "is or will be authorized to make, alter or discharge this contract, or to waive any forfeiture thereof, or to extend this insurance, or to grant permits or to receive for premiums anything but cash."

On these facts His Lordship was of opinion that the appeal should be allowed and the action dismissed. The majority of the court took a different view and dismissed the company's appeal. This appeal was then taken to the Supreme Court.

Marsh K.C. for the appellant.

Riddell K.C. and *Harding* for the respondents.

TASCHEREAU J.—As to the facts of this case I refer to the judgment of Mr. Justice Maclennan in the Court of Appeal, as reported in 27 Ont. App. Rep. 675-894, for a full statement thereof, the accuracy of which has not been questioned. As to the law and the principles which should govern the solution of the controversy between the parties, I am of opinion that the view taken by that learned judge is also the correct one, and I adopt his reasoning in its entirety.

However, in addition to his remarks, the importance of the case imposes upon me the duty of expressing my independent opinion upon the main question that it presents.

I premise the observation that this is a class of cases where the rule cannot be too often recalled to

attention that general expressions in every judicial opinion are to be taken in connection with the facts in reference to which those expressions are used. If that rule had not been lost sight of, the respondent would probably not have placed so much reliance upon the case of *The Liverpool and London and Globe Insurance Company* v. *Wyld et al.* (1), as he did at the argument. I will refer again to that case later on.

The policy in question, it is conceded, is strictly in accordance with the respondent's written application. And, by its express terms, it is that application, as printed upon it, that forms part of the contract. So that, as the memorandum in question does not form part of the application that is printed upon the policy, it does not form part of the contract. It is because it so appears by the policy not to form part of the contract that the respondent asks by his statement of claim, as originally drawn, (in the nature of an action for specific performance, *Gray* v. *Fowler* (2)), that the contract be enforced with the conditions contained in that memorandum, recognising, as he always had in the correspondence before action, the policy as a subsisting contract. However, any technical difficulty in relation to the pleadings is removed by the amendment allowed in the Court of Appeal. That amendment reads as follows:

16. And, in the alternative, the plaintiff alleges as follows, that is to say:

A. That he applied to the defendant company for a policy of insurance upon his life at an uniform rate of premium for his life, that is to say, premium $\$124\frac{50}{100}$ per annum.

B. That the defendant company upon receipt of such application sent to the plaintiff the policy of insurance which is mentioned in the previous part of this statement of claim without any intimation to the plaintiff that it varied in terms from the plaintiff's application and proposal, and the plaintiff believed that the said policy was in accord with

(1) 1 Can. S. C. R. 604. (2) L. R. 8 Ex. 249.

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his application and proposal, and only discovered the contrary upon the demand for increased premium being made upon him in March, 1898, as hereinbefore set forth.

C. The plaintiff did not accept the said policy of insurance as so issued and sent to him.

D. The plaintiff paid to the defendant the sum of $124.50 in each of the years 1891, 1892, 1893, 1894, 1895, 1896 and 1897, which payments were without consideration and should be returned to the plaintiff with interest thereon.

E. The said payments were made under mutual mistake of fact.

See *Fowler* v. *Fowler* (1); *Hearne* v. *Marine Insurance Co.* (2).

It is exclusively upon the question of the amount of premium that is based the judgment appealed from in favour of the respondent.

As remarked by Mr. Justice Maclennan:

> The case is simply this: The plaintiff signs an application and with it another paper requiring certain assurances, and that he desired the premium to be a fixed rate for life. The application and the additional paper were sent forward to the general agent and company; a correspondence ensued, and he says the letters he received "to a great extent met my requirements and I gave a cheque for the amount." There was not a word in the correspondence about the rate of premium, and the company prepared and sent him a policy, not according to the slip, but in accordance with the signed application. He accepted it, paid the premium, and continued to do so without question for seven years.

I doubt very much that the memorandum contained anything in reference to the premium. We have only the respondent's own uncorroborated assertions for it, and no cases have been cited at bar in which a written document has been cancelled upon such slight and unsatisfactory evidence as is to be found in the case. However, assuming that the material facts are as alleged by the respondent, and that he did not get the policy he, at one time, might have expected from the company, I do not think that he can succeed in this action.

(1) 4 DeG. & J. 250. (2) 20 Wall. 488.

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It is not disputed that he had ample opportunity, several times during several days, to read his policy before paying the first premium. Neither can it be contended that the company did anything whatever, when delivering the policy, or at any time during the seven years, to mislead him or to put him off his guard, or to induce him not to read it. They had no reason whatever to believe that he would not read it. And, if he did not read it he has no one but himself to blame. As an inference of fact, from the facts proved, I find that he acted with gross carelessness. And a court of equity will not, it is trite to say, any more than a court of law, relieve anyone from the consequences of his own carelessness. *Mackenzie* v. *Coulson* (1); *Grymes* v. *Sanders* (2); *Pope* v. *Hoopes* (3). "*Vigilantibus non dormientibus subvenit lex.*" By the judgment *a quo*, he has benefited from his careless act. He has been insured gratis for seven years. If he had died during that period his wife would have got $3,000 from the company. Yet the company is ordered to return him the premiums.

His contention that he was justified in trusting that it was what he had previously bargained for that the company handed him is met by the most salutary rule, that parol negotiations leading up to a written contract are merged in the subsequent written instrument, which is conclusively presumed, in the absence of fraud (and none is found here), to contain the entire engagements of the parties, and by which alone their intentions are to be ascertained. *Carroll* v. *The Provincial Natural Gas and Fuel Company of Ontario* (4), and the cases there cited; *Inglis* v. *Buttery* (5).

And if, in the course of making a contract, one party delivers to another a written document, and the party

(1) L. R. 8 Eq. 368.
(2) 93 U. S. R. 55.
(3) 90 Fed. Rep. 451.
(4) 26 Can. S. C. R. 181.
(5) 3 App. Cas. 552.

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receiving the paper knows that the other party hands him the document as the contract between them, then the party accepting the document and keeping it assents to the conditions it contains, and agrees that the contract is as expressed therein, although he does not read it and does not know what they are. *Van Toll* v. *The South Eastern Railway Company* (1); *Lewis* v. *McKee* (2); *Parker* v. *The South Eastern Railway Company* (3); *Watkins* v. *Rymill* (4); *Coombs* v. *The Queen* (5); *Burke* v. *The South Eastern Railway Company* (6).

When the company handed this policy to the respondent they said to him, the law speaking for them, as in *Parker* v. *The South Eastern Railway Company* (per Bramwell L. J.) (3).

> Read—Examine. Be careful, for never mind what we or you may have said previously, we accept your application to insure you, but we cannot give you any other policy but this one, and in that document alone is contained the contract between us; pay the first premium only if you are satisfied with it. If you accept it without reading it, you will not be allowed to contend hereafter that it does not correctly express the contract between us. Whatever is not found therein will be understood to have been reciprocally waived and abandoned.

He thereupon paid the premium. Then, and then only, was the contract formed. Then only was the respondent insured. All that had passed previously was preliminary. No final contract was intended until this payment. *Canning* v. *Farquhar* (7); *MacKenzie* v. *Coulson* (8); *London and Lancashire Assurance Company* v. *Fleming* (9); *The Canadian Fire Insurance Company* v. *Robinson* (10); *Parker* v. *The South Eastern Railway Company* (3).

(1) 12 C. B. N. S. 75.
(2) L. R. 4 Ex. 58, 61.
(3) 2 C. P. D. 416, 421.
(4) 10 Q. B. D. 178.
(5) 26 Can. S. C. R. 13.
(6) 5 C. P. D. 1.
(7) 16 Q. B. D. 727.
(8) L. R. 8 Eq. 368.
(9) [1897] A. C. 499.
(10) 31 Can. S. C. R. 488.

If he had signed at the foot of the policy "I agree to the conditions and stipulations aforesaid," he would not have had the right subsequently to be released from his contract simply upon the ground that he had not read it. Now, that is what he implicitly did, and must be held to have done. He said, in effect, by accepting the policy offered to him as his only contract with the company, "I assent to the terms contained therein, whatever they may be." *Stewart* v. *London and North Western Railway Co.* (1).

That the defendant did not read the charter and by-laws, said the United States Supreme Court, in *Upton* v. *Trebilcock* (2), if such were the fact, was his own fault. It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it. If this were permitted contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract, and, if he will not read what he signs, he alone is responsible for his omission.

As said by Gibson C.J. *In re Greenfield's Estate* (3);

If a party who can read will not read a deed put before him for execution * * * he is guilty of supine negligence, which, I take it, is not the subject for protection, either in equity or at law.

And in appeal, Bell J. said:

The general rule is that a party executing a legal instrument is presumed to be acquainted with the contents * * * the authorities show that, usually, if one who is about to execute an instrument can read it, and neglects to do so * * * he will, (in the absence of fraud or deceit,) be bound to it, though it turn out to be contrary to his mind.

And an old case is cited from Skinner, 159, where a lessee who could read, having signed a lease for one year, believing it to be for twenty-one years, as previously agreed upon with the lessor, was refused relief in equity "because, being able to read, it was his own folly." These, no doubt, were cases of sealed instru-

(1) 3 H. & C. 135, 139. (2) 91 U. S. R. 45, 50.
(3) 14 Pa. St. 489-496.

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ments, but besides the special rules that govern such documents, there are, in these decisions, a common sense reasoning which I would apply to the facts of this case.

In the case, (not cited at bar,) of *Mackenzie* v. *Coulson* (1), the insurers had filed a bill for the rectification of the policy, so as to make it conformable to that which they said was the real contract, in proof of which they produced in evidence a slip which had been signed when the insurance had been applied for. By that slip, the insurance was "free from particular average." By the policy, it was not; the insurers taking it for granted that it was drafted in accordance with the slip, had signed it without reading it. The insured denied that they had ever entered into any contract other than expressed by the policy. It was held that as the slip formed no contract, there was no binding agreement between the parties until the policy was signed and the premium paid; and the bill was dismissed. Said the Vice Chancellor:

> If all the plaintiffs can say is, we have been careless * * * it is useless for them to apply for relief.

That case, though the converse of the present one as to the party impugning the policy, cannot, it seems to me, be distinguished.

If here, it were the agent of the company, under orders from headquarters, who had said to the respondent that to his application they would attach a memorandum to the effect that the company reserved to themselves the right to increase the premiums in accordance with their rules, and if the policy, as drafted, had not reserved that right, but had been signed without being read and issued under the belief that it did, and the company had asked a reformation of their policy upon the ground that it was not drafted

(1) L. R. 8 Eq. 368.

in accordance with what they believed it to be when they issued it, or a cancellation of it upon the ground that they had not consented to make the contract evidenced by it, they could not have succeeded if that case of *Mackenzie* v. *Coulson* (1) is law; and I am not aware that it has ever been questioned.

In the much litigated case of *The New York Life Insurance Co.* v. *Macmaster* (2); (see also *Graves* v. *The Boston Marine Ins. Co.* (3); *Travellers Ins. Co.* v. *Henderson* (4); *Chicago, etc., Railway Co.* v. *Belliwith* (5); *Quinlan* v. *Providence Washington Insurance Co.* (6); *Insurance Co.* v. *Mowry* (7); *McConnell* v. *Provident Savings Life Assur. Soc.* (8); the agent of an insurance company had told the insured at the time of taking the application that his policy would give him thirteen months insurance upon the payment of the first annual premium, but the policy subsequently issued by the company did not do so. Upon an action to reform the policy, so as to make it read in accordance with what the agent had said, it was proved that the insured had accepted his policy without reading it.

But, said the court, customary negotiations for insurance do not constitute a contract where there is no intention to contract otherwise than by a policy made and delivered upon payment of the first premium * * * It was his duty to read and know the contents of the policies when he accepted them. It is true that the evidence is that he did not read them, but the legal effect of his acceptance is the same as if he had read them. He had the opportunity to read and to learn their contents, and, if he did not, it was his own gross negligence and no act of the insurance company or of its agent that concealed them and misled him as to their effect. The statement of the agent fourteen days before the deceased received the policies, that they would insure him for thirteen months from the payment of the first premium, was not a statement of an existing fact. It was not calculated to impose upon him, or to prevent him from reading his policies

(1) L. R. 8 Eq. 368.
(2) 87 Fed. Rep. 63; 90 Fed. Rep. 40, and 99 Fed. Rep. 856.
(3) 2 Cranch 419-444.
(4) 69 Fed. Rep. 762.
(5) 83 Fed. Rep. 437.
(6) 133 N. Y. 356 at pp. 364-365.
(7) 96 U. S. R. 544.
(8) 92 Fed. Rep. 769.

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and learning for himself whether this promise had been kept or broken. It was not a fraudulent representation, because fraud never can be predicated of a promise or a prophecy. Neither the company nor its agent, therefore, made any representation or promise, or used any artifice or deceit to prevent the insured from learning the terms of his policies. Their contents were not concealed. They were not misrepresented. The deceased must accordingly be conclusively presumed to have known their terms when he accepted them. If one can read his contract, his failure to do so is such gross negligence that it conclusively estops him from denying knowledge of its contents, unless he was dissuaded from reading it by some trick, artifice or fraud of the other party to the agreement.

That case is not a binding authority upon us, but its reasoning seems to me to be unassailable. It is based upon principles which, in the interest of the business community, courts of justice should everywhere apply to transactions of this character. Undoubtedly, the wholesome rules that it lays down must sometimes yield to circumstances, but, not to apply them to the facts of this case would be to seriously impair their efficiency and reduce to very narrow limits indeed the possibility of their application.

Since the argument, I have noticed that the United States Supreme Court have reversed the decision in that *MacMaster Case* (1). But the court exclusively based its conclusions, first, upon the fact that the agent of the company had inserted material words in the application, after it had been signed, without applicant's knowledge; secondly, upon the fact that the agent of the company, when delivering the policy, had deliberately put the insured off his guard and induced him not to read it by the express assertion, in answer to the insured, that the policy was in the terms agreed upon. Had it not been for these two facts, to which sufficient weight had not been given in the lower courts, their judgment against the plaintiff's conten-

(1) [1901] 22 S. C. Rep. 10.

tions, as I read Chief Justice Fuller's opinion, would have been sustained by the Supreme Court.

I refer to the case of *Leigh* v. *Brown* (1), where it was held that:

Where a policy of life insurance which was duly delivered to an applicant differed in any material respect from the kind of policy for which he had contracted, it was his duty, if he did not desire to retain and accept the policy received by him, to return the same within a reasonable time to the company and, upon his failing to do, the applicant could not avoid paying a promissory note which he had given for the first premium.

And to *Reeve* v. *The Phœnix Insurance Co.* (2), holding that the insured is bound by all the conditions clearly written or printed in the body of the policy. Having accepted and taken possession of the policy he is presumed to know all its clauses and provisions. If the insured did not examine the policy, it has been his own fault.

The cases relied upon by the respondent are clearly distinguishable. In the case of *Bate* v. *The Canadian Pacific Railway Co.* (3), (see Burton J. in 15 Ont. App. R. at page 402), the ticket issuer, as remarked by the Chief Justice, in *Coombs* v. *The Queen* (4), had induced the purchaser into error, and this court held that she, having relied upon the statement of the ticket issuer not to read the contract, she could not be held to have been negligent in not reading it. In the case of *Henderson* v. *Stevenson* (5), the House of Lords' holding is, in effect, that there was no evidence of any other contract than that appearing upon the face of the ticket, and that the ticket-holder could not reasonably be held to have known that the ticket contained the special condition that the company were not to be liable for losses of any kind or from any cause.

In *Richardson, Spence & Co.* v. *Rowntree* (6), all that the House of Lords determined is that, upon the

(1) 99 Ga. 258.
(2) 23 La. An. 219.
(3) 15 Ont. App. R. 388; 18 Can. S. C. R. 697.
(4) 26 Can. S. C. R. 13.
(5) L. R. 2 H. L. Sc. 470.
(6) [1894] A. C. 217.

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evidence given at the trial, the jury could properly find that the plaintiff had in fact no notice of the conditions upon which the company claimed exemption from liability. Then these ticket cases have no application. As remarked by Mr. Justice Maclennan:

> The case of a formal instrument like the present, prepared and executed, after a long negotiation, and correspondence delivered and accepted, and acted upon for years, is wholly different from the cases relating to railways and steamship and cloak-room tickets, in which it has been held that conditions qualifying the principal contract of carriage or bailment, not sufficiently brought to the attention of the passenger or bailor are not binding upon him. Such contracts are usually made in moments of more or less haste and confusion and stand by themselves.

As to the case of *The Liverpool and London and Globe Insurance Co.* v. *Wyld et al.* (1), it is clearly distinguishable. In that case the fire insurance company had by their interim receipt entered into contractual relations with the insured and they thereby became legally bound to issue a policy in accordance with the provisions of the interim receipt, and, when they did issue their policy, the insured was entitled to assume that they had conformed to their legal obligation, and, therefore, there was no negligence on the part of the insured in not examining the policy. The interim receipt was, by itself, a written contract, and the premium had been paid upon its being issued, the insured had become insured from that date, and the insurers had contracted to issue a policy in accordance with the interim receipt, or if not, at their will, to refund the premium. They did issue a policy, but it was not in accordance with it. The interim receipt, therefore, was the only document evidencing the real contract. The premium had been paid, not for the contract contained in the policy, but for the contract contained in the interim receipt. Here there was no contract

(1) 1 Can. S. C. R. 604.

between the appellants and the respondent before the delivery of the policy and the payment of the premium. The respondent was not insured till then, and the appellants had not contracted to insure him. They had till then the right to arbitrarily refuse to insure him.

That case would bind us here, if an interim receipt, upon payment of the first premium, had been issued upon the respondent's life, as had there been upon the insured property. But it is not so. The only contract between the parties was formed when the policy was accepted and paid for by the respondent.

As to the other grounds of the respondent's action, upon which the majority of the Court of Appeal did not have to pass, that the appellants, by their agents, falsely represented to him that at the end of five years the policy would have a large amount of cash value, large amount of insurable value, and value for extended insurance, I need not do more than refer to the opinion of Mr. Justice Maclennan thereupon in the last paragraph of his remarks. It is upon the question of premium that the respondent mainly rested his case at the argument here.

I would allow the appeal with costs and dismiss the action with costs.

SEDGEWICK and GIROUARD JJ. concurred.

DAVIES J.—I have reached the conclusion that this appeal should be allowed for the reasons stated in the Court of Appeal by Mr. Justice Maclennan. I desire, however, to add a few observations. It was agreed by Mr. Riddell, who argued the appeal for the respondent, that, if Mr. Mowat accepted the policy, he was bound by it, but he relied upon *Wyld's Case* as showing that he did not accept it and was not bound to

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read it. I think *Wild's Case* clearly distinguishable, because, in that case, there was a pre-existing contract arising out of the payment of the insurance premium and the giving of the receipt therefor. The subsequent policy was supposed to be a carrying out of this contract and the plaintiff had a right to assume it conformed to the contract already made out and was not bound to read the policy so to ascertain.

But, in the case of a life policy, such as this, it is entirely different. There never was any payment of the premium made or any contract existing until the payment of the premium by the plaintiff at or after the receipt of the policy by him, and after he had all the time and opportunity for its inspection he desired. This payment and the acceptance of the policy constituted the contract. All that went before were mere negotiations. Even if the policy did not comply with all the plaintiff desired and applied for, still as it was in the nature of a counter-offer, which the plaintiff could either accept or reject, if he, with ample opportunities for examination, chose to accept and pay his premium, he cannot, in the absence of fraud, complain. There is no fraud charged here. The policy set out on its face plaintiff's application in full. He had his attention specifically drawn to its terms and ample time and opportunities for inspection and examination when the policy was first submitted to him for examination. He discussed the matter with the sub-agent, and, eventually, satisfied himself, as he says in his evidence, that to a great extent the latter's letters "met his requirements." This indicates to me strongly that he not only had ample opportunities of acquainting himself with the contents of the policy, but that he had availed himself of these opportunities.

Now these letters which "to a great extent met his requirements," do not contain any reference whatever

to that which the plaintiff puts forward as his principal claim, viz., that the policy he was to get was to be a level rate life premium policy, or any reference whatever to level rate premiums. The policy tendered him was a yearly renewable one whereby the surplus, if any, was to be applied towards keeping the premium level. The application, on which it purports to be based, is set out in full on its face, and shows that such was the kind of policy applied for, and the original application which was forwarded to this court with the records, shows that these words "with surplus left with the company to keep the premium level" were written into the printed form of application in the blank designating the character of the policy the appellant desired.

Even at the end of the seven years, when the plaintiff was complaining that the policy he had received was not in accordance with his application, he persisted that "the policy did not read in such a way as to indicate that the premium was liable to be increased." In this he was clearly in error, as the policy unmistakably indicates this liability to an increase and contains a schedule of rates showing the yearly increase up to sixty years of age and specially refers to means of keeping the premium down to a level rate, with a memorandum at the foot of the schedule, pointing out that, for further years beyond sixty, schedule rates for renewals would be furnished on request.

I am of opinion that in a case such as this, the entire engagement of the parties, with all the conditions on which its fulfilment could be claimed, must, in the absence of fraud, be conclusively presumed to be stated in the policy. If, by inadvertence, or mistake, provisions, other than those intended, were inserted or stipulated provisions were omitted, the parties

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could have had recourse, for a correction of the policy, to the equitable jurisdiction of the court. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and the insurance company. *Insurance Company* v. *Mowry* (1).

It was strenuously contended, on the authority of *Wyld's Case* (2), and of some observations of the learned Chief Justice of this court in *Robertson* v. *The Grand Trunk Railway Co.* (3) that the plaintiff was not bound to read his policy and was not bound by its conditions or terms, in so far as they differed from or altered the terms and conditions which he supposed he had applied for and was getting. But I do not think either of these cases, or the language of the learned Chief Justice, supports any such proposition.

I have already distinguished *Wyld's Case* (1), and the language of the Chief Justice of this court, quoted from the latter case, does not go further than this, that in so far as *Henderson* v. *Stevenson* (4) might conflict with *Watkins* v. *Rymill* (5), this court following the later case of *Richardson, Spence & Co.* v. *Rowntree* (6), would follow *Henderson* v. *Stevenson* (4).

In my opinion, however, these cases of *Henderson* v. *Stevenson* (4) and *Richardson, Spence & Co.* v. *Rowntree* (6) do not support the propositions the respondent contends for on this appeal. They were cases arising out of conditions attempted to be attached by carriers of passengers to tickets for carriage, and they determined that where it was properly found that the passenger did not know that the writing or printing on the ticket contained conditions relating to the terms of his contract and that the carrier company had not done what was reasonably sufficient to give the pas-

(1) 96 U. S. R. 544.
(2) 1 Can. S. C. R. 604.
(3) 24 Can. S. C. R. 611 at pp. 617-8.
(4) L. R. 2 H. L. Sc. 470.
(5) 10 Q. B. D. 178.
(6) [1894] A. C. 217.

senger notice of the conditions, he was not to be held bound by them. Such decisions can have no possible application to a policy of life insurance issued, as this was, after prolonged negotiations, and the amplest opportunity on the part of the assured of accepting or rejecting the contemplated offer. The rule fairly deducible from the authorities with reference to the duty on the part of the assured to read his policy or otherwise acquaint himself with its contents is thus laid down by the Circuit Court of Appeal of the United States in *The New York Life Assurance Co.* v. *Macmaster* (1), and seems to me to be a sound one.

> If one can read his contract, his failure to do so is such gross negligence that it conclusively estops him from denying knowledge of its contents, unless he was dissuaded from reading it by some trick, artifice or fraud of the other party to the agreement.

Mr. Justice Moss, in the course of his judgment, seems entirely to ignore the fact that the plaintiff's application expressly applies for a L.R. renewal term with surplus left with the company to keep premium level. The learned judge says that the defendant company in this case took no steps to notify the plaintiff or draw his attention to the fact that the policy was, as regards the premium, not expressed to be in the terms called for by the application. But, apart from the fact that the tender of a policy is not to be deemed so much an acceptance of the application as in the nature of a counter-offer made by the company as decided by the Court of Appeal in *Canning* v. *Farquhar* (2), there are one or two important facts which the learned judge seems to have overlooked, viz., that the policy offered to the respondent purported to set out on its face verbatim the application made by him, and such application was not for a level rate life premium policy but for a level rate yearly renewable one, "with

(1) 87 Fed. Rep. 63. (2) 16 Q. B. D. 727.

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surplus left with the company to keep premium level"; it also contained the schedule of yearly rates payable on each $1,000 of insurance for each age from 16 to 60, shewing the rate of increase each year with age, with notice that schedule rates on the same basis as above for renewal above sixty would be furnished on request.

No person of ordinary intelligence, reading the policy handed to the plaintiff with such recitals and information, could fail to understand its nature, or see that it did not stipulate, as the plaintiff says he thought it did, for a level rate premium for his whole life, but that, on the contrary, it was a yearly renewable policy in accordance with the schedule of rates which were subject to be reduced by the surplus, so far as it would go, to keep the premium level.

It is true that no notice, dehors the policy, was given to the applicant of any difference between the application made and the policy granted. The company contend that he got just the policy applied for. Assuming for argument that there was any difference however, the circumstances themselves, the long delay in accepting, the conversations if not disputes with the sub-agent and the correspondence with the general agent, the payment of the first premium and the continued payment of the premiums for six years afterwards, combine, in my opinion, to conclude the respondent from now denying that the policy he received was not the policy he applied for or, at any rate, that it did not constitute the contract made between him and the company.

I have nothing useful to add to what Mr. Justice Maclennan has said on the other branch of the case, viz., the alleged misrepresentation of the value of the policy at the end of five years. Whether or not the misrepresentation, if found in the plaintiff's favour, would enable him to maintain, as against the agent or

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the company, an action for damages for deceit, is not now before us and, upon that question, I express no opinion.

MILLS J.—In this case, William Mowat, the plaintiff, was a banker, residing in the city of Stratford, in the province of Ontario, and the company are a corporation under the laws of the state of New York, that carried on the business of life insurance in the province of Ontario.

In March, 1891, one Slaght was the general agent of the said company at the city of London in Ontario, who canvassed the plaintiff with a view of obtaining from him an application for insurance on his life with the defendant company. Negotiations took place between Slaght and the plaintiff with a view of effecting this insurance. During the negotiations the agent represented to the plaintiff that the premium payable by him for such insurance at the age of sixty years would be $41.50, per thousand dollars of insurance, and the plaintiff could renew such insurance from year to year upon the payment of this premium. The plaintiff was told that after five years the policy would have a large cash surrender value which might be applied in the purchase of a paid up insurance for a lesser amount or for extending the existing insurance. The plaintiff insisted upon more definite information touching the amount of such surrender value. The general manager of the defendant company in a letter to Slaght, intended to communicate to the plaintiff the impression that the cash surrender value of the policy at the end of five years should be about $275, paid-up policy should be about $500 or the equivalent of an extended insurance of about four years. The plaintiff applied for insurance to the amount of $3,000 upon the level rate plan and paid

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the premium therefor. In March, 1892, the defendants applied to the plaintiff for the payment of a renewal premium upon the said policy. The plaintiff paid $124.50, being at the rate of $41.50 a thousand, and this sum, he continued to pay each year until 1898, when he was informed that the sum that he was required to pay was $155.63, and the company contend that the renewals were in 1892, $135; in 1893, $147; in 1894, $159; in 1895, $172.50; in 1896, $182.28; in 1897, $194.88, and in 1898, $212.16, and that it was merely by grace of the company that it had not demanded these larger premiums.

The plaintiff demands from the company payment of the cash surrender value of the said policy, and the company maintain that the said policy has no cash surrender value, and refuse to pay any sum whatever. The plaintiff maintains that the term level rate plan has a well understood and well defined meaning in the business of life insurance, and signifies that in a policy issued upon such plan, the annual premium is not subject to any increase whatever, but continues throughout the whole period the same.

The defendant contends that neither Mr. Slaght nor the general manager was authorized to make, nor did they make any representation to, or contract with the plaintiff, in any way inconsistent with the terms of the contract.

The policy of insurance was shewn by the defendant to the plaintiff before the plaintiff paid the first premium thereon, and the company contends that the plaintiff accepted the same as set forth. The defendant pleads the Statute of Frauds.

The correspondence relating to this policy of insurance is set out with sufficient fulness to a clear understanding of the case in the judgment of Chief Justice Armour. The company always charged the plaintiff

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the same annual premium up to 1898. The defendants, the Chief Justice says, were bound by the knowledge and acquiescence in the representations made by Slaght and by the general manager as to the surrender value of the policy and should make good the same, and he held that Mowat should recover back the various sums of money that he had paid together with interest upon the same.

The question was taken to the Court of Appeal and, there, the judgment of the Queen's Bench Division was upheld, Mr. Justice Maclennan dissenting, being of the opinion that the appeal should be allowed and the action dismissed.

In this case the respondent desired a policy of a certain sort, one in which the premium would be a uniform amount throughout life. This was what he asked for. This was what he supposed he had received, and the fact that he paid a uniform premium of $124.50 each year for several years, confirmed him in this mistaken notion.

Had he died at any time during this period, the difference between his opinion and that of the company would never have been disclosed It is fair to assume that in that event, the policy would have been paid and that the difference between himself and the company on this subject would have remained unknown. I think that during all these years his life was in fact insured, but since the difference between himself and the company has become known to him, his age is now such that he can no longer secure for the same annual payments the same amount of insurance upon his life, and he has undoubtedly sustained a loss to the amount of the difference between what he would now be called upon to pay and what he would have had to pay annually beginning at that time for the period of life which remains to him, according to the tables of mortality.

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But it is important to consider whether or not the law would excuse him for not having read his policy of insurance By the case of *Biggar* v. *The Rock Life Assurance Co.* (1) decided in the King's Bench, 1901, it was held that it was the duty of the applicant to read the answers in a proposal made by him for insurance before signing it, and that he must be taken to have read and adopted them, and secondly, that in filling in false answers in the proposal, the agent of the company who did so, was acting, not as agent of the insurance company, but as the agent of the applicant. In that case the agent falsified Biggar's answers to a series of questions in his proposal. Biggar signed the proposal without reading it. His attention was not called to the questions and answers. These false statements afforded a good defence to the company. Wright J., who presided at the trial, held that the correctness of the answers was a condition precedent to the validity of the policy. He said that the plaintiff was disentitled to recover because he signed a paper containing certain other particulars, and especially the statement that no company had ever declined to assure him or to renew his policy.

I am inclined, said Mr. Justice Wright, to think that this is, of itself, sufficient to prevent him from having any claim against the company.

But he did not rest his decision on this ground, but adopted the principles which were laid down by the Supreme Court of the United States in *The New York Life Insurance Co.* v. *Fletcher* (2).

In that case the opinion of the whole court was delivered by Mr. Justice Field, of which Wright J. says:

I agree with the view taken by the Supreme Court in that case, and apparently in other cases there cited, that if a person in the position

(1) 1902] 1 K. B. 516. (2) 117 U. S. R. 519.

of a claimant chooses to sign, without reading it, a proposal form which somebody else fills in, and if he acquiesces in that being sent in as signed by him, without taking the trouble to read it, he must be treated as having adopted it.

Business could not be carried on, if that were not the law. On that ground I think the claimant is in great difficulty. The court held that the agent in filling in the answers in the proposal which Biggar signed, was acting as Biggar's agent, and not as the agent of the company. It cannot be imagined that the agent of the insurance company can be treated as its agent to invent the answers to the questions in the proposal form. In this case as the untruthfulness of the answers in the proposal were known to Biggar it was his duty to see that they were correct. Reasonable diligence and good faith were alike required. In that case the insured had it in his power to prevent the misrepresentation and the insurer had not.

Here, the most that can be said is that the respondent was negligent in not having read his policy, and the insurance company must have known that he did not receive what he applied for, but when he continued to pay the premiums for several years, it may well be that the company assumed that he acquiesced in their proposal.

Whether or not he has any claim against the com pany on other grounds, I am not called upon to consider. I do not think he is legally entitled to receive back the moneys which he has paid for the reason that during the period for which the premiums were paid, his life was insured for the sum named in the policy.

Appeal allowed with costs.

Solicitors for the appellant: *Lount, Marsh & Cameron.*

Solicitor for the respondent: *R. T. Harding.*

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*Mar. 21.

*May 6.

JAMES P. LANGLEY AND OTHERS (PLAINTIFFS)..... } APPELLANTS;

AND

E. VAN ALLEN AND COMPANY (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Money paid—Voluntary payment—Insolvency of debtor—Action by assignee —Status.

S. a trader, in August, 1899, procured the consent in writing of his creditors to payment of his debts then due and maturing by notes at different dates extending to the following March. V., one of the creditors, insisted on more prompt payment of part of his claim and took from S. notes aggregating in amount $708, all payable in September, which S. agreed in writing to pay at maturity, and did pay. In November, 1899, S. assigned for benefit of his creditors when the arrangement between him and V. first became known and the assignee and other creditors brought an action to recover the said sum of $708 from V. as part of the insolvent estate.

Held, affirming the judgment of the Court of Appeal (3 Ont. L. R. 5), and that at the trial (32 O. R. 216) that S. having paid the notes voluntarily without oppression or coercion could not himself have recovered back the amount and his assignee was in no better position.

Held, per Taschereau J.—As anything recovered by the assignee would be for the benefit of his co-plaintiffs only who would thus receive what would have been an unjust preference if stipulated for by the agreement for extension the plaintiffs had no *locus standi in curiâ*.

APPEAL from the decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial (2) in favour of the defendants.

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*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mil JJ.

(1) 3 Ont. L. R. 5. (2) 32 O. R. 216.

The facts about which they are practically no dispute, or conflict, are as follows:

Prior to 15th August, 1899, James A. Sword carried on a mercantile business in Toronto, and the appellants other than Langley, and the respondents, were in the habit of supplying him with goods on credit. Being unable to meet his liabilities as they matured he prepared a statement of his liabilities, and an approximate estimate of his financial position, based upon a previous stock-taking, for the purpose of interviewing his principal creditors, with a view of obtaining an extension of time for the payment of their claims.

The respondent, Eli Van Allen, was in Toronto on the date aforesaid, and saw Sword, who told him the position of his affairs, and stated that he was going to Montreal that evening for the purpose of seeing his principal creditors, who there resided, or carried on their business. Sword says that Van Allen approved of this course, and assured him that he would join the other creditors in granting him whatever time might be agreed upon.

On the following day, viz., 16th August, 1899, Sword arrived at Montreal and interviewed his principal creditors, showed them the statement of affairs prepared by him and asked an extension of time for payment of their claims against him.

He first saw Tooke Brothers, who were his largest creditors, and after talking over the position of matters with them, Mr. Tooke suggested that he should see Gault Brothers Company, who were also creditors for a large amount. Sword accordingly saw Mr. Rodger, the managing director of Gault Brothers Company, who, after examining into the statement of affairs prepared by Sword, and considering the matter, drew up an agreement whereby six of the largest

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cr ditors, whose aggregate claims represented about three-fourths of Sword's total liabilities, (the claims of the other creditors, with one exception, an English firm, being less than $200 respectively) agreed to extend the time for payment of their respective bills against him, maturing between 16th August and 8th December, and to accept payment therefor in six monthly instalments commencing the following October. Although not expressly mentioned in the document, it was understood that the first payment was to mature on 18th October, and so on for the succeeding months. Sword then circulated his statement of affairs and this agreement among his Montreal creditors, and on 16th August obtained the assent and signatures of all the appellants, other than Langley, thereto. He returned home the same evening, and on the following day forwarded the extension agreement to the respondents, in a letter to them dated 17th August, 1899, requesting their signature and explaining that the Montreal creditors had stipulated that he should send the agreement back to Montreal to show the creditors there that all who were intended to grant the extension had assented thereto and had signed the agreement. The letter is as follows:

"TORONTO, 17th August, 1899.

"DEAR VAN ALLEN,—I am sending you by to-night's mail agreement which I think will be very satisfactory to all. I had no trouble whatever, and like yourself they were all anxious to help me out. Kindly sign and return soon as possible, as I have to send it down to Montreal to show that all the names are on it. Thanking you in anticipation.

"I remain, yours respectfully,

"JAMES A. SWORD."

On the 18th August, 1899, Sword wrote the respondents again apologizing for his bookkeeper's neglect in

not having sent them the statement of affairs and stating "I am sending you by to-night's mail the exact copy I took to Montreal." On 22nd August Sword wrote again, and on that day the respondents replied acknowledging the receipt of Sword's statement of affairs and letter requesting them to sign and return agreement, and informed him, "before doing so we will have to have a little arrangement made as to those bills maturing in July and August previous to this agreement," and invited Sword to come to Hamilton to see them personally, saying, "we will try and have the matter arranged and signed, and you can take your paper home with you."

Sword complied with this request and went to Hamilton on 23rd August. He there saw the respondend, Mr. Eli Van Allen, who declined to sign the extension agreement except on certain conditions, and after a short interview in the respondent's office, Sword was taken over to the office of Messrs. Staunton & O'Heir, who, Van Allen gave him to understand, were acting as solicitors for the bank that was raising difficulty about the discounting of Sword's paper. These gentlemen were in reality the respondents' own solicicitors. The following agreement was then entered into:

"MEMORANDUM of agreement made this twenty-third day of August, one thousand eight hundred and ninety-nine."

"BETWEEN

JAMES A. SWORD, of Toronto, Merchant,
Of the first part,

AND

E. VAN ALLEN & COMPANY, of Hamilton,
Manufacturers,
Of the second part."

"Whereas the said Sword, being indebted to E. Van Allen & Company in a large amount has applied to

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said E. Van Allen & Company for an extension, and has requested the said E. Van Allen & Company to sign a certain agreement dated 16th August, 1899, and made between the said Sword, Tooke Bros., and others, for that purpose; and the said E. Van Allen & Company have consented to sign the said agreement in consideration of the said Sword entering into this agreement, and on the conditions hereinafter named."

"Now this agreement witnesseth, that in consideration of the said E. Van Allen & Company signing this agreement, as hereinbefore stated, the said Sword covenants and agrees, that he will, as they become due, pay to The Eagle Knitting Company (Limited) or order, the amount of six promisory notes made this day by him in favour of the said Eagle Knitting Company (Limited) for $118 each, payable on the 25th August, 1st September, 8th September, 15th September, 22nd September and 29th September, 1899, respectively."

"And it is further agreed, that if the said Sword shall make default in payment of any of the said notes, the whole amount of the indebtedness of the said Sword to the said E. Van Allen & Company, at the date of such default, shall become due and payable, notwithstanding the fact that notes or acceptances maturing at a later date may have been given by the said Sword to the said E. Van Allen & Company for the same, or any portion thereof."

"And it is further agreed that upon default being made by the said Sword in the payment of any one of the above mentioned notes the said E. Van Allen & Company shall thereupon be released and discharged from the said agreement, dated August 16th, 1899, and may forthwith after such default enforce payment of all indebtedness covered, or intended to be covered, by the said agreement."

"In witness whereof the parties hereto, have hereunto set their hands and seals, the day and year first above written."

"Signed, sealed and delivered in the presence of } "JAMES A. SWORD." [Seal.]

On the following day Van Allen & Co., sent Sword a copy of this agreement in the following letter:

"HAMILTON, Ontario, August 24th, 1899.

"MR. JAMES A. SWORD,

"55 King Street East, Toronto, Ont.

"DEAR SIRS,—Enclosed you will find a copy of the agreement which the solicitors prepared. I did not read this agreement until it was sent to the factory to-day. I presume it is in conformity with the wishes of the party who was so exacting about the notes. I trust you will try and meet them as they mature in conformity with the terms of the agreement and greatly oblige. If you will send your remittance up to the factory on Monday of each week, I will see that the paper is looked after."

"Yours truly,

"E. VAN ALLEN & CO."

Sword paid the notes mentioned in the said agreement and on October 16th assigned to the plaintiff Langley for benefit of his creditors. The latter and the other creditors eventually brought the action from which this appeal arose.

George Kerr for the appellant. If the arrangement between Sword and his creditors had been a composition instead of an extension of time the transaction with respondents would, clearly, have been a fraud on the other creditors. But there is no distinction in this respect between the two. *Leicester* v. *Rose* (1); *Atkinson* v. *Denby* (2).

(1) 4 East 372. (2) 7 H. & N. 934.

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In all such arrangements the parties must contract on terms of equality. *Dauglish* v. *Tennent* (1).

The money can be recovered back. See *McKewan* v. *Sanderson* (2); *Clarkson* v. *McMaster* (3); *Wilson* v. *Ray* (4) has not been followed in later decisions.

Staunton K.C. for the respondent. In all the cases in which money has been ordered to be returned under circumstances such as we have here there has been coercion in obtaining the payment. See *Atkinson* v. *Denby* (5); *In re Lenzberg's Policy* (6).

Where the payment is voluntary the money cannot be recovered back even if paid under an illegal contract. *Kearley* v. *Thomson* (7); *Howden* v. *Haigh* (8); and see *Pickering* v. *Ilfracombe Railway Co.* (9).

TASCHEREAU J.—This is an appeal from the judgment of the Court of Appeal for Ontario affirming the judgment of His Lordship the Chancellor which had dismissed the appellants' action. I refer to the report of the Chancellor's judgment at page 216, vol. 32 of the Ontario reports for a full statement of the facts of the case.

The appeal is not pressed as to the $126 claimed for a quantity of shirting alleged to be illegally in the defendants' possession.

On the other part of the case, as I view it, I would dismiss the appeal upon the simple ground that the appellants have, upon their own allegations, no *locus standi* to maintain this action. As to the assignee, he is a trustee for the general body of creditors, but should he recover, his co-appellants only, not the other creditors, would get the benefit of the judgment. So that

(1) L. R. 2 Q. B. 49.
(2) L. R. 15 Eq. 229.
(3) 25 Can. S. C. R. 96.
(4) 10 A. & E. 82.
(5) 7 H. & N. 934.
(6) 7 Ch. D. 650.
(7) 24 Q. B. D. 742.
(8) 11 A. & E. 1033.
(9) L. R. 3 C. P. 235.

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he is asking the aid of the court to obtain after the debtor's assignment a preference for his co-appellants; and they join him in the action for the purpose of recovering for themselves exclusively an amount, the payment of which to them at this date Sword could not make without committing an act of fraudulent preference to the prejudice of his other creditors. That, it would seem to me, puts the appellants out of court.

It would not be necessary for me to go further. But in deference to the judges of the Court of Appeal, who granted special leave to appeal to this court (as the amount in litigation was below the statutory limitation) with the view of having, if possible, a mooted point of law settled in the public interest, I deem it right that we should not refrain from passing upon the main question raised and earnestly argued before us by Mr. Kerr for the appellants, as it had been before the Chancellor and in the Court of Appeal.

Mr. Kerr fairly admitted at the argument that he was asking us to overrule *Wilson* v. *Ray* (1). Now that case though questioned at bar in *Gibson* v. *Bruce* (2), has always, since 1839 that it dates from, been considered as law in England. In the last edition of Sir Frederick Pollock's book on Contracts and of Smith's Leading Cases, it is quoted as an authority, and it is to be found in the valuable collection of the revised reports edited by a number of the most eminent men in the profession (3). It is considered as law by the four judges of the Court of Appeal for Ontario, before whom this case was heard, including the Chief Justice, who, though dissenting, thought he could distinguish it, but did not question its law. It was under those circumstances an uphill undertaking for

(1) 10 A. & E. 82.

(2) 5 Man. & G. 399.

(3) 50 Rev. Rep., 341.

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Mr. Kerr to attempt to convince us that we should overrule it. I am sorry to say for his client that he has not succeeded. The action in that case was for money had and received. The plaintiff being about to compound with his creditors, the defendant, one of them, would not sign the deed unless he were paid in full. To obtain his signature the plaintiff gave him his note (not a payment in cash, and coerced to pay then and there as in *Atkinson* v. *Denby* (1)) for the amount required to pay him in full, upon which he signed the deed. Plaintiff, after dishonour of the note, paid it, and this action was to recover back from the defendant, Ray, the surplus that he had so received over his co-creditors.

His action was dismissed on the ground that he had paid the note voluntarily and with full knowledge of the facts. Of course, no action could have been maintained upon the note; it had been clearly extorted for an illegal consideration. But there was no extortion, no duress, nor any kind of compulsion practiced upon the plaintiff when he paid it. Ray could not have coerced the payment of that note. "He did not hold the rod" *Smith* v. *Cuff* (2), as quoted in *Atkinson* v. *Denby* (1). How then could Wilson say he was oppressed when he willingly assented to pay, though knowing all the facts that released him in law from the obligation to pay? His note had been given for an illegal consideration, no doubt, but it is the law that

> whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the court to fetch it back again.

Collins v. *Blantern* (3). Add to that dictum for the purposes of this case, after "thereof," the words "voluntarily," "without oppression," or "coercion" and

(1) 7 H. & N. 934.
(2) 6 M. & S. 160.
(3) 1 Sm. L. C. (10th ed.) 355.

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that is the law which rules this litigation. As Denman, L. C. J., said in that *Wilson Case* (1), one who pays under such circumstances waives the right he had not to pay. How can he be subsequently admitted to recover it back? As expressed in the Civil Law, "*Si sciens se non debere solvit, cessat repetitio.*" Poth. Pand. lib. 12, tit. 6, art. 3, par. 33.

The facts of the present case are not precisely similar to those upon which the decision in that *Wilson Case* (1) was given, but the appellants get no help from the difference between the two. Six of Sword's creditors, including the respondents, agreed with him to extend the time for payment of a specific part of their respective debts. It was however secretly agreed between him and the respondents that, notwithstanding the aforesaid agreement, he, Sword, would pay the respondents sooner than the other five creditors, and he gave them accordingly a note or notes payable before the time extended by them all, and when these notes became due he paid them. The appellants ask that the respondents be ordered to return the money so paid. Now Sword paid to the respondent nothing but what he owed them and as Maclennan J., remarked in the Court of Appeal:

> It is not a case of composition; there is no stipulation for ratable or proportionate payment, or for security by pledge of or charge upon the debtor's property; but he remains as before master of his estate.

Assuming that Sword would have had the right of refusing to pay these notes (though I fail to see upon what ground) the payment he made of them was a perfectly voluntary act on his part, and the law of *Wilson's Case* (1) clearly applies. He himself would have no right to recover and the plaintiffs have no more right than he would have.

Mention has been made of the "Act respecting

(1) 10 A. & E. 82.

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Assignments and Preferences," R.S.O. ch. 147. I do not see, however, that anything in that Act, did it apply, can affect this case. By section 3 thereof, money paid to a creditor although paid before the date at which his claim became exigible, even if a preferential payment, is exempted from the operation of section 2. *Campbell* v. *Patterson* (1). Then this is not an action for the benefit of Sword's estate.

The appellants further ask by their statement of claim that the respondents be restrained from proving upon the estate for the balance of their debt. This is a matter which cannot be adjudicated upon in this action. And whether an action would lie against the respondents by the co-contracting creditors upon the facts proved in this case is also a matter which is not before us.

I would dismiss the appeal with costs.

SEDGEWICK, GIROUARD and DAVIES JJ., concurred.

MILLS J.—In this case, one James A. Sword, of Toronto, was in debt to several mercantile firms in Montreal, and to Van Allen & Co., of Hamilton. On the 16th of August, 1898, the creditors of Sword agreed to grant him an extension of time for the payment of the notes which each of the parties held against him, which were maturing between that day and the 8th of December, and they agreed to accept notes from him payable in October, November, December, January, February and March, with interest at 7 per cent per annum. This agreement was to be valid only upon condition of its being signed by certain creditors within one week from its date. Van Allen had several notes which had fallen due before the 16th of August, some of which had been renewed and had been made pay-

(1) 21 Can. S.C.R. 645-651.

able after the date named in the agreement for the extension of time. These notes amounted to $708. It is said that the other parties to this agreement did not promise any extension of time on the notes which had fallen due prior to the 16th of August. And they complained that Van Allen should have demanded payment of those notes which had fallen due and had been renewed prior to that date, and which, by the renewal, were made payable after that date. Van Allen refused to sign the agreement for the extension unless those notes which had been renewed were arranged for and made payable independently of the terms of the proposed agreement. If Van Allen had not prior to entering into the agreement taken new notes, which fell due at a later period, his position with respect to these notes, or the indebtedness which they represented, would not have differed from that of the other creditors. When it became known that he had placed a certain part of his indebtedness upon the footing upon which it had before stood, Mr. Langley, the assignee of Sword's estate, sued Van Allen for payment into the common fund, of all the moneys which Sword had paid him after the date of the agreement. The trial judge was the Chancellor, Sir John Boyd. He pointed out that in any event $236.88 of the amount sued for must be retained by Van Allen as it had fallen due before the 16th of August, 1899, and no extension of time had been given to Sword in respect to these obligations, and so they were not included in the terms of the agreement, because Van Allen believed that by this arrangement he had simply placed himself upon a footing of equality with the other creditors of Sword who were parties to the agreement for the extension of time. There was no stipulation for secrecy; and it was not proved that the agreement was not mentioned to the plaintiff whereby the defend-

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ants were to be paid bills which had matured in July and August, amounting to $471.12, although the paper for this indebtedness had been renewed before the agreement was entered upon, nor does it appear for how much the defendants were to be given time, as understood by the plaintiffs. There was besides the parties to the agreement, a large number of outstanding creditors, whose claims amounted to over $2,000, who were not asked to come into the arrangement. The plaintiff who is one of the creditors of Sword, seeks to invalidate the transaction, fairly entered into. Sword cannot himself impeach the transaction. The assignee occupies no better position. The evidence discloses a business deal between Sword and the defendants. At the time the arrangement was made, Sword was solvent. He was simply arranging his affairs so as to be in a better position to pay his liabilities as they became due. He voluntarily entered into this agreement. He paid off the six notes to Van Allen & Co. for the sum of $708 before the end of September of that year. All of this had become due before the 16th of August, before the arrangement between Sword and the creditors who were parties to the agreement had arranged for delay. Defendants had given for some of the debts which had matured before the 16th of August, an extension of time, and when this new arrangement came to be made, they, apart from this transaction, would have been in a more advantageous position than the other creditors. They arranged with Sword for the earlier payment of these notes so that the agreement should not apply to them, and that the indebtedness for which an extension of time should be given and to which the agreement would apply, should be that indebtedness which matured after the 16th of August, and not to what had matured before, so that

they might stand upon a footing of exact equality with the other parties to the agreement.

Sword became insolvent between the 23rd of August and the 16th of October. The voluntary payment of these six notes before Sword's assignment gave Langley no right to sue Van Allen & Co. any more than if they had been paid before any arrangement was made.

The doctrine the plaintiff relies upon is that of extortion, and unjust oppression of the debtor when in straits, by a creditor. This doctrine which is discussed in *Smith* v. *Cuff* (1); *Alsager* v. *Spalding* (2); is not in my opinion involved in this case. The case of *Wilson* v. *Ray* (3) decides that where payment is voluntary made, as it is in this case, it is too late to re-agitate the matter thereafter. Here the sum was due. Van Allen & Co. were only getting their own. Sword was not insolvent, and he was at perfect liberty to have paid them all, had he been able to do so, before the extension of time expired. He was not paying into the hands of an assignee for the common benefit of all, but to each man, as he might deem proper.

The case of *Re Lenzberg's Policy* (4) decides that where a creditor, at the time of signing a composition deed under the Bankruptcy Act of 1861, sec. 192, took from the debtor a private agreement that the debtor should make future payments on his account the agreement was so far fraudulent that the debtor could recover back from the creditor the payments subsequently made thereunder. Vice Chancellor Hall said:

> It is said that the memorandum which Lenzberg signed was a memorandum providing for future payments, which Kearns was not bound to make, and that from the character of the payments there was nothing wrong in the stipulation taken from the debtor. I cannot agree to that. It seems to me that the taking of any such engagement whether the debtor is bound to pay or not, is equally obnoxious

(1) 6 M. & S. 160.
(2) 4 Bing. N. C. 407.
(3) 10 A. & E. 82.
(4) 7 Ch. D. 650.

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to the rule which prohibits private or independent agreements with creditors at the time when a general arrangement is being made with them. Those agreements are called by law fraudulent, and are so far considered so that money paid thereunder has been recovered back. It is said that this was an independent transaction, distinct from the composition. But it is to be observed that it is part of the same case that this creditor signed the composition for a nominal amount. It is therefore not clear that the giving of the memorandum was a distinct transaction; but it would seem as if the true explanation of what took place is that Kearns was not content with a verbal promise but got the stipulation put in writing. It, therefore, seems to me that the payment so made to the creditor's nominees are to be treated as having been made to himself, as they were on his own account and one within the rule. But independently of that rule, I think that the obtaining of this letter from the debtor by Kearns under the circumstances in this case, was a transaction which the court would not allow to stand; and accordingly on equitable grounds alone, I cannot allow Kearns the benefit of any contract contained in the document. The conclusion is that the moneys in question were moneys paid by the debtor, for the use of the creditor and ought to be brought into account; and Mr. Robinson's client must pay the cost of the summons.

Here Lenzberg was an insolvent. Sword was not, but was being dealt with as a solvent debtor.

In this case there was no difference between what was actually done by Van Allen & Co. and by the other creditors of Sword, who were parties to the agreement. They all exempted from its operation the debts that had become due before the date of the agreement. Van Allen & Co. were apparently an exception to the rule in this. They had given an extension of time upon debts due before the 16th of August before this extension of time to Sword was proposed, to the amount of $471 12, and this change in respect to prior debts, simply put that firm in a position of equality with the other creditors who were parties to the agreement.

An appeal was taken from the Chancellor's judgment and the case was heard in the Court of Appeal The judgment of the Chancellor was appealed from on the ground that he erred as to the secrecy of Van

Allen's transaction with Sword; that he erred in holding that Van Allen had a right to stipulate for the payment of the notes included in this ageeement; and that he erred in eliminating the element of fraud in the consideration of the transaction. They submit also that the case of *Wilson* v. *Ray* (1) does not govern this case, and that it is not a satisfactory exposition of the law as applicable to secret agreements; that the case of *Cockshott* v. *Bennett* (2), which is quoted by the Master of the Rolls, in *Ex parte Milner* (3), is clearly in point, in support of the judgment rendered in the trial of *Wilson* v. *Ray* (1).

The case was heard in the Court of Appeal; the Chief Justice held that the transaction should be set aside and the money which had been paid to Van Allen handed over to the plaintiff, who is the assignee, for the benefit of the creditors, as Sword's assets had been diminished to the extent by which the defendant had profited by the perpetration of a fraud. He quoted Lord Chief Justice Cockburn in *Atkinson* v. *Denby* (4), who said:

> We are all of opinion that *Smith* v. *Bromley* (5), and *Smith* v. *Cuff* (6), govern the present case. When a debtor offers his creditors a composition whereby they all are to receive the proportionate amount in respect of their debts it is contrary to the policy of the law to allow him to purchase the consent of one creditor by payment of his debt in full. It is said that both parties are *in pari delicto*. It is true that both are *in delicto*, because the act is a fraud upon the other creditors, but it is not *par delictum*, because the one has power to dictate, the other no alternative but to submit. *Smith* v. *Bromley* (5); *Stock* v. *Mawson* (7).

But this is not a case to which the doctrine of these cases may be applied. Sword was not a bankrupt, but a debtor who claimed to have all means necessary to

(1) 10 A. & E. 82.
(2) 2 T. R. 763.
(3) 15 Q. B. D. 605.
(4) 7 H. & N. 934.
(5) Douglas 696*n*.
(6) 6 M. & S. 160.
(7) 1 B. & P. 286.

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pay his creditors, if sufficient time was given him. In *Kearley* v. *Thomson* (5), Fry L. J., after quoting from *Collins* v. *Blantern* (6), the general rule that whoever was a party to an unlawful contract if he had once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to get it back again; you shall not have the right of action when you come into a Court of Justice in this unclean manner, to recover back what has been paid; the Lord Justice said:

> To that general rule there are undoubtedly several exceptions, or apparent exceptions; one of these is the case of the oppressor and the oppressed, in which case usually the oppressed party may recover the money back from the oppressor.

Mr. Justice Osler held that the other plaintiffs here are creditors, who were parties to that agreement between Mr. Sword and his creditors. Langley represents the general creditors of Sword. The rights he had to enforce are those of the assignor. He stands in Mr. Sword's shoes and can maintain no action that Sword could not have maintained. The agreement was not a composition agreement, but one for the extension of time by a small body of Sword's creditors. The debtor had overdue obligations to Van Allen. The facts concerning these had not been brought to the notice of the other parties while their extended time was running, and the claims of Van Allen were being paid. It is not a case of a premium being paid to induce a creditor to sign the composition agreement, nor was it paying him a larger sum than the others, but it was putting him with respect to overdue obligations upon precisely the same footing as the others. It only differed from the others in this, that he had given already an extension of time in respect to some of these overdue obligations, which put him in respect to them

(5) 24 Q. B. D. 742.

(6) 1 Sm. L. C. (10 ed.) 360.

upon a less advantageous footing than the other parties. The rule which applies in this case is, that payment of money voluntarily made cannot be recovered back. The facts are within the decision of *Wilson* v. *Ray* (1), and *Brigham* v. *Banque Jacques-Cartier* (2). In *Collins* v. *Blantern* (3) it was held that whoever is a party to an unlawful contract if he has once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to recover it back again. You shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back.' See *Weese* v. *Banfield* (4). A creditor who procures a fraudulent preference, cannot recover the amount of the composition, because the whole agreement with his debtor is vitiated by the fraud, and if he sues for his original debt, his debtor may plead a satisfaction for discharge under the composition, the validity of which the creditor is estopped from denying by reason of his partition in the fraud (5).

It is a universal rule that a fraudulent deed, though operative against a fraudulent party, is not operative for him, and therefore confers on him no right whatever. The deed is not void. The release remains absolute. But the condition being a fraudulent condition, made with the intention of deceiving all the other creditors, is void, and the fraudulent party has lost both the original debt and the composition. (6.) I agree with Maclennan J. A. where he said of this agreement between Sword and certain of his creditors for an extension of time for the payment of debts to become due, that it is not a case of composition; that there is no stipulation for proportionate payment, or for

(1) 10 A. & E. 82.
(2) 30 Can. S. C. R. 429.
(3) 1 Sm. L. C. (10 ed.) 360.
(4) 22 Ont. App. R. 489.
(5) Leake on Contracts (3 ed.) 669.
(6) *Ex parte Oliver*, 4 DeG. & S. 354.

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securities by a charge upon the debtor's property; he remains, as before, master of his estate. Soon after he pays one of the creditors part of the extended debt in advance, without availing himself of the extension of time. Subsequently he makes an assignment, and the other creditors and the assignee bring an action for the recovery of the money so paid in advance.

I know no law nor authority, says the learned judge, by which a debtor might not lawfully pay, and the creditor lawfully receive payment. It is no breach of any agreement. He embraced certain debts in respect to which an extension of time was given. If the two acts are inconsistent, the latter must prevail. He might have refused to pay four of the six notes. He didn't refuse, he paid them. He might have done so with any of the others without waiting for the intervening time to expire. There is no reason why he should not.

I think this is a proper exposition of the law applicable to this case. I also agree with Moss J. A. with regard to $236.88, part of the sum paid by Sword; it was overdue on the 16th August, and did not come within the terms of the agreement. The balance, $471.12 was covered by the extension. The remedy for its recovery was suspended, and technically fell within that part of his debt for which extension was promised. It was so far fraudulent and illegal that it vitiated the extension agreement, as against the other creditors. It was a payment which, if known to the other creditors, might have led them to repudiate the extension. Sword did not invoke the agreement or set up the illegality of this secret arrangement in answer to the demand for payment. The arrangement with the Eagle Knitting Co. was a matter of form, as Sword knew. The payments, under the circumstances were similar to those of *Smith* v. *Bromley* (1), *Smith* v. *Cuff* (2), and *Atkinson* v. *Denby* (3). There was no release of any part of Van Allen's claim against

(1) 2 Douglass, 696*n*. (2) 6 M. & S., 160.
(3) 7 H. & N., 934.

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Sword. In *Smith* v. *Cuff* (1), the notes given by the plaintiff had been negotiated, and the plaintiffs had been compelled to make payment to the holder of one of them against whom he had no defence. *Wilson* v. *Ray* (2) is not distinguishable from this case. In *Lenzberg's Case* (3) the court proceeds upon the ground that in taking the account, Kearns could only displace that right by setting up an illegal agreement, which the court would not permit. As to $236.88 of the sum paid Van Allen, he stood upon the same footing as the other parties to the agreement; as to the remainder of the sum which he received, it was an overdue sum for which further time had been given to Sword, and Van Allen may have insisted upon its being restored to the position of an overdue debt, as a part of his claim for which no extension of time had been given, so that he might be upon a footing of equality with the other creditors; in thus exempting it from the terms of the agreement, which applied to the indebtedness of Sword falling due after the date of the agreement, Van Allen seemed to be simply aiming at equality. The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants: *Kerr, Bull & Rowell.*

Solicitors for the respondents: *Staunton & O'Heir.*

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(1) 6 M. & S., 160.

(2) 10 A. & E. 82.

(3) 7 Ch. D. 650.

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*Mar. 25.
*May 6.

THE CANADIAN RAILWAY ACCIDENT INSURANCE COMPANY (DEFENDANT)..... .... } APPELLANT;

AND

LOUISA McNEVIN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Amount in controversy—Interest before action—60 & 61 V. c. 34, s. 1 (c)—Accident insurance—Baggageman on railway—Conditions in policy—Hazardous occupation—Voluntary exposure to unnecessary danger.

A judgment for $1,000 damages with interest from a date before action brought is appealable under 60 & 61 Vict. ch. 34, sec. 1 (c).

An accident policy issued to M., who was insured as a baggageman on the C. P. Ry., contained the following conditions: "If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." (There was no classification of "exposure" by the company). "This insurance does not cover * * * death resulting from * * voluntary exposure to unnecessary danger." M. was killed while coupling cars, a duty generally performed by a brakesman, whose occupation was classed by the company as more hazardous than that of a baggageman.

Held, (Davies J. dissenting) affirming the judgment of the Court of Appeal (2 Ont. L. R. 521) which sustained the verdict for plaintiff at the trial (32 O. R. 284) that as he was only performing an isolated act of coupling cars, the insured was not injured in an occupation classed as more hazardous under the first of the above conditions.

Held also, that as the evidence showed that insured was in the habit of coupling cars frequently, and therefore would not consider the operation dangerous there was no "voluntary exposure to unnecessary danger" within the meaning of the second condition.

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*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgments at the trial in favour of the plaintiff (2).

The material facts are sufficiently stated in the above head-note and in the judgments given on this appeal.

Nesbitt K.C. and *Fripp* for the appellant.

Aylesworth K.C. and *McGarry* for the respondent.

Aylesworth K.C. for the respondent, moved to quash the appeal for want of jurisdiction. The damages were $1,000 with interest from the date of insured's death. Under 60 & 61 Vict. ch. 34 sec. 1 (*c*) the amount necessary to give the court jurisdiction is over $1,000 and interest cannot be added to make the damages sufficient.

The court held that the judgment showed jurisdiction on its face. It was claimed, also, that $159 paid into court reduced the amount in dispute below $1000. As the court had decided on dismissing the appeal they did not deal with this contention.

Nesbitt K.C. and *Fripp* for the appellant. Insured was killed while performing a brakesman's duty. If he had been insured as a brakesman the limit of his policy would have been $500 and the premium $29 per $1,000. It is inequitable that he should recover $3,000 for which he paid at a much lower rate. See *Aldrich* v. *Mercantile Mutual Accident Association* (3).

Insured volunteered to do the coupling and it was therefore a voluntary exposure to danger. *Tuttle* v. *Travellers Ins. Co.* (4); *Neill* v. *Travellers Ins. Co.* (5).

Aylesworth K.C. and *McGarry* for the respondent referred to May on Insurance, (3 ed.) p. 1228, par. 532; *Stone's Administrators* v. *United States Casualty Co.* (6).

TASCHEREAU J.—An objection to our jurisdiction in this cause has been taken by Mr. Aylesworth on the

(1) 2 Ont. L.R. 521.
(2) 32 O.R. 284.
(3) 149 Mass. 457.
(4) 134 Mass. 175.
(5) 12 Can. S.C.R. 55.
(6) 34 N.J. (L.R.) 371.

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ground that the amount in controversy before us does not exceed the sum of one thousand dollars; *City of Ottawa* v. *Hunter* (1). The judgment appealed from is for one thousand dollars with interest from a date anterior to the issue of the writ, so that on its face the appeal from it involves an amount sufficient to give us jurisdiction.

It is however contended for the respondent that as the appellant company offered by their pleas and deposited in court a sum of $159 in satisfaction of the plaintiff's claim, the pecuniary amount in contestation before us is reduced to a sum less than one thousand dollars. This is so, it is conceded, as a matter of figures, if, as the respondent contends, that sum of $159 is to be considered as deducted from the amount of the judgment. The case of *Tintsman* v. *The National Bank* (2), (see also, *Hilton* v. *Dickinson* (3), in the United States Supreme Court,) seems in point, and would, perhaps support the respondent's contention, though it might be possible to distinguish it. The question is not free from difficulty. However, as we have come to the conclusion that the appeal should be dismissed upon the merits, it need not be solved here.

Now, as to the merits. The appeal is from the judgment of the Court of Appeal for Ontario (4), affirming, by an equal division of opinion, among the learned judges the judgment of the trial judge in favour of the responden . . . . 284.

The respondent brought this action as beneficiary named in a policy of accident insurance issued by the appellant to her son, Alexander McNevin, deceased, to recover the sum of $1,000, amount of the said policy, with interest thereon from the twenty-seventh day of August, 1900.

(1) 31 Can. S. C. R. 7.
(2) 100 U. S. R. 6.
(3) 108 U. S. R. 165.
(4) 2 Ont. L. R. 521.

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The defence to the action was based entirely upon the two following conditions of the policy within which it was sought by the appellant to bring the facts connected with the death of the insured as disclosed by the evidence; and, it is conceded on their part that if they fail to bring the case under one of these clauses, their appeal fails.

Condition number one indorsed on the policy is as follows:—

1. If the insured is injured in any *occupation or exposure* classed by this company as more hazardous than that stated in the application, his insurance shall be only for such sums as the premiums paid by him will purchase at the rates fixed for such increased hazard.

The second clause of condition, number three, is as follows:—

This insurance does not cover disappearance or suicide, sane or insane, nor injuries of which there is no visible mark on the body (the body itself, in case of death, not being deemed such mark); nor accident, nor death, nor loss of limb or sight, nor disability resulting, wholly or partly, directly or indirectly from any of the following causes, or while so engaged or effected; disease or bodily infirmity, hernia, fits, vertigo, sleep-walking, medical or surgical treatment (except amputation necessitated solely by injuries and made within ninety days after accident), intoxication or narcotics, voluntary or involuntary taking of poison or contact with poisonous substances (except in cases where it occurs to insured whilst necessarily exposed in the discharge of the duties pertaining to the occupation under which he is insured) duelling or fighting, war or riot, intentional injuries, (inflicted by insured or any other person), voluntary overexertion, violating law or violating the rule of any corporation, *voluntary exposure to unnecessary danger*, expeditions into wild or uncivilised countries.

The appellant pleaded first, that the accident in question happened to the deceased while he was engaged in an occupation or exposure more hazardous than that stated in his application for insurance, namely, that of brakesman, or failing this, secondly, that the accident resulted in consequence of voluntary exposure to unnecessary danger.

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The accident being proved, upon the appellant, I think, rested the burthen of proving the facts which they rely upon to be relieved from the liability which, *primâ facie*, the policy imposes upon them. *Baden-field* v. *Massachusetts Mutual Accident Association* (1); *Williams* v. *United States Mutual Accident Association* (2). The Ontario Insurance Act, R. S. O. (1897) ch. 203 sec. 153, expressly decrees that where the event has happened on the occurrence of which the insurance is payable, but the amount payable is a matter of dispute, the amount payable by the insurer shall *primâ facie* be the maximum amount indicated in the policy, and it shall lie on the insurer to prove the contrary. This enactment would seem to have its application here, though there is room for doubt on this point. However, the course followed at the trial renders the question of the *onus probandi* immaterial here.

Another rule that must not be lost sight of in the consideration of this appeal is that in case of a real doubt arising in the construction of a policy, the construction most favourable to the insured must prevail. I am free to say, however, that, as I read this policy, there is, in my opinion, no room for doubt in the construction of it in relation to the facts of the case.

As to condition No. 1, thereof;—

> If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in the application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard.

All the judges in the Court of Appeal have been of the opinion, with the trial judge, that the defence to the action *quoad hoc* could not prevail. And the appellant has not been able to show any error in the rejection of the said ground of defence. The deceased did not give up his occupation or employment as bag-

(1) 154 Mass. 77. (2) 82 Hun. N.Y. 268.

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gageman to become a brakesman. And he was not injured in any exposure classed by the company as more hazardous. Occupations are classified, according to the evidence, but not exposures. The word "exposure" in the policy is a redundancy. It means nothing else than any occupation more hazardous. I could not say more upon this first ground of the appellant's pleas without repeating what has been said in the opinions of the courts appealed from. To the cases already cited, I would add a reference to *The National Accident Society* v. *Taylor* (1); and to *The Provident Life Insurance Co* v. *Fennell* (2), in which the insured, represented in the policy as a switchman, met his death while acting as as a brakeman.

Did McNevin's death result from voluntary exposure to unnecessary danger? is the next point to be considered.

The trial judge answered that question negatively and, in my opinion, he could not but do so. It never came to this man's mind, on the occasion in question, accustomed to couple cars as the evidence shows he was, that there was any danger in the act he was going to perform. "Voluntary," in this policy, conveys the idea of an act of volition. It means "knowingly," "wilful," not that he is going knowingly to perform an act which for others might be dangerous, but "knowingly," "rashly" and conscious of danger to himself, recklessly taking the risk, wanton or grossly imprudent exposure. *Manufacturers Accident Indemnity Co.* v. *Dorgan* (3). It is the exposure that must be wilful, voluntary. *Burkhard* v. *The Travellers Insurance Company* (4). *The Providence Life Insurance Company* v. *Martin* (5). Now, how could the deceased

(1) 42 Ill. App. 97.
(2) 49 Ill. 180.
(3) 58 Fed. Rep. 945.
(4) 102 Pa. St. 262.
(5) 32 Md. 310.

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be said to have wilfully exposed himself to danger, to a danger that was for him certain, and ought to have been present to his mind; *Lovell* v. *The Accident Insurance Company* (1); if he did not know that the act was for him dangerous, or if he believed that it was not? *Miller* v *The American Mutual Accident Insurance Company* (2); *Jones* v. *The United States Mutual Accident Association* (3); *Keene* v. *The New England Mutual Accident Association* (4); *Schneider* v. *The Provident Life Insurance Company* (5).

He never thought for a moment, that he was in the least exposing himself to danger when he went to couple these cars. He did not knowingly risk his life, when he did so, no more than it could be said that the thousands of men who couple cars daily could be said to risk their lives or to act rashly. The accident was not what might have been reasonably expected to follow the act done. The act of coupling cars requires experience and carefulness. The experience the deceased had, but he must have been careless and negligent. That is what caused the accident. Carelessness and negligence, however, are no defence to an accident of this nature. Even if he could be said to have been imprudent in attempting to couple these cars, though with the experience he had it was not so, that would not constitute a voluntary and wanton exposure to danger within the meaning of the policy. The case of *Neill* v. *The Travellers Insurance Company* (6), and *Cornish The Accident Insurance Company* (7), have been relied upon by the appellant, but the facts in those cases are not such as to make them authority in the case at the bar. I would dismiss the appeal with costs.

(1) 3 Ins. L. J. 877.
(2) 21 S.W. Rep. 39.
(3) 61 N. W. Rep. 485.
(4) 161 Mass. 149.
(5) 24 Wis. 28.
(6) 12 Can. S.C.R. 55.
(7) 23 Q.B.D. 453.

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Sedgewick J.

SEDGEWICK J.—I am of opinion that the judgment of the court below is right.

The principal question is as to the interpretation to be given to the words in the policy, "voluntary exposure to unnecessary danger." If the act of the deceased which occasioned his death comes within this description the appeal must succeed, otherwise not, as we all agree. The phrase was doubtless borrowed from accident policies issued by United States companies and there are, in that country, many decisions as to its intent and meaning, most of them being cited in the first volume of the American and English Encyclopædia of Law, under the title of "Accident Insurance." They are not binding on this court, but I have gone carefully over them all, and they confirm me in the view I take as to the proper meaning of the phrase in controversy.

The deceased was an employee of the Canadian Pacific Railway Company at Arnprior station. The only officers of the company there were the station agent and himself. He was insured as baggageman, but he was called the porter. His duties were not defined by any written document or instructions by the company; he was, I suppose, to do all that it was necessary to do in and about the station and yards that the agent was not to do. He was, in fact, a "man of all work" subject to the agent's directions and to his own sense of duty in the interests of his employers. On a certain Sunday there was a freight train at the station in charge of a conductor and two brakesmen, the conductor and one brakesman being at the front of the train, the other brakesman at the rear. It was necessary that the train should back down to a yard a considerable distance off, to attach it to a van. To do this a coupling-pin had to be found, none being on board the train. The deceased

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found the pin and did the coupling. In doing this, he slipped between the van and the train to which it was attached, was run over and killed. The brakesman denied asking him to do the coupling, but a witness testified that he heard a conversation between him and the deceased and he understood from the conversation that that was the request made.

The trial judge found that the deceased understood that the request was made and did the coupling in pursuance of it. He had several times done the same thing before. It was part of his duty to seal cars, involving the same danger as coupling cars, but the agent gave evidence that it was no part of his duty to couple cars, simply meaning, as I think, that as a general thing he had nothing to do with the management or operation of a train, whether at a stand-still or in motion, that duty being imposed upon the engineman, conductors and brakesmen, and that, as porter, his work was "on-shore."

Was there then, on this occasion, and under these circumstances, "a voluntary exposure to unnecessary danger?" Let me critically examine this phrase. To bring the company within the exception, they must be able to answer affirmatively, four independent questions of fact:—

1. Was there *danger?*
2. Was there *unnecessary* danger?
3. Was there an *exposure* to danger? and
4. Was there a a *voluntary* exposure to danger?

I am inclined to the belief that the original design of the stipulation was to prevent an act on the part of the assured exhibiting a conscious, reckless, wanton and wicked disregard of personal safety, whether of life or of limb,—the doing of a thing that would, according to the view of a "reasonable man," be madness, except upon the hypothesis of voluntary suicide or self-mutilation.

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But, let me deal with the questions just suggested. Was the doing of the deed in question a danger—a dangerous deed? The evidence discloses that the act complained of was in ordinary circumstances done by a person on board a train, known as a brakesman, and that his occupation was more hazardous and more liable to accident than that of the deceased, just as probably the occupation of a seaman is more subject to risk than that of a landsman. But, in the exercise of a brakesman's duty, he has many things to do other than the coupling of cars—what these duties are, I have not knowledge to specify. He lives and moves and has his being on a moving machine. Accidents may befall him from innumerable causes. He may fall from the car's roof on which he has to travel. There may be a defective track, or a miscreant may obstruct or derail it, or a collision with another train or engine before or behind may occur and misfortune may come to him, but there is no evidence that, as far as he is concerned, the coupling of a car alone is any more dangerous than many acts the deceased was accustomed to do. It may be easy enough to decide whether or not one occupation is more dangerous than another, but it is not easy to determine whether or not the coupling of two cars by one who knows how to do it (as the deceased did) is more dangerous than the act of sealing from the platform of a moving car, or say the harnessing of a horse to a carriage. Danger lurks everywhere. The word (danger), however, is not used in that broad sense in the policy. The act in question must be an act which, as regards the person doing it, a jury would find was dangerous. I have great doubt as to whether the coupling of cars here was dangerous within the meaning of the policy, and I therefore do not answer the first question, yes or no.

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In dealing with the second question, I assume there was danger, but was the doing of the act a necessary or an unnecessary danger? If necessary, the appellants are out of court. The act of coupling must be done. It is an inseparable incident to the operation of a railway, and, in fact, the doing of it, if a danger at all, is a necessary danger.

My admission as to the first question applies to the third, and I come to the fourth question: Was there a voluntary exposure? These are the only words in the phrase I am commenting on, that have reference to conscious personal agency or the exercise of human volition or free will. I think that the adjective "voluntary" here, is not used as the opposite of "involuntary," but to describe an act which the deceased thought he had the liberty to do or not to do as he might think best. To convey the intended idea the word "unnecessary" might have been here used as a proper equivalent or synonym. As before suggested the two words "voluntary exposure" mean exposure not called for—officious exposure. They do not include an exposure or act done under a sense of duty, under a feeling of obligation, to either a fellow-servant or to the company, whose man he is, to an act behind which there is an insistent voice, a human or divine imperative impelling it. The evidence, I think, shows that it was in obedience to this call of duty that the deceased acted as he did, and the question now being considered must, therefore, be answered in the negative.

Upon these grounds, which I might elaborate, at much greater length, I am of opinion that the appeal should be dismissed with costs.

GIROUARD J.—Concurred in the judgment dismissing the appeal with costs.

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Davies J.

DAVIES J. (dissenting).—With respect to the contention of the insurance company that, as the death of the assured resulted from injuries received in "an occupation or exposure classed by the company as more hazardous than that of baggageman at station," which insured was described as being in his application, he was not entitled to recover at all or, if entitled at all, could only recover under clause thirteen of the policy such sum as the premium paid would purchase at the rate fixed for such increased hazard, I understand we are all of the opinion, in common with the judges of the Court of Appeal and the trial judge, that such contention cannot be upheld, because the "occupation or exposure" classed by the company as more hazardous than that stated in the application of insured does not cover the case of a mere transient or isolated act of the insured done by him outside of his regular occupation. This clause in the policy was only intended to cover an entire change of occupation or employment and, if the company intended that it could cover isolated or transient acts done or committed by the insured and not part of his duties as baggageman at the station or fairly arising therefrom, language much more clear and definite must be used to express the intention.

With regard, however, to the company's contention that the plaintiff cannot recover because of the stipulation in the second paragraph of clause three, I am of opinion that it is sound and fatal to the right of the plaintiff to recover.

The clause is one common to many accident policies and reads as follows:

> This insurance does not cover * * * voluntary exposure to unnecessary danger.

I agree with the learned Justices Osler and Moss, in the Court of Appeal, that the injuries the deceased received, when engaged in coupling the cars of the train were within the clause.

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Many decisions have been given in different states of the Union, as to the meaning of the provision in question, but none of them appear to be directly in point. They will be found collected in the first volume of the American and English Encyclopædia of Law, at page 306.

The learned editors say that the words "voluntary exposure" imply conscious intentional exposure to something which one is willing to take the risk of, and "one which reasonable and ordinary prudence would pronounce dangerous." I agree in these definitions as far as they go, but they do not cover all the ground. If the danger is unknown and hidden an injury would be accidental.

There is a clear distinction between a voluntary act and a voluntary exposure to danger. A hidden danger may exist, yet exposure thereto, but without knowledge of the danger, would not constitute a voluntary exposure to it. The act may be voluntary and the exposure involuntary. It must also be an unnecessary danger. A voluntary exposure to a necessary danger is not forbidden nor an involuntary exposure to unnecessary danger.

The policy recognises the existence of dangers which it may become necessary for the insured to meet in the daily walks of life, and even out of the ordinary walks. For instance, the attempt to rescue persons in deadly peril, where such an attempt is not absolutely foolhardy. I think the words imply a conscious intentional exposure to a danger which neither his contractual duty to his employers nor the duties of our common manhood call upon him to face. For instance, voluntarily assisting in the rescue of a ship's crew in a stormy sea, or in an attempt to save the lives of passengers on a burning car, would not be a voluntary exposure to unnecessary danger because it would be a man's duty as such so to assist.

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Mr. May, in his treatise on insurance, section 2624, formulates the rule thus:

> If the insured voluntarily places himself in a position where, from the surrounding circumstances a person of ordinary prudence would reasonably hesitate to place himself for fear of danger to life or body, then there can be no recovery for injuries or death in consequence of such an act.

Read in the light of the limitations I have already suggested, I think this fairly states the law, and that the words, "unnecessary danger" mean when the whole policy and its object is studied, danger which it is unnecessary for the insured to incur.

The cases of *Neill* v. *The Travellers Insurance Co.* (1), and *Cornish* v. *The Accident Insurance Co.* (2) are both pertinent and instructive as to the proper construction of the clause.

In the case at bar, it does seem to me that the insured, by entering as he did between the cars and coupling them together, brought himself directly within the clause. As the learned judge has found this act was clearly not part of his duty as baggage-man at station, nor was it part of his duty in any way to couple cars or to have anything whatever to do with the management of trains. The learned judge, however, decided that the deceased understood Carroll, the brakesman, to ask him to make the coupling and that, therefore, his exposure would not be voluntary. With every respect to the learned judge, I do not think the evidence warranted any such finding. Carroll himself expressly swore that he did not ask him and the "understanding" of a by-stander ought not to countervail the positive testimony of the man Carroll himself. But, whether Carroll did or did not ask him, makes no difference to my mind. The deceased man was in no way connected with or under the control of or working with Carroll. The latter as he says had

(1) 12 Can. S C. R. 55. (2) 23 Q. B. D. 453.

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stepped off the train "to get a pin and as he could not see any pin around, gave the signal to stop the cars," and that he neither asked nor expected McNevin to make the coupling. The latter, at the time, was not on duty, had no business with the management of the train service, and the brakesman had no authority or control over him in any way whatever. The fact is the deceased, being off duty, was riding on the train for amusement or pleasure and either voluntarily or officiously, without any request, or voluntarily at the request of Carroll, but, without any duty or obligation on his part, attempted to couple the cars, by going between them, with a pin. It does seem to me to be idle to talk of such an act not being a dangerous one. To one not expert in the business it would be a most dangerous one, and to any, even the coolest and most self-reliant men, accompanied with great danger.

The conclusion I have reached, reluctantly, is that the act of coupling cars together when in motion, as this train was, towards the car to be coupled, was so far as deceased was concerned a voluntary, if not an officious exposure of himself to a danger known to him and unnecessary for him to face. There was neither moral obligation nor contractual duty impelling him to incur the risk he did, and it was outside of his ordinary duties. It was not one of the dangers which a man may meet in or about his ordinary avocation or while engaged in any pursuit, recreation, act or duty incident to his ordinary habits of life or the promptings of humanity, but was a "voluntary exposure to unnecessary danger."

MILLS J.—I concur in the judgment of Mr. Justice Taschereau and think this appeal should be dismissed with costs.

I do not think that the performance of a single hazardous act will take the policy out of the class in which the respondent's son was insured and put him in a class in which the rate of insurance is very much higher and where the amount to which he would be entitled is very much less. McNevin was used to coupling cars, and so possessed skill which, in his case, made the danger very much less, and a single act done, as would very naturally be done by an active, industrious and obliging man, would not put him in the class of one whose ordinary employment would be regarded as specially dangerous. In all cases of this sort some regard must be had to surrounding circumstances. The performance of an isolated act of this kind cannot be regarded as determining his employment, and as taking him out from the class in which he is insured and putting him in one that is more hazardous. The doing of an act such as that he was engaged in when he lost his life, is a very different thing indeed from being constantly engaged every day in work of this kind. There is no one whose life is insured, who does not at times do some act more hazardous than those which pertain to his ordinary occupation, and yet no insurance company would think it their duty to take one out of the class in which he was insured because occasionally in his lifetime he felt it his duty to perform some act which entailed greater risk than those connected with his ordinary occupation. Some regard must be had to the relations in which men situated as McNevin was, stand to others about him. The good will and occasional assistance of others make it necessary that he should sometimes perform acts which oblige them. No one can suppose that he desired to endanger his life by what he did. He simply aimed at doing for others what he would that they should, in like circumstances, do for him, and

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this, it would seem, was the thought uppermost in his mind. He was not deserting his ordinary avocation to engage in more hazardous labours. He was not seeking to become insured in one class while his ordinary avocation put him in another where his rate of insurance would be very much greater. He simply did that which almost every industrious man finds it occasionally necessary to do, in order to oblige others, and the mutual service which men do for each other in this way is as much in the interest of insurance companies as it is in the interest of the parties who perform it.

The policies of insurance companies, in this regard, must receive a reasonable construction, and it is neither to the advantage of the insurer nor the insured that the lines should be drawn with so much rigidity that to occasionally cross them is to be regarded as a violation of the conditions of the policy which they have received.

I cannot, therefore, hold that McNevin's act was a voluntary exposure to unnecessary danger. It was, in my opinion, a duty that it was his interest to perform, and his act is not within the rule of voluntary exposure to unnecessary danger, but is quite as certainly outside of the intended restriction as the more extreme acts performed by the promptings of humanity in the cases suggested. In all these cases we must have regard to the surrounding circumstances of the party, and we must not lay down rules which would operate against the individual who, in endeavouring to get on, and who, as a useful employee, is occasionally called upon to step outside of those limits within which he, for the most part, remains.

Appeal dismissed with costs.

Solicitors for the appellant: *Tripp & McGee.*

Solicitors for the respondent: *McGarry & Devine.*

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THE TOWN OF GODERICH (DEFENDANT) ..... } APPELLANT ; *Mar. 17. *May 6.

AND

F. BARLOW HOLMES (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Sale of goods—Delivery—"At" shed—"Into" shed or grounds adjacent.

A tender by H. to supply coal to the Town of Goderich pursuant to advertisement thereof contained an offer to deliver it "into the coal shed, at pumping station or grounds adjacent thereto where directed by you," (that is by a committee of the council). The tender was accepted and the contract afterwards signed called for delivery "at the coal shed." A portion of the coal was delivered, without directions from the committee, from the vessel on to the dock, about 80 feet from the shed and separated from it by a road.

Held, reversing the judgment of the Court of Appeal, that the coal was not delivered "at the coal shed" as agreed by the contract signed by the parties which was the binding document.

Held also, that if the contract was to be decided by the terms of the tender the delivery was not in accordance therewith the place of delivery not being "at the pumping station or grounds adjacent thereto."

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of the Divisional Court in favour of the defendant corporation.

The facts are sufficiently stated in the above headnote and in the judgment of the court on this appeal.

Garrow K.C. for the appellant.

Aylesworth K.C. for the respondent.

The judgment of the court was delivered by :

*PRESENT :—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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TASCHEREAU J.—This is an appeal by the municipal corporation, defendants, from the judgment of the Court of Appeal for Ontario which reversed a judgment of the Divisional Court in their favour, and restored the judgment against them of the Chief Justice of Ontario, before whom the action was tried without a jury. The Chancellor, and Ferguson and Meredith JJ. in the Divisional Court, were of opinion that the respondent's action as to the amount now in dispute, should be dismissed, the balance having been paid and accepted without prejudice to either party. In the Court of Appeal Maclennan J., dissenting, was of opinion that the judgment of the Divisional Court, should be affirmed but the majority of the court, Meredith C.J.,C.P., Osler, Moss and Lister JJ. were of opinion that that judgment should be reversed and the judgment against the corporation given at the trial restored.

The facts that have any bearing upon the controversy between the parties as now submitted are substantially as follows:

In October, 1899, the respondent, a coal dealer, by a letter addressed to the Water and Light Committee, tendered to supply to the appellant corporation the Hocking Valley coal they required at $2.22 per ton "to be delivered *into the coal shed at pumping station, or grounds adjacent thereto* where directed by you." The committee, on the same day, accepted respondent's tender, and afterwards reported to counsel that they had done so, "the coal to be delivered in the coal shed." And a few days after the following contract was signed:

F. B. Holmes, of the first part, and the Town of Goderich, of the second part. The said party of the first part agrees to deliver *at the coal shed* 600 tons of Hocking Valley coal at $2.22 per ton. The party of the second part agrees to pay the party of the first part the above mentioned price on the delivery of the said coal.

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Taschereau J.

The respondent's action is for the price of 600 tons of coal alleged to have been sold and delivered under the said contract. I am of opinion that he has failed to prove that he ever delivered that coal to the corporation, as he was bound by his contract to do, either "*at the coal shed*" or "into the shed *at the pumping station* or grounds adjacent thereto where directed by the Water or Light Committee." When the coal arrived at the wharf the appellants directed him to place the coal in the shed until filled, and the balance where directed by the engineer, but the respondent expressly refused to do so, contending, as he now does, that by his contract the dumping over of the coal on the dock was a sufficient delivery to the appellants. The appellants refused to accept the coal at that place, notwithstanding which the respondent continued to unload the coal on the dock, agreeing however next day, as evidenced by two witnesses, Kelly and Cantalon, that he would put it subsequently into the shed if allowed to proceed. The learned Chief Justice at the trial was of opinion that the delivery on the dock was, under the circumstances of the case, a delivery *at the coal shed*, according to the terms of the contract. The majority of the Court of Appeal held that by the pleadings, it is not the contract that must govern, but the tender as accepted, that is to say, that by the real contract, the respondent was to deliver "into the coal shed at pumping station, or grounds adjacent thereof, where directed by the committee." It seems to me that, as held at the trial, it is the contract that governs. That is what the respondent himself contended for in his reasons of appeal before the Court of Appeal. Now, has the coal been delivered *at the coal shed*, in the terms of the contract? It clearly has not. It was deposited upon the dock, away from the shed, 50 or 80 feet from it, with a street separating

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the dock from the shed. And the uncontradicted fact that it will cost ten cents a ton to carry it to the shed demonstrates that this cannot constitute a delivery at the coal shed as the parties must have intended it to be, for when the corporation and the respondent agreed to $2.22 per ton, that meant, under the circumstances, delivered at a place where the cost of it when used would be that sum, and not $2.32 as it would be if the respondent's contention prevailed.

The respondent cannot have reasonably assumed that the appellants, when they signed the contract, intended to give him ten cents more per ton than what he had asked and what they had previously agreed upon.

Assuming with the majority of the Court of Appeal that a delivery "into the coal shed at pumping station, or grounds adjacent thereto as directed by the committee," was what was agreed upon, I do not think the respondent's position more favourable. The place where he dumped the coal is not a ground adjacent to the coal shed *at pumping station;* then he was never directed to deliver it where he deposited it by any one authorised to do so by the corporation. On the contrary, the evidence is all one way, that the appellants and their officers positively refused to accept it there.

I do not allude to the alterations made in the coal shed after the contract was signed. The objections now taken upon that ground by the respondent are after-thoughts. There was no inconvenience resulting from these changes, but rather greater convenience, it would appear; and at the time, no objection to deliver at the shed was made upon that ground, the respondent, or his father for him, simply contending that they had the right to deliver on the dock, and not a foot further, and not in the shed, or at the shed, or on grounds adjacent *to the pumping station*, though the

respondent himself afterwards, as I before remarked, undertook to put the coal in the shed if allowed to proceed to unload, conceding unequivocally that the dumping on the dock was not the delivery he was bound to make according to his contract.

Assuming that the appellants had no right to refuse acceptance as they did, the fact remains that the coal has not been delivered to them; it is to the present day respondent's coal, and his action for goods sold and delivered must in any case fail.

I would allow the appeal with costs and restore the judgment of the Divisional Court.

Appeal allowed with costs.

Solicitors for the appellant: *Garrow & Garrow.*

Solicitor for the respondent: *E. L. Dickinson.*

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*Mar. 18.
*May 6.

THE COLLINS BAY RAFTING AND FORWARDING COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

THE NEW YORK AND OTTAWA RAILWAY COMPANY (PLAINTIFFS) AND WILLIAM LESSLIE (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Divisibility—Completion.

By a contract to remove spans from a wrecked bridge in the St. Lawrence the contractors agreed "to remove both spans of the wrecked bridge and put them ashore for the sum of $25,000, we to be paid $5,000 as soon as one span is removed from the channel and another $5,000 as soon as one span is put ashore and the balance as soon as the work is completed. * * * It being understood and agreed that we push the work with all reasonable despatch, but if we fail to complete work this season we are to have the right to complete it next season."

Held, reversing the judgment of the Court of Apppeal, Taschereau and Davies JJ. dissenting, that the contract was divisible, and the contractors having removed one span from the channel and put it ashore were entitled to the two payments of $5,000 each notwithstanding the whole work was not completed in the second season.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment at the trial in favour of the defendant company.

The contract which gave rise to this action was as follows:

"This agreement made and entered into this day of October, 1898, by and between the Collins' Bay Rafting and Forwarding Company, Limited, party of the first part; and the New York and Ottawa Company, party of the second part, witnesseth:

*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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"Whereas the said second party invited bids for the removing from the St. Lawrence River the two wrecked spans of its bridge now in the south channel of the St. Lawrence River, including all the metal work of bridge, and erecting plant connected therewith; and said first party submitted two propositions for the accomplishment of said undertaking, one based on the payment of fixed prices per day for the labour and machinery required to do the work, and the other proposing a fixed price for a completed job and for the accomplishment of which said first party proposes to assume all risk and furnish all the labour, machinery and appliances required for and suited to said undertaking, which said latter proposition is in words and figures following, viz:

"KINGSTON, September 30th, 1898.

"GEO. W. PARKER, ESQ.,

"Pres. N. Y. & O. R. Co., Cornwall.

"DEAR SIR,—Since seeing you I have had personal interview and correspondence with my partners, and as you seem to prefer having the spans of the bridge removed by contract, the contractors to assume all risk in the matter, we have decided to make you another proposition, leaving it optional with you to accept either offer.

"We will contract to remove both spans of the wrecked bridge and put them ashore for the sum of ($25,000) twenty-five thousand dollars, we to be paid ($5,000) five thousand dollars as soon as one span is removed from the channel, and another ($5,000) five thousand dollars as soon as one span is put ashore and the balance as soon as the work is completed.

"It being agreed that you get us permit from the U. S. Government to allow us to use our plant, vessels and men to do the work. We to commence operations with two gangs and outfits next week, one to work at

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the middle span and the other at the south span, it being understood and agreed that we push the work with all reasonable despatch, but if we fail to complete work this season we are to have the right to complete it next season.

"Security to be given us that we will be paid as above, and on completion of our contract.

"Awaiting your reply, I remain,

"Yours respectfully,

"(Sgd.) COLLINS' BAY RAFTING AND FORWARDING COMPANY, LIMITED.

W. LESSLIE,

Manager.

"Upon due consideration said second party accepted said latter proposal in words and figures following, namely:

"CORNWALL, Ont., October 3rd, 1898.

"COLLINS BAY RAFTING AND FORWARDING CO.,

W. LESSLIE, Manager,

Collins Bay, Ont.

"DEAR SIR,—After considering your propositions we have decided to accept the one dated Sept. 30, 1898, in which you propose to remove the entire wrecked spans of our St. Lawrence bridge, and all metal material connected therewith, and place them on shore for twenty-five thousand dollars ($25,000) with the understanding that your agreement is to take out the middle span whole, so that the material can be used in the construction of another bridge.

"The rest of the wrecked metal is to be taken out unbroken, so far as practicable, but to be cut up by blasting if it is found impossible to take the material out otherwise.

"It is further understood that you are to commence the work this week and prosecute it with all possible

vigour, with a view of completing the undertaking at the earliest practicable moment.

"We of course understand that unless we can secure the necessary permit from the United States Government for you to work in American waters, we are to take all risk incident to or connected therewith.

"Very truly yours,

"(Sgd.) GEO. W. PARKER,
President.

"Accepted,

(Sgd.) COLLINS BAY RAFTING AND FORWARDING COMPANY, LIMITED.

(Sgd.) W. LESSLIE, Manager.

CORNWALL, Oct. 3rd, 1898.

"Now in consideration of the premises and of the sum of one dollar paid by each of the said parties hereto to the other, said first party stipulates and agrees to commence work immediately on said undertaking and will furnish all the men, machinery and appliances necessary and proper for the speedy and efficient accomplishment of the removal of said bridge, spans and erecting plant, in the time and manner specified in said correspondence, and assume all risk of accident, and damage incident thereto, except as otherwise herein provided.

"Upon the accomplishment of said work in the way and manner specified above, said second party agrees to pay the sums of money therefor to said first party at the times and upon the conditions above stipulated and is to secure such payments by acceptable security, or by the deposit of the cash covering same with the Bank of Montreal at Cornwall, or some other bank to be agreed upon.

"It is mutually agreed that the work shall be done and the job completed under the supervision and to the acceptance of the chief engineer of said second party.

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"Said second party to secure the approval or consent of the United States Government for the craft and men of said first party to do said work in American waters, or to protect and save harmless said first party from and against all hindrances or seizure resulting from the failure to have such consent.

"IN WITNESS WHEREOF said parties have hereunto subscribed their corporate names by officers thereunto duly authorized, in duplicate, the day and date above stated.

"(Sgd.) COLLINS BAY RAFTING AND FORWARDING CO., LIMITED.

"(Sgd.) W. LESSLIE, Manager.

"(Sgd.) NEW YORK AND OTTAWA COMPANY by GEO. W. PARKER, President.

At the time this contract was made a considerable part of the south span projected out of the water, and it was entirely broken up by its fall and tangled up in every way and there was no attempt made to save it; and the middle span lay crosswise of the stream in from 26 to 34 feet of water. It was twenty-four feet wide and the depth of water above it was from three or four feet at one end up to ten feet at the other end, and was apparently whole, but it was afterwards found that it was broken at the ninth point.

By the end of the season of 1898 the defendant company had put ashore about one-quarter of the south span and had turned the middle span parallel with the stream, and had dragged it down the stream about five hundred feet, and on the 30th December, 1898, the defendant company wrote to the plaintiffs "under the terms of our contract with your company for the removal and putting ashore of the wrecked spans of the Cornwall bridge, we are entitled to a payment of ($5,000) five thousand dollars when we remove the span from the channel, and this we claim we have

done as far as it affects your company. We have lifted it from its position where it lay directly across the channel and formed a dam and would have obstructed the ice, and so possibly been detrimental to the remaining piers and span of the bridge, and have taken it down the river so that its upper or west end is now about five hundred feet below the line of the bridge, and it lies parallel with the current and to the south side of the centre of the channel so that at least three-fourths of the ice now remaining passes to the north side of the span."

"As you know, we have spared no expense to push the work ahead as rapidly as possible and trust you will instruct Mr. Pringle to join in signing the cheque for $5,000 in favour of our company."

This $5,000 was paid by the plaintiffs to the defendant company and a receipt taken from the defendant company for it, in which it was stated to be paid under protest and that the payment of it was not to be construed as an admission or an acquiescence on the part of the plaintiffs that any moneys were due under the said contract or for the work to be performed thereunder so far as to call for the payment of any moneys. During the season of 1899 the defendant company completed the putting ashore of the balance of the south span, but were unable to remove the middle span from where it was left at the end of the season of 1898.

The whole work not having been completed by the end of the season of 1899 an action was brought by the New York & Ottawa Co. to recover back the $5,000 so paid and to have the amount deposited with trustees as security for payment of the contract price returned. The defendant by counterclaim demanded $5,000 more having placed one span on the shore. The trial judge dismissed the action and gave defendant the sum so

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claimed. The Court of Appeal reversed this judgment and ordered judgment to be entered for plaintiff as prayed in the statement of claim. The defendant appealed.

Walkem K.C. and *Shepley K.C.* for the appellant. There was no time limit for completion of the work but appellant had to finish it within a reasonable time. See Addison on Contracts (9 ed.) p. 801. *In re Canadian Niagara Power Co.* (1).

The contract was clearly divisible. Addison on contracts 9 ed. 802.

Aylesworth K. C. and *J. A. C. Cameron* for the respondent.

TASCHEREAU J (dissenting).—I am of opinion that that this appeal should be dismissed for the reasons given by Moss J., in the Court of Appeal.

As I read the agreement of the fourth of October, 1898, the appellants undertook to complete the works and earn the $25,000 during the season of 1898, but, if it turned out that it was impossible for them to complete it in that time, they were given the season of 1899, as a peremptory delay, to complete it. If they had at all intimated to the respondents that they did not then and there intend to be bound to complete in 1899 at the latest, the respondents would not have given them the contract.

SEDGEWICK J.—I agree with the opinion of Mr. Justice Girouard.

GIROUARD J.—I am of the opinion that the appeal should be allowed with costs before this court and the Court of Appeal, and the judgment of the High Court of Justice for Ontario restored for the reasons given by Mr. Justice Maclennan.

(1) 30 O. R. 185.

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Mills J.

DAVIES J. (dissenting).—I am of opinion for the reasons given by Chief Justice Armour and Mr. Justice Moss, that this appeal should be dismissed with costs and judgment entered for the plaintiffs.

MILLS J.—This is an appeal by the defendants, the Collins Bay Rafting and Forwarding Company (Limited), from the judgment of the Court of Appeal, pronounced on the 21st day of September last, whereby the appeal of the plaintiffs from the judgment of the Honourable Mr Justice Street, pronounced at the trial of the action, in favour of the Rafting Company, allowing them $5,000 on their counter-claim and otherwise dismissing the action with costs was allowed and judgment given in favour of the plaintiff with costs. William Lesslie is merely a stake-holder between the parties and has no substantial interest in the appeal.

In this case, the plaintiffs are a corporation under the laws of the State of New Jersey, carrying on business in Canada, with their head office at Collins Bay.

The defendant Lesslie is the manager of the Rafting Co., and resides in the City of Kingston, in Ontario. In 1898, this company entered into negotiations with the New York and Ottawa Railway Company for the removal of two spans of their bridge which had fallen into the south channel of the River St. Lawrence, and the Rafting Company submitted to the New York and Ottawa Railway Company, two propositions for the accomplishment of this work, the one based on the payment of a fixed price for labour and machinery, upon terms and conditions set out in an agreement of the 26th day of November, 1898, being accepted.

The time having expired for the completion of the work according to the condition of the New York and Ottawa Railway Co., they notified William Lesslie and

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Robert Pringle, trustees, in whose names the money had been deposited, requiring them to indorse over to the New York and Ottawa Railway Company the deposit receipt issued by the Bank of Montreal, and on the 21st day of December, 1899, the Collins Bay Rafting Company were requested by the trustees to indorse over to the New York and Ottawa Railway Company the deposit receipt for $20,000 which they did not do.

The trustees had expressed their willingness to indorse over the said deposit receipt, at any time that direction was received to do so from the Collins Bay Rafting and Forwarding Company. The Collins Bay Rafting and Forwarding Company and William Lesslie, one of the trustees, refused to comply with this notice and request to have the deposit receipt of $20,000 indorsed over to the New York and Ottawa Railway Company. The plaintiffs maintained that the time for completing the said contract had expired and they claim the right to recover back the $5,000 paid by them to the Collins Bay Rafting and Forwarding Company. They claim that they have suffered damage to the extent of $20,000 by reason of the non-fulfilment of the contract. They ask that the trustees be required to indorse the deposit receipt of the $20,000 to them; that the Collins Bay Rafting Co. be directed to pay back to them the $5,000 received with interest, and that $20,000 damages for non-performance of the contract be awarded to them, together with the costs of the action.

The defendants set out the agreement between them and the New York and Ottawa Railway Company by which the Collins Bay Rafting and Forwarding Company agreed to effect the removal from the St. Lawrence River of the two wrecked spans of the bridge of the New York and Ottawa Railway Company from the south channel. They assume all risk in the matter,

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and make this further proposition to remove both spans of the wrecked bridge, and put them ashore for the sum of $25,000; $5,000 to be paid as soon as one span is removed from the channel, and another $5,000 as soon as one span is put ashore and the balance that is $15,000, as soon as the work is completed. This is agreed to if the permission from the United States is secured by the New York and Ottawa Railway Company to allow the company to use their plant, vessels and men to do the work.

On the 3rd of October, the president George Parker, of the New York and Ottawa Railway Company accepted the proposal of the 30th September, in which the defendant company proposed to remove the entire wrecked spans of the St. Lawrence bridge and all metal material connected therewith, and place them on shore for $25,000, with the understanding that the Collins Bay Rafting and Forwarding Company agree to take out the middle span whole, so that the material can be used in the construction of another bridge. The rest of the material was to be taken out unbroken as far as practicable. It was further understood that the work was to be commenced that week, and prosecuted with all possible vigour. Accordingly an agreement was entered into to carry into effect the understanding so had. The defendants contend that the time for completion of the said contract was not limited to the fall of 1899, but that they were entitled to such reasonable time for the performance of their work as might be necessary, and they contend that they have so proceeded in the execution of the said contract in accordance with the terms thereby imposed and they claim by reason of the refusal of the plaintiffs to regard the said contract as still subsisting, to recover the full amount as though the same had been completely fulfilled, and they claim that the contract was made upon the

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assumption by both parties, that the middle span of the bridge was unbroken, so that the same could be taken out whole, whereas the said middle span was, at the time of making the contract, so much fractured and broken that it was impossible for the defendants to take the same out whole. The defendants contend that the provision for arbitration has been waived or cancelled between the parties. The defendants maintained that the plaintiffs received the material composing the south span as it was taken out of the river and disposed of the same to their own use, and that the defendants are entitled to recover the contract price for their services for the same. The defendants have removed the middle span to such a position as to relieve the plaintiffs from any danger of claims for damages by reason of the obstruction in said channel of the river and the only loss to the plaintiffs from not having put it on shore, is, its value as scrap iron or steel.

The defendants, by way of counter-claim, ask that the plaintiffs be ordered to pay the full amount agreed to, less any sum that may have been paid already, and payment to them by the plaintiffs, in any event, of the value of the work and services performed in connection with the removal of the said wreck.

The case came on for trial before Mr. Justice Street on the 26th June, 1900. The Rafting Company maintain that they had not contracted to complete the work in any particular time. They proposed in their letter of the 30th of September, 1898, to remove both spans of the wrecked bridge and put them ashore. They stipulated that if they failed to complete the work during the then current season, they should have the right to complete it in the season following. The plaintiffs stipulated that the middle span should be taken out whole, so that the material might be

used in the construction of another bridge. In the actual contract these letters of the 30th of September, and the 3rd of October, are set out as part of the contract as agreed upon between the parties.

The trial judge found that the defendants were entitled to keep the sum of $5,000 which they had received from the plaintiffs, because, although they had not, at the time they received it, removed the one span of the bridge, namely, the south span, ashore, they have since done so. Two of the iron spans of the bridge had fallen over into the water, and caused a dangerous obstruction to the navigable channel which passes between two of the piers, and, if allowed to remain would form an immense dam, the back water from which might carry away the piers themselves; besides it would be a source of danger to vessels navigating the river. This danger would be greatly diminished by the removal of the south span from the channel and putting it on shore, and the removal of the centre span which was a complete barrier to navigation where it had fallen. It is not shown that the channel in which the south span lay, ceased to be obstructed until it was drawn ashore. The centre span, instead of lying across the channel, was drawn bodily down the stream some 500 or 600 feet where it still lies; the danger of a flood has, by what has been accomplished, been entirely provided against, and the channel between the piers of the bridge has been cleared by the centre span being turned parallel with the flow of the water, although it is still in the channel of the river, upon its south side.

The trial judge found that the Collins Bay Company, having removed the south span from the channel became entitled to the payment of $5,000 and by putting it on shore, they became entitled to a further sum of $5,000.

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The plaintiffs in appealing to the Court of Appeal, claimed that the trial judge had erred in the construction of the contract. The New York and Ottawa Company maintained that the Rafting Company were to receive $25,000 for a completed job, that this work was to be wholly done by the end of the season of 1899. They also maintained that the trial judge erred in holding that the Collins Bay Company had performed their contract in so far as they were to furnish proper plant and appliances and all the men and machinery, necessary for the performance of the work; that he erred in finding that the Rafting Company had commenced their work in due time and had prosecuted it and had continued to prosecute it with due diligence and skill; that he erred in holding that they were entitled to keep the sum of $5,000 from the plaintiffs, as the contract is a specific contract for a completed job; that the trial judge has put an interpretation upon the contract inconsistent with its language, when he decided that they were to be paid $5,000 when one span was put ashore and $5,000 when one span was removed from the channel,

The Collins Bay Company in resisting this appeal assert that the agreement between the parties distinctly provides for the payment of certain sums for cetain work on certain parts of the said contract being fulfilled. These payments were intended to remain as payments for the performance of certain parts of the work. The terms of the contract shew that payment was to be made in the way spoken of, as the work progressed, which is conclusive against treating the contract as an entire indivisible contract.

In the Court of Appeal Chief Justice Armour, in his judgment, points out that the defendant company had, by the end of the season, put ashore about one quarter of the south span, and had turned the middle

span parallel with the stream, and had dragged it down the stream about five hundred feet. They demanded a payment of $5,000 on account, which was paid during the year 1899; they completed putting ashore the balance of the south span, but were unable to remove the middle span from where it was left at the end of the season of 1898. The railway company knew by the last of June, 1899, that the middle span would not be raised in time for use in the re-construction of the bridge, and they ordered a new one. The Chief Justice inferred from the contract that the whole of the work was to be completed during the season of 1899, if the defendant company failed to complete it during the season of 1898, as the offer says:—

it being understood and agreed that we push the work with all reasonable despatch, but, if we fail to complete the work this season, we are to have the right to complete it next season.

The more difficult question, in the opinion of the Chief Justice, growing out of this contract, is as to the amount to which the defendant company are entitled in respect of what was done by them on the contract. The words are:

We will contract to remove both spans of the wrecked bridge, and to put them ashore for the sum of $25,000, we to be paid $5,000 as soon as one span is removed from the channel, and another $5,000 as soon as one span is put ashore, and the balance as soon as the work is completed.

The difficulty hinges on the meaning to be ascribed to the word "channel" in this term of the contract. The river is here divided into two channels, called respectively, the north and south channels, by an intervening island, over which, as well as over these two channels, the bridge crossed, and if the word "channel" in this term of the contract, is taken to mean the whole of the bed of the south channel of the river, and that is the sense in which the word is used in the

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agreement where the two wrecked spans are described as being in the south channel of the St. Lawrence river, then the judgment of the learned judge, holding that the south span of the bridge was not only removed but also put ashore, the defendant company were entitled to $10,000, might be supported. But by taking this to be the meaning of the word "channel," the words "removed from the channel" and "put ashore" would mean the same thing, and it is evident that they were used in contradistinction to each other, as having different meanings, and the letter written by the defendant company to the plaintiffs on the 30th of December, 1898, above quoted, in which they claim that they had removed the middle span from the channel, as far as it affected the plaintiffs, so that they did not consider that these words meant the same thing. What the defendant company intended by the word "channel" in this term of the contract was, in the opinion of the Chief Justice, the navigable channel, in which the middle span of the bridge was then lying, and, upon the removal of which from that channel, they were to be paid $5,000, and this accords with the construction put upon this term of the contract by the defendant company themselves, in their letter to the plaintiffs of the 20th of December, 1898.

The Chief Justice, therefore, considered that the defendant company could not be held to be entitled to this $5,000, for it could not be said that what they did do to this span was a substantial compliance with the contract, and they could only be entitled to $5,000 for putting the south span ashore, which sum they had already been paid, and, in the judgment of the Chief Justice, the appeal should be allowed with costs and the order go to the defendants for the indorsing over of the deposit receipts to the plaintiff; that the counter-claim should

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be dismissed with costs, and the defendant company pay the costs of Lesslie.

Mr. Justice Osler was of opinion that the defendants must be taken to have proposed to complete the work at farthest by the end of the season of 1899; that the judgment at the trial dismissing the action must stand, as the plaintiff expressly disclaimed a desire to sue for anything but the deposit, which they could recover because time was not of the essence of the agreement, so as to entitle them to sue at once upon its non-performance, to recover back the security; that the contract to perform, and the contract to pay were independent agreements, otherwise the defendants might have performed nearly the whole of the contract within the time, and because this very small part was not performed they would lose their labour, without any opportunity of earning the price by completing the contract. The learned judge was of opinion that the defendants were entitled to judgment for the second instalment of $5,000. He did not think them entitled to the two sums of $5,000 for removing and putting ashore one and the same span; by putting one span ashore they earned $5,000; and by removing the other from the centre channel, even though not put on shore, they earned another $5,000. The centre span was removed that it might not dam back the ice and interfere with the navigation.

He thought the evidence shewed that they removed it from the channel so far as that was necessary to entitle them to a second instalment of $5,000, and that the judgment on the counter-claim should therefore be affirmed.

Mr. Justice Maclennan, among other things held that there was a contract to remove both spans of the wrecked bridge and put them ashore for $25,000, $5,000 of which was to be paid as soon as one span was

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removed from the channel, and a second $5,000, as soon as one span was put ashore, and the balance as soon as the work was completed. The learned judge said:

The St. Lawrence River, where this bridge was constructed, is divided into two great channels by an island, and the spans of the bridge which had fallen were two of the three composing the bridge, across the south channel. In the recital of the contract the word "channel" is used in the widest sense, and as including the whole of the stream from the island to the shore, but in this paragraph, the word is evidently used in some other sense, otherwise "removing from the channel" and the "putting ashore" would mean the same thing, and when one span was removed from the channel and put ashore, the whole work would be finished, and the whole $25,000 earned, instead of only two sums of $5,000 each.

There was an abutment on each shore and two piers in the stream; on these abutments and piers the three spans of the bridge rested. The piers divided the stream into three channels and, when the two spans fell, each of them filled up and obstructed one of the channels. I think these are the channels which are meant in this part of the contract. It was all important in the public interest that they should be removed with as little delay as possible. While they continued the plaintiffs might be held responsible for damage suffered by persons navigating the stream. * * What the parties meant by the language they employed was that every effort should be made to remove the wreck * * and the defendants were to have a payment of $5,000 as soon as one of the channels was clear, even if the span taken out had not been put ashore, and they were to have $5,000, when the other span was put * * ashore.

I think the middle span was removed from the channel according to the contract; it was removed from its position between the piers * * and turned parallel with the current instead of across it.

The learned judge then went on to say that about the south span there was no dispute, and that the defendants had earned and were entitled to two sums of $5,000 each; that the materials to be removed were the property of the plaintiffs, the middle span was supposed to be unbroken, the other span was known to be broken; that the middle span was found to be broken in two, and the parts were still clinging together; that the stipulation for payment by instal-

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ments, at certain stages of progress, favoured the view that the time fixed for completion was not of the essence of the contract. He thought there was no time limited for completion and that the disposition of the action by the judge was right; that the deposit was a security for the payment of the contract price. The appeal of the plaintiff, both on the action and on the counter claim, Mr. Justice Maclennan held should be dismissed with costs.

Mr. Justice Moss held that the purpose of this action was to restore to the plaintiffs the sum of $20,000 in the Bank of Montreal to the credit of Lesslie and Pringle, and the repayment to the plaintiffs of $5,000 paid the Collins Bay Rafting Company.

His Lordship stated that in December, 1899, the plaintiffs claimed that the Collins Bay Rafting Company had not completed the work under their contract, and they claimed the repayment to them of the money held by the bank, to which the Collins Bay Rafting Company refused to agree. A suit was bronght by the railway company for this purpose and also for the repayment of the $5,000. The Collins Bay Rafting Company were to complete their contract in the season of 1898, if possible, but, if not, then by the end of the season of 1899.

Judge Moss held that, by putting the south span ashore the defendant company were not able to claim $10,000 in respect to it, and he finds that during the season of 1898, efforts made towards the removal of the middle span were unsuccessful. His Lordship quotes their letter as follows:

> Under the terms of our contract with your company for the removal and putting ashore of the wrecked spans of the Cornwall bridge we are entitled to a payment of $5,000 when we remove the span from the channel. Now, this we claim to have done, as it affects your company, as we have lifted it from its position where it *lay directly across* the channel and have taken it down the river.

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All this (the learned judge says) is plainly descriptive of the one span to be removed from the channel, and it is in respect of this work that the claim is made. But the letter emphasizes the matter by reference to the south span as follows:

"We have hauled out and put upon the south shore alongside your railroad track about one-third of the broken span, and false work."

They say that it (the centre span) is in the south side of the centre of the channel, but they add that they have been prevented, owing to a break in the south end of it, from getting the whole span below the point as they anticipated. * * They make no higher claim than that they have moved the middle span into such a position as to relieve the plaintiffs from any danger of claim for damages by reason of the obstruction of the channel. They do not assert that they have removed it from the channel. The idea was that it was to be lifted bodily and carried into shallow water, but, in fact it was left in the swift current where it still lies, and the trial judge does not find upon the evidence that the contract has been performed in that respect. * * I am therefore of opinion that the defendants' counter-claim fails.

His conclusion was that the plaintiffs were entitled to the $20,000 in the bank, together with the accrued interest, and to an order that the defendant Lesslie indorse the deposit receipt.

Mr. Justice Lister agreed with Mr. Justice Moss and the Chief Justice.

It is most important to consider what was undertaken, and what the parties were required to do under their agreement. By the indenture of agreement signed on the 26th of November, it is stated that the Collins Bay Rafting Company and the New York and Ottawa Railway Company have entered into agreement in reference to the removal of two wrecked spans of the railway bridge in the south channel of the St. Lawrence, including all the metal work of the bridge and erecting plant therewith. They state in one of the terms of the agreement that the New York and Ottawa Railway Company should place $25,000 in the Bank of Montreal to the joint credit of William Lesslie and Robert A. Pringle, to be held by them as trustees as security for

the payment of all sums of money that may from time to time become due to the Rafting Company which arrangement the Rafting Company are required to accept upon the conditions hereinafter mentioned, the Rafting Company are to draw out of the said $25,000, such sums as they may from time to time be entitled to, under the contract, and Mr. Pringle agrees, when authorised by the New York and Ottawa Railway Company to pay to the Collins Bay Rafting Company, such sum as he may be directed to pay, and Mr. Lesslie is to join Mr. Pringle in paying to the Collins Bay Rafting Company such sum as he may be directed by the New York and Ottawa Railway Company to pay. This agreement also provides to refer to arbitration any question with reference to the performance of the work which may become a matter of controversy between them.

When the correspondence is referred to it does not afford very satisfactory information as to the specific work to be performed and the payments to be made. The agreement says that the first party,—the Collins Bay Rafting Company,—agrees to commence work immediately on the said undertaking, to furnish all men, machinery and appliances necessary and proper for the speedy and efficient accomplishment of the removal of the said fallen spans of the bridge, and the erecting plant in the time and manner specified in the said correspondence, and assume all risk of accident and damage incident thereto, except as otherwise hereinafter provided. There is nothing here indicated as to the work which was to be performed, but the correspondence is referred to from which that is to be ascertained. Upon the accomplishment of the work in the way and manner specified, the second party agrees to pay the sum of money therefor, at the time and upon the conditions stipulated, to the first party, and the

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second party agrees to obtain the approval and consent of the United States Government for the employment of the crafts and men of the said first party to do the work in American waters, and so we are sent back to the correspondence for the purpose of ascertaining what the Collins Bay Rafting Company have bound themselves to perform. In the letter of the 30th of September, the Collins Bay Rafting Company say to the president of the New York and Ottawa Railway Company:

> We will contract to remove both spans of the wrecked bridge and put them ashore for the sum of $25,000, we to be paid $5,000 as soon as one span is removed from the channel, and another $5,000 as soon as one span is put ashore, and the balance as soon as the work is completed.

What balance or further work was there to perform and for the performance of which the remaining $15,000 were retained? Did these two transactions, when completed, embrace all the work that was to be done for this sum of money? This paragraph of the contract is a species of progress estimate, and there is usually some relation between the amount of work performed and the payments made. Is it then the fact that this contract provides only for the payment of forty per cent of the estimate when both of the fallen spans of the bridge are placed on shore? I do not think so. I think the more reasonable construction of this part of the contract is that $5,000 are to be paid when one span is removed from the channel, and another $5,000 as soon as the span so removed from the channel is placed on the shore; so that with regard to the removal of each of those spans from where it was lying, to the shore, the Collins Bay Rafting Company became entitled to the payment, on this progress estimate, of $10,000 or $20,000 in all, for the entire accomplishment of this part of the contract.

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The word "channel" as used in this part of the contract means "that part of the river in which vessels go on their voyage in sailing up and down the St. Lawrence, and in which either section of the fallen bridge, if permitted to remain where it had fallen, would become an obstruction to navigation."

The New York and Ottawa Railway Company desired to escape the danger which might arise to their structure if the water was dammed back and the ice there accumulated, as well as proceedings for obstructing the navigation of the river. They also sought to utilize the material of the fallen bridge in the construction of another. The president of the New York and Ottawa Railway Company, on the 3rd of October, wrote to the Collins Bay Rafting Company:—

We have decided to accept your proposition of the 30th of September, in which you propose to remove the entire wrecked span of our St. Lawrence bridge, and all metal material connected therewith, and place them on shore for $25,000, with the understanding that your agreement is to take out the middle span whole, so that the material can be used in the construction of another bridge. The rest of the wrecked metal is to be taken out unbroken so far as practicable, but to be cut up by blasting, if it is found impossible to take the metal out otherwise. You are to commence the work this week and to prosecute it with all possible vigour, with a view of completing the undertaking at the earliest practical moment. We, of course, understand that unless we can secure the necessary permit from the United States Government for you to work in American waters we are to take all risks incident or connected therewith.

An agreement was entered into in October between these companies, in which it was stated that the New York and Ottawa Railway Company invited bids for removing from the St. Lawrence river, the two wrecked spans of the bridge now in the south channel of the St. Lawrence river, including all the metal work of the bridge, and erecting plant connected therewith, and the said first party submitted two propositions for the accomplishment of the said undertaking,

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one based on the payment of fixed prices per day for the labour and machinery required to do the work, and the other proposing a fixed price for the completed job, and for the accomplishment of which the said first party proposes to assume all risk and furnish all the labour, machinery and appliances required for and suiting to the said undertaking.

This latter proposition embraces the prices for which I have already quoted with this additional:—

> We to commence operations with two gangs and outfits next week, one to work at the middle span and the other at the south span, it being understood and agreed that we push the work with all reasonable despatch, but if we fail to complete the work this season we are to have the right to complete it next season.

I am of opinion that this contract is a divisible contract; that the payments authorized by it, if made from time to time, under it, as the work proceeds, cannot be recovered back; that the Collins Bay Company were to continue vigourously to prosecute the work until it was completed and that they were at liberty to continue this prosecution throughout the season of 1899 if, when working with all possible vigour, this was necessary. I hold that when the southern span was removed to the shore the company were entitled to receive $10,000; and when they removed the centre span from between the piers had they, in taking it down the channel, so placed it as to prevent it interfering with the navigation of that channel as well as from damming back the ice, they would have earned another instalment of $5,000. I hold that the judgment in their favour on the counterclaim by the trial judge should be upheld.

Appeal allowed with costs.

Solicitors for the appellants: *Walkem & Walkem.*

Solicitors for the respondent: *Leitch, Pringle & Cameron.*

THE TORONTO RAILWAY COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

ARCHIBALD E. BALFOUR (PLAINTIFF)..... } RESPONDENT.

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*Mar 19,
*May 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Question of procedure—Verdict—Weight of evidence.

The Supreme Court of Canada refused to interfere with a decision of the Court of Appeal for Ontario in a matter of procedure, namely, whether a verdict of a jury was a general or special verdict.

The court also refused to disturb the verdict on the ground that it was against the weight of evidence after it had been affirmed by the trial judge and the Court of Appeal.

APPEAL from a decision of the Court of Appeal for Ontario affirming the verdict for the plaintiff at the trial.

The action was brought for damages for personal injuries sustained by the respondent on the 23rd of August, 1899.

The respondent alleged that at the time of the injury the appellants were negligently, improperly and unlawfully driving an electric motor car at an unusual and excessive rate of speed, and operating the car unlawfully by running the same in a wrong direction on the easterly track, contrary to the contract with the City of Toronto and the general usage of said cars in that locality.

The accident occurred on Dufferin Street, about midway between King Street and the tracks of the Grand Trunk Railway Company. On this portion of Dufferin Street there is laid two lines of track belonging to

*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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the appellants, leading to the grounds of the Toronto Industrial Exhibition Association. These lines of tracks do not form a part of the appellants' system of railway in daily operation, but are used only for short periods of time in each year.

At the time of the accident the opening of the Exhibition for the 1899 was approaching, and the appellants established on Dufferin street, between King Street and the Exhibition Grounds, what is called a "stub service," namely, one car running between two points, receiving and transferring passengers from and to the main line of the appellants' railway on King Street, and confining its operations to a single track, namely, the easterly track on Dufferin Street.

About 8.30 a.m. on the 23rd August, 1899, a car was proceeding south on the said easterly track.

The respondent was at the time driving with one Thomas Crashley down the westerly track. He was seated upon the driving seat of the waggon, which was a high seat in the front thereof with no dashboard in front, having merely a board for the feet. Crashley heard the car coming, and not looking back, supposed that it was on the westerly track, and turned out of the track, but instead of turning to the right, as is usual and as required by the Act to regulate travelling on public highways and bridges, R. S. O. ch. 236, turned to the left and thereby placed his waggon immediately in front of the car coming down the easterly track. There was no reason for this as there was plenty of room on the right, and there was, in fact, no vehicle or other thing obstructing the passage upon the roadway for vehicles to the west of the westerly track.

The motorman immediately sounded the gong, and the respondent, then looking around for the first time,

saw that the car was on the easterly track and warned Crashley of his danger. Crashley immediately turned to the right to get out of the way. The car struck the waggon and the respondent fell out, either from the effect of the sudden turn to the right or from the impact of the waggon with the car and was badly hurt.

At the trial which took place before the Honourable Chief Justice Falconbridge on 9th February, 1900, two specific grounds of negligence was alleged against the appellants:

(1) The car was running unlawfully and improperly down the easterly track.

(2) The car was running at an excessive speed.

The learned judge in charging the jury upon the two grounds of negligence charged as follows: (1) It is alleged as one of the grounds of negligence against the company that their car on that morning was being propelled upon the east track, that is the left hand track as the car was proceeding south.

(2) The other element of negligence claimed is as to the rate of speed.

He then in the course of his charge said: "I shall direct the clerk of the court—for another judge will be here—to ask you, in the event of your returning a verdict for the plaintiff, what negligence you point to."

The counsel for the plaintiff did not object to the jury being required to state upon what ground they found for the plaintiff, in case they came to the conclusion that he was entitled to a verdict.

The jury found as follows: "We find that the Street Railway Company were responsible for the accident for the following two reasons: that the car was on the wrong track according to the general custom; second, that the motorman and his appliances were in the rear of the car instead of the front, the car being reversed."

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Upon these findings judgment was directed to be entered for the plaintiff. On appeal to the Court of Appeal it was contended by the company that the verdict was special and the jury should have stated the facts upon which their findings were based. The court held that it was a general verdict and dismissed the appeal. The company appealed to this court.

Bicknell for the appellants. The jury should not have given reasons for their verdict. *Walton* v. *Potter* (1). By 55 Vict. ch. 99 (Ont.) the company is given a right to the use of the tracks. And they may be used in any way that is convenient. *Altreuter* v. *Hudson River Railroad Co.* (2). Elliott on Roads, (2 ed.) secs. 828-833.

John Macgregor for the respondent. The court will not disturb the verdict when there is evidence to justify it. *Toronto Railway Co.* v. *Gosnell* (3).

TASCHEREAU J.—This appeal fails. The respondent's action was brought for personal injuries he suffered by the negligence of the appellants, as he contends, whilst driving on Dufferin Street in Toronto, in August, 1899. He alleged by his statement of claim that at the time of the injury the appellants were negligently, improperly and unlawfully driving their electric motor car at an unusual and excessive rate of speed, and operating the car unlawfully by running the same in a wrong direction on the easterly track, contrary to their contract with the City of Toronto and the general usage of said cars in that locality.

The case was tried before Chief Justice Falconbridge with a jury. The learned judge in charging the jury said:

(1) 3 Man. & G. 411. (2) 2 E. D. Smith (N.Y.) 151.
(3) 24 Can. S. C R. 582.

(1) It is alleged as one of the grounds of negligence against the company that their car on that morning was being propelled upon the east track, that is the left hand track as the car was proceeding south.

(2) The other element of negligence claimed is as to the rate of speed.

He then in the course of his charge said:

I shall direct the clerk of the court—for another judge will be here—to ask you, in the event of your returning a verdict for the plaintiff, what negligence you point to.

The jury found as follows:

We find that the Street Railway Company were responsible for the accident for the following two reasons: that the car was on the wrong track according to the general custom; second, that the motorman and his appliances were in the rear of the car instead of the front, the car being reversed.

Upon these findings judgment was directed to be entered for the respondent.

The appellants contend that this finding is in the nature of a special verdict and that the question for the court to consider is whether upon the facts stated the appellants are liable to the respondent, which question, they contend, should be answered in their favour. The respondent, on the other hand, contends that this finding is in law a general verdict in his favour, and that the reasons given by the jury do not form part of it, and cannot affect its being a general verdict. The Court of Appeal have unanimously adopted the latter view, and affirmed the judgment of first instance in favour of the respondent for the amount of the verdict. The appellants are asking us to review that decision, that is to say, a decision upon what seems to me nothing else, under the circumstances of the case, but a question of practice, and consequently one with which, in accordance with the jurisprudence, we should not interfere. See *O'Donohoe* v. *Beatty* (1); *Williams* v. *Leonard & Sons* (2); *Price* v. *Fraser* (3).

(1) 19 Can. S. C. R. 356. (2) 26 Can. S. C. R. 406.
(3) 31 Can. S. C. R. 505.

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As to the other ground invoked by the appellants, that the verdict was against the weight of evidence, I refer to what the Privy Council said in *Lambkin* v. *The South Eastern Railway Co.* (1).

> With respect to the verdict being against evidence, it appears to their Lordships * * * * that the question of negligence being one of fact for the jury, and the finding of the jury having been upheld, or at all events not set aside, by two courts, is not open under the ordinary practice to the defendants.

I would dismiss the appeal with costs.

SEDGEWICK, GIROUARD and DAVIES JJ. concurred in the judgment dismissing the appeal with costs.

MILLS J.—This is the case in which the respondent Balfour was thrown from a waggon and very severely injured by reason of the waggon in which he was riding being overtaken by a street car of the appellant company. It is alleged that the car was running on the wrong track and that it was running at too great a rate of speed. The jury found against the appellant on both these grounds. The car was running behind the waggon and, assuming that the car was running upon the accustomed track, the driver, Mr. Crashley, turned off the track on which the street car ought to have been running and went on the track upon which it was running and so put himself in the way of the car.

It is not necessary to enter into any lengthy discussion of the law applicable to the case or any analysis of the evidence given at the trial. I accept the judgment of Chief Justice Armour in the Court of Appeal as a correct statement of both the law and the evidence in the case. In my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *James Bicknell.*

Solicitor for the respondent: *H. M. East.*

(1) 5 App. Cas. 352.

JOSEPH E. JACKSON (PLAINTIFF).....APPELLANT; 1902

AND *Mar. 26,27.
*May 6.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Railway—Sparks from engine—Evidence—Findings of jury—Defective construction.

Fire was discovered on J's farm a short time after a train of the Grand Trunk Railway had passed it drawn by two engines one having a long, and the other a short, or medium, smoke-box. In an action against the company for damages it was proved that the former was perfectly constructed. Two witnesses considered the other defective, but nine men, experienced in the construction of engines, swore that a larger smoke-box would have been unsuited to the size of the engine. The jury found that the fire was caused by sparks from one engine and they believed it was from that with the short smoke-box; and that the use of said box constituted negligence in the company which had not taken the proper means to prevent emission of sparks.

Held, affirming the judgment of the Court of Appeal (2 Ont. L.R. 689) that the latter finding was not justified by the evidence and the verdict for plaintiff at the trial was properly set aside.

APPEAL from a decision of the Court of Appeal for Ontario (1) setting aside the verdict for the plaintiff at the trial and dismissing the action.

The facts are sufficiently stated in the above headnote and in the judgments on this appeal.

Robinson K.C. and *Montgomery* for the appellant.

Nesbitt K.C. and *Rose* for the respondent.

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* PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

(1) 2 Ont. L. R. 689.

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TASCHEREAU J.—This is an action whereby the plaintiff, appellant, whose farm adjoins the tracks of the respondent company, claims damages for the destruction of his barns by a fire, which he contends was caused by sparks from one of their engines on the 27th day of April, 1899.

It appears from the evidence that within a few minutes after the passing of a train, during a dry season, fire was discovered at two places in the grass on the appellant's farm near his barns to which it soon spread. The said train was hauled by two engines, differing in construction, one, the largest, No. 531, having what is called "a long smoke-box," while engine No. 215, had a shorter smoke-box known as "the short smoke box," or "the medium smoke-box." No. 531 was in front.

The statement of claim alleges that

On the said date while the engines were being driven along the defendants' said line of railway near the plaintiff's said farm, under the management and control of the defendants, the defendants so negligently and unskilfully managed said engines and the fire and the burning material therein contained, and the said engines or one of them, were or was so insufficiently or improperly constructed and operated, were or was in such an improper condition or state of repair, that sparks or cinders from the said fire and burning matter escaped therefrom to and upon the plaintiff's premises by reason whereof the said plaintiff's barns, stables, sheds and chattel property were set on fire, and were totally burned and destroyed.

The respondents pleaded "Not guilty by statute."

The following are the questions put to the jury at the trial, and their answers:

First. Was the fire in question caused by a spark or sparks from either of the engines 215 or 531?

Answer. Yes. Unanimous answer.

Second. If so, from which of them?

Answer. We believe that it was 215.

Third. If so, did such spark or sparks escape by reason of the negligence of the defendants?

Answer. Yes.

Fourth. If so, wherein did such negligence consist?

Answer. Smoke-box.

Fifth. Did the defendants, under all the circumstances, take fair and reasonable precautions, and exercise reasonable care to have their engines and appliances for preventing the omission of fire properly constructed?

Answer. No.

No objection was made to the charge to the jury, and, upon the said answers to the above questions, the learned judge who presided directed judgment to be entered for the appellant for the sum agreed upon of five thousand eight hundred and fifty dollars. The respondents appealed against the said judgment and verdict to the Court of Appeal for Ontario, and the said appeal was allowed upon the majority opinion of the judges of that court and the appellant's action was dismissed with costs, the Honourable the Chief Justice of Ontario dissenting (1). It is from that judgment that the appellant now appeals, and asks that it be set aside and the judgment of the trial judge restored, or that, at least, a new trial should be granted.

In my opinion the judgment appealed from should be affirmed.

The law that governs cases of this nature is now so well settled, (*Qui jure suo utitur neminem laedit. Nemo damnum facit nisi facit quod facere jus non habet*;" *Oatman* v. *Michigan Central Railway Co.* (2); *New Brunswick Railway Co.* v. *Robinson* (3); *The Canada Atlantic Railway Co.* v. *Moxley* (4); *Canada Southern Railway Co.* v. *Phelps* (5); *Canadian Pacific Railway Co.* v. *Roy;* that there is no room for controversy in the case in that respect, and the appellant fairly admitted at bar that if he has not succeeded in proving that the company were guilty of negligence, as he alleges

(1) 2 Ont. L.R. 689.
(2) 1 Ont. L. R. 145 and cases there cited.
(3) 11 Can. S. C. R. 688.
(4) 15 Can. S. C. R. 145.
(5) 14 Can. S. C. R. 132.
(6) [1902] A. C. 220.

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in his statement of claim, he is out of court. His only contention is

> that the respondents were guilty of negligence, and that such negligence consisted in the defective character of the smoke box of engine No. 215, both as regards its length and its internal arrangements.

The charges against engine No. 531 are withdrawn. She was admitted, at the trial, to have been perfect in every respect. So that if she caused the damage the appellant has no redress against the company. The jury, however, have found, in answer to the second question, that, as contended by the appellant, it was engine No. 215 that caused the fire. Now, that finding is exclusively based on the defectiveness of that engine; there is absolutely nothing else to support that answer; the jury have inferred the fact that she, of the two, was the guilty one exclusively from the fact that she was defective and the other one perfect. Was she proved to have been defective, is consequently the question to be considered *in limine*, in connection with the jury's answer to the second question, for, if she was not defective, the jury could not, it being conceded that every engine throws sparks, reasonably attempt to say which of the two engines caused the damage, and the case is at an end. Then had the appellant been able to prove directly that the sparks came from No. 215, that would have been of no assistance to him if No. 215 was not defective. If both 215 and 531 were perfect, it matters not from which of them the sparks came, or if they came from both.

And to put the case in another form, leaving No. 531 out of the question, supposing that No. 215 had been the only one hauling this train, so that the jury's answer to the second question was fully justified, that alone would not entitle the appellant to recover. He would have had to prove the negligence charged

against the company as to the smoke-box, and he has not done so. The jury's answers to the third, fourth and fifth questions cannot be supported. They must either have disregarded the evidence or else completely failed to understand it. Assuming that sufficient evidence had been brought by the appellant to throw the onus upon the respondents of proving that they had not been guilty of negligence and to justify the refusal of a non-suit at the conclusion of the case, they have overwhelmingly proved that engine No. 215 was as perfect and in as good order and condition in all respects as engine No. 531. All that the law requires from railway companies is not that they use engines which do not emit sparks, for that is so far an impossibility, but that they use the best practicable means that can reasonably be required according to modern science and knowledge to avoid doing damage to the property through which the statute allows them to run.

Here, it is clearly proved that the smoke-box of engine No. 215 was constructed, as to size, in proportion to the engine itself, and that it had all the appliances that practical experience could suggest for the prevention of fires. Morse, an experienced engineer, says that a long box, as No. 531 had, on No. 215 would have been of no use whatever to lessen the emission of sparks. And Willa, the superintendent of tests of the Baldwin Locomotive Works of Philadelphia, says that the present tendency is to shorten up smoke-boxes, and that the old idea of lengthening the smoke-boxes to entrap the sparks had to be given up as not bringing the result expected. This evidence is fully corroborated by that of a number of other witnesses, to which I deem it unnecessary to refer in detail. I fail to see how it can be contended that the respondents were guilty of negligence in the construction of this smoke-

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box, when they adopted, as proved, the appliances that a number of the most eminent engineers in America, if called together as experts to advise them in the matter, must have reported to be the best and most reliable known in the world. *Earl of Shaftsbury* v. *London & South Western Railway Co.* (1).

The Canada Atlantic Railway Co v. *Moxley* (2), relied upon by the appellant, has no application. It was clearly proved in that case that one of the company's engines was defective. Then, the appeal to this court was from the judgment of two courts in both of which the findings of the jury against the appellant had been upheld. Consequently, following the rule laid down by the Privy Council in *Lambkin* v. *The South Eastern Railway Co.* (3), in the Privy Council, the question of the verdict being against the weight of evidence was not open to the appellant.

As to the appellant's motion for a new trial, it was rightly refused by the Court of Appeal. There is no suggestion that any new evidence could be brought. The question is one of law; it is a question of fact which, in law, must be answered in favour of the respondents, and which no jury would have the right, in law, to find against them; and this is the same thing as a question of law.

I would dismiss the appeal with costs.

SEDGEWICK and GIROUARD JJ. concurred.

DAVIES J.—This was an action brought against the defendants (respondents), to recover damages sustained by the plaintiff from a fire caused by a spark or sparks which escaped, as alleged, from one of the defendants' engines while drawing a train past the plaintiff's

(1) 11 Times L R. 269. (2) 15 Can. S. C. R. 145.
(3) 5 App. Cas. 352.

farm contiguous to the line of the defendants' railway. The damages suffered by the plaintiff (appellant), were agreed upon between the parties at the trial at five thousand eight hundred and fifty dollars.

The train in question was one being drawn by two locomotives known as numbers 531 and 215, respectively. The leading and larger engine was 531 and as to it no question of any kind arises either as to its construction or its working.

The complaint of the plaintiff was practically that the engine No. 215 was negligently constructed and with a "smoke-box" too small for its purposes and which was not, on account of its length, best calculated to prevent the emission of sparks.

The jury, in answer to questions put to them at the trial by the learned judge, found; that the fire was caused by a spark or sparks from one of the engines, which they believed to be number 215; that the defendants' negligence consisted in the "smoke-box;" and, that the defendants did not take reasonable precautions and exercise reasonable care to have their engines and appliances for preventing the emission of fire properly constructed.

Although the answer of the jury did not specifically point out in what respect the smoke-box was negligently constructed, it was clear from the evidence given at the trial that they must have meant that the smoke-box should have been a longer one.

The argument at bar proceeded almost altogether upon this one point, as to whether or not the box was sufficiently long for its purposes.

Was there evidence from which a jury might reasonably find (*a*) that the smoke-box of number 215 was less efficient for its purpose of preventing the emission of sparks than a longer and larger one would

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have been, and (*b*) that in permitting its use the defendants were guilty of negligence?

As to the law which governs the liability of railway corporations, in cases of this kind, there was not much dispute. In the case of *The Port Glasgow and Newark Sailcloth Co.* v. *The Caledonia Railway Company* (1), on appeal to the House of Lords where the injury and damage were the result of a spark from one of the defendant's engines, the Lord Chancellor Herschell said:

> It is now well settled law that in order to establish a case of liability against a railway company, under such circumstances, it is essential for the pursuers to establish negligence. The railway company having the statutory power of running along the line with locomotive engines which, in the course of their running, are apt to discharge sparks, no liability rests upon the company merely because the sparks emitted by an engine have set fire to an adjoining property. But the defenders, although possessing this statutory power, are undoubtedly bound to exercise it reasonably and properly, and the test whether they exercise this power reasonably and properly appears to be this. They are aware that locomotive engines running along the line are apt to emit sparks. Knowing this they are bound to use the best practicable means according to the then state of knowledge, to avoid the emission of sparks which may be dangerous to adjoining property, and if they, knowing that the engines are thus liable to discharge sparks, do not adopt that reasonable precaution they are guilty of negligence.

This may be taken as a sufficiently clear and comprehensive statement of the law with respect to the appeal now before us. The questions we have to decide are: Have the appellants made out such a case of negligence? Was the verdict one which, viewing the whole evidence reasonably, the jury could not properly find?

It is not a question as to how far this court concurs in the finding, nor simply that the verdict was against

(1) 20 Ct. of Sess. 4 Ser. 35.

the weight of evidence, but whether or not, there being some conflicting evidence, the jury might reasonably have arrived at the conclusions they did. *Metropolitan Railway Company* v. *Wright* (1).

As to the origin of the fire, the evidence as to its having been caused by sparks from one or the other of the engines of the defendants' train is such that I do not think any court would interfere with the jury's finding. A much more difficult question arises as to which engine the fatal spark or sparks came from. No complaint was made as against engine No. 531, and, of course, if the sparks came from that engine, the defendants were not liable. The jury found that the sparks came from the engine 215, as to which there was the evidence of Clark and Pink, that its smoke-box was defective. It cannot be said, therefore, that there was no evidence from which a reasonable inference might not be drawn that the fire escaped from the engine alleged to be defective, though the defendants' contention that it was pure conjecture was strong. Looking, however, at the evidence as a whole, an appeal court would greatly hesitate to set aside the verdict on that ground. But, admitting that finding to be one which should not be set aside, the plaintiff's case is only advanced one step. It still remains for him to show some evidence from which reasonable minds might properly find that there were defects in the smoke box of engine No. 215, fairly attributable to the negligence of the defendants. Even if the devices used to prevent the emission of sparks from this engine No. 215 were defective in any respect, there must be evidence of negligence on defendants' part in not using other or better devices. Where is that evidence here?

The plaintiff relied upon the testimony of two men of some experience, Messrs. Clark and Pink, who both

(1) 11 App. Cas. 152.

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testified that, in their opinion, a longer smoke-box would have been safer and more effective. The value of this evidence was attacked by the defendants owing to the alleged want of recent experience on the part of these witnesses, and it was strongly urged that their opinions, both as to the proper length the smoke-box on such an engine should be, and also as to the practice of railway companies in recent years in lengthening or shortening the boxes, was completely refuted by the testimony of nine experienced experts called for the defence. The testimony of these experts certainly went to show most strongly that the modern tendency is rather to shorten than to lengthen the box and that the length of the particular box in question in this case was all right, or as some of them put it "good practice."

To my mind, their evidence established, beyond reasonable doubt, that the engine No. 215, in its various parts, was the mechanical equivalent of engine No. 531. And, further, that, if the smoke-box of No. 215 had been as long as contended for by the witness Clark, the result would have been that it would have automatically reduced itself to a much shorter size; that, in other words, experience has shown that there is a practical limitation to the length of smoke boxes which may be used and that, if the box is too long, cinders will accumulate in the front which may, in certain cases, become themselves a source of danger and which will, by making a solid bank of cinders, automatically shorten the box.

These witnesses were, further, all of the opinion that this engine No. 215 had all the appliances which practical experience could suggest for the prevention of the emission of sparks, but that no locomotive has yet been built which will not throw sparks. Mr. Justice Lister has collated much of this evidence in

his judgment in the Court of Appeal for Ontario. But assuming that, in the opinion of this Court, the weight of testimony was in favour of these opinions, that would not justify us in setting the verdict of the jury aside and entering judgment for the defendants. Before taking such a course of interfering with the findings of a jury in a matter unquestionably within their province to decide, this Court must, as all the more recent authorities determine, be satisfied that the finding is one which a jury "viewing the whole evidence, reasonably could not properly find." In such a case only should the finding be interfered with. *Metropolitan Railway Co.* v. *Wright* (1); *Allcock* v. *Hall*, (2).

But, assuming for the present that there was some evidence to justify a finding that engine No 215 was defective as having too small a smoke-box, where is there the slightest evidence to show any negligence on the part of the defendants? In determining the proper length of this smoke-box they acted on the professional judgment of their expert advisers These are men of great experience, whose business it is carefully to study all these appliances which experience and skill devise to reduce to a minimum the danger arising from the emission of sparks. They advised that the length of box used was the proper length. The jury, it is true, found that the defendants' negligence consisted in the use of this smoke-box—but on what evidence?

The defendants' expert advisers thought differently, and how, I ask, could the defendants be found guilty of want of reasonable skill or knowledge when all, or nearly all, the experienced engineers and experts called at the trial agreed with them? There were examined at the trial for the defence, Mr. Morse, the superintendent of motive power of the Grand Trunk Railway,

(1) 11 App. Cas. 152. (2) [1891] 1 Q.B. 444.

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under whose charge are all the company's locomotives; Mr. Willa, the superintendent of tests of the Baldwin Locomotive Works of Philadelphia, one of the largest locomotive works in America. This gentleman, in addition to his extensive experience, is a graduate of Cornell University where he took an engineering course. He commenced work in the shops where he gained a practical knowledge of construction, and has occupied position after position in the service of the company until he became, four or five years ago, superintendent of tests; Mr. Gentry, the assistant superintendent of the Richmond Locomotive Works, Virginia; Mr. Lane, chief draughtsman of Locomotive Works at Schenectady, New York; Mr. Joughins, master mechanic of the International Railway, a position stated to be equivalent to that of superintendent of motive power on the Grand Trunk Railway.

These witnesses, together with Mr. Alexander Maver, the superintendent of locomotives at London, Ontario, for the defendants, and several other mechanics of experience called by them, were all of the opinion that the smoke box was all right as to length, and that any longer box would only accumulate cinders in front which might be a source of danger and would automatically shorten itself to a proper length after steaming a few miles. It must be borne in mind that the evidence showed conclusively that there was no hard or fast rule as to the length of a smoke box, that it depends upon the length which the practice shows is necessary to secure easy working and give the space required for the exhaust pipes, the deflector and the necessary amount of wire netting, and the expert witnesses for the defence all concurred in testifying that the additional length of box suggested by Mr. Clark and Mr. Pink was of no practical

utility, while several of them thought that it might possibly add to the danger.

How, let me ask, could any jury, in the face of all this evidence, find, not only that the box should have been longer, but that the defendants were guilty of negligence in not knowing that and acting on that knowledge? How can it be successfully contended that they ought to have known that a longer box was better and safer and that the best thing was not done to minimize the danger from sparks when their own scientific and expert employees, not only did not know it, but thought the contrary; and when, in addition to that, the experts and scientific witnesses whose experience and training best qualify them to form an opinion, state explicitly, after hearing the evidence of Clark and Pink, that their suggested change would not be beneficial.

If, as was well put during the argument, the defendants' board of directors had met to discuss the question whether or not the engine No. 215 ought to be altered, and had called in all the witnesses examined at the trial, and heard their statements and acted on the judgment of the great body of experts, whose business it is to consider just such questions, disregarding the suggestions of Messrs. Clark and Pink, could it have been inferred that they acted negligently? I think not. But, on the other hand, if they had accepted the advice of Clark and Pink, and disregarded that of their own and other expert and scientific witnesses, and a fire had occurred they might possibly have been open to such a charge.

It must be remembered that Messrs. Clark and Pink, after giving their evidence for the plaintiff, were not recalled to contradict, qualify or explain any of the statements made by these experts with reference to

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any or either of the three salient and important facts testified to by them, namely:—

(*a*.) That the user of the engine 215, with a smoke-box of forty-six inches long and the wire netting of the size used was "good practice."

(*b*) That while no hard and fast rule existed as to the proper length of a smoke box, such being determined largely by practice, the smoke box and engine of No. 215 were the mechanical equivalents of engine No. 531, which was, admittedly, not open to objection.

(*c*) That they would not have advised the user of the larger smoke box suggested, as it would probably accumulate a bank of cinders in the front (which might in themselves be a source of danger) and which would automatically shorten the box.

(*d*) And that the tendency in recent years is rather towards shortening than lengthening the size of these boxes.

On a general and careful review of the entire evidence I am of the opinion that the verdict of negligence on the part of the defendants was one which the jury, viewing the whole evidence reasonably, could not properly find; that, in point of law, there was no evidence of negligence at all or any evidence from which it could be properly inferred by reasonable men and, therefore, under the authorities, I think the appeal should be dismissed. *Earl of Shaftsbury* v *London and Southwestern Railway Co.* (1); *Port Glasgow and Newark Sailcloth Co.* v *The Caledonian Railway Co.* (2); *Jackson* v *Hyde* (3).

MILLS J.—The plaintiff here is the appellant. His farm joins the line of the respondent. His barn was destroyed by a spark from one or other of two engines,

(1) 11 Times L.R., 269. 608. (Affirmed in the H. of L.
(2) 19 Court of Sess., (4 ser.) 20 Court of Sess. (4 ser.) 35.)
(3) 28 U.C.Q.B. 294.

in April, 1899. Almost immediately after the train had passed the premises of the appellant fire was discovered near Jackson's buildings, which soon extended to them, and by which they were destroyed.

At the trial the plaintiff charged that the defendants, by their negligent and unskilful management, set fire to his barns and stables, sheds and chattel property, by which they were totally destroyed. The respondents pleaded "Not guilty by statute."

The judge put to the jury at the trial the following questions:—

(1) Was the fire in question caused by a spark or sparks from either of the engines numbered 215 and 531? (2) If so, which of them? (3) Did such spark or sparks escape by reason of negligence of the defendants? (4) If so, wherein did such negligence consist? (5) Did the defendants, under all the circumstances, take fair and reasonable precautions and exercise reasonable care to have their engines and appliances for preventing the emission of fire properly constructed?

To the first of these questions, the jury answered "Yes." To the second they replied, "We believe that it was 215." To the third they answered, "Yes." To the fourth their answer is, "Smoke-box" And to the fifth, their answer is, "No."

Upon these findings of the jury the judge entered judgment for the appellant for the sum of $5,860, and an appeal was taken by the company to the Court of Appeal for Ontario. The appellant's action was dismissed with costs, Chief Justice Armour dissenting. The appellant asks that the judgment of the trial judge should be restored, or that a new trial should be granted.

The law which governs cases of this sort and the responsibility of railway companies is now well settled, and it is this;—where there is no negligence there is no responsibility on the part of the company.

The appellant endeavoured to establish that the smoke-box of the engine, No. 215, was too short;

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that it was due to this defect that sparks were emitted, and that it was from sparks emitted from this engine that the fire emanated that destroyed Jackson's buildings. I think it was overwhelmingly established that No. 215 was not defective in this particular; that the size of the smoke-box was in proper proportion to the size of the engine; that it was as perfect as that of the engine No. 531, and that, had it been made longer, it would, in running a very short distance, have become partly filled with ashes and cinders until it was shortened up to the required length. There was no actual evidence that the fire originated in sparks from engine No. 215. This was a matter of inference by the jury from the assumption that the smoke-box of No. 215 was too short; that the engine was defective in this respect; that the use of an engine so defective was negligence, and that such negligence established responsibility.

In the case of *The Port Glasgow Co. and others* v. *The Caledonian Railway Co.*(1) which was ultimately decided by the House of Lords, it was held that, to establish liability against a railway company, negligence must be established. There is negligence where a company does not use the best practicable means, according to the then state of knowledge, to prevent the emission of sparks, which may be dangerous to adjoining property. See *Metropolitan Railway Co.* v. *Wright* (2); *Allcock* v. *Hall* (3); *Jackson* v. *Hyde* (4).

I do not think that in this case, any negligence on the part of the company was established, and I do not think we are warranted in coming to any other conclusion than that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Montgomery, Fleury & Montgomery.*

Solicitor for the respondent: *John Bell.*

(1) 19 Ct. of Sess. (4 ser.) 608; 20 Ct. of Sess. (4 ser.) 35.
(2) 11 App. Cas. 152.
(3) [1891] 1 Q. B. 444.
(4) 28 U. C. Q. B. 294.

GEORGE BROPHY (DEFENDANT).....APPELLANT; 1902

AND *Mar. 20, 21. *May 6.

THE NORTH AMERICAN LIFE ASSURANCE COMPANY (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Life insurance—Wager policy—Endowment—*14 *Geo.* 3, *c.* 48, *s.* 1, *(Imp.) —Action for cancellation—Return of premiums.*

If the beneficiary of a life insurance policy has no interest in the life of the insured, has effected the insurance for his own benefit and pays all the premiums himself the policy is a wagering policy and void under 14 Geo. 3, ch. 48, sec. 1 (Imp.)

The Act applies to an endowment as well as to an all life policy.

Judgment of the Court of Appeal (2 Ont. L. R. 559) affirmed.

In an action by the company for cancellation of the policy under said Act a return of the premiums paid will not be made a condition of obtaining cancellation.

Judgment of the Court of Appeal (2 Ont. L. R. 559) reversed, Davies and Mills JJ. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming that portion of the judgment at the trial which ordered the cancellation of the policy and reversing the part which refused to order a return of the premiums.

The facts of the case are thus stated by Armour C.J.O. in his judgment in the Court of Appeal.

"The evidence in respect of the impeached policy of insurance is very plain and simple.

"One Richard Alexander Cromar, a broker and insurance expert as he calls himself, on the 27th of October 1885, wrote to the defendant Brophy, as follows: 'Re

*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

(1) 2 Ont. L. R. 559.

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the pleasant intercourse we have had in business matters lately, on the condition of your making Mr. A. C., your referee, adviser and broker in any transaction relating to insurance, real estate or monetary investments, I agree and hereby promise to allow you the following rebate or commission on all premiums or amounts paid to any company or institution transacting business in Canada as follows, viz.: Annuity bonds, one-half of one per cent; endowment policies, single premiums, one per cent; endowment policies, annual premiums, ten per cent. On all other transactions the half of commission given me as a general broker. Advice in any matter I will be pleased to give you to the best of my knowledge and ability, gratis.'

"This proposed arrangement was apparently agreed to by defendant Brophy and continued in force until after the impeached policy was effected.

"The defendant Brophy deposed as follows: 'I wanted to know from him the different kinds of insurance, and we had a talk about it two or three times and he was telling me the different plans, and they did not suit me altogether, and I was thinking over that thing one night and wanted to have as little trouble with the business as possible myself, and I was thinking over it one night after we had talked the second or third day, and the next morning I told him what I had been thinking of during the night; that there seemed to be a convenient and easy way for me, and that would be to buy the annuities and let the annuities go for insurance on my life, and he struck the table and said 'that is the best idea I ever heard. I have been a long time doing insurance business, and that never came into my mind before' So he went out of the room where we were, and told the manager then what he proposed, and that he approved

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of so much, and that is the first insurance he did for me.'

"The insurance here referred to was an endowment policy in the New York Life, upon the life of the defendant Brophy, effected in 1885. Shortly before the effecting of the impeached policy the defendant Brophy had an interview with Cromar, and this is the account he gave of it: 'I said I had some more money to put into insurance, and he said 'wouldn't it be much better for you to have a young life? How would it be if I put it on my life?' And he drew out the figures and showed me the difference in the insurance that I would get on his life and on my life, and showed me the advantage of putting it on his life, and that is the way he came to put the insurance on his life.'

"The defendant Brophy thereupon, through Cromar, applied to the plaintiffs for an annuity bond for $300, and Cromar applied for an insurance on his life for an amount, the annual premium for which would be met by the annuity bond, which amount was ascertained to be the sum $6,025.

"The annuity bond was issued by the plaintiffs for the annual sum of $300, payable to the defendant Brophy on the 5th day of March in each year, and the policy of insurance on the life of Cromar for $6,025, in consideration of the annual premium of $300, was issued by the plaintiffs, payable to Cromar on the 5th day of March, 1917, if living, if not, his executors, administrators or assigns. This policy was originally written with premiums payable annually, 20th February, but was altered, making the premiums payable on the 5th day of March in each year, the same day on which the annuity of $300 was payable.

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"The amount charged for the annuity, was $2,546 70
And for the premium of insurance.. 300 00
$2,846 70
And from this was deducted one-half of one per cent. on the sum paid for the annuity bond of $12.73, and ten per cent. on the premium of insurance $30.00..... 42 73
$2,803 97

these deductions being made in pursuance of the arrangement contained in the letter of Cromar of the 27th October, 1885. And for this balance of $2803 97, the defendant Brophy sent his cheque to the plaintiffs."

"Thereafter, until the death of Cromar, who died on the 24th April, 1900, the money payable by the annuity bond was applied in payment of the premiums payable by the policy of insurance."

"On the 13th of March, 1897, Cromar, by assignment under his hand and seal, assigned, transferred and set over unto the defendant Brophy, and for his sole use and benefit, all his right, title and interest in and to the said policy of insurance, subject to all its terms and conditions, expressly reserving to the insured however, sole right and power to make choice of any investment, option or options granted under the conditions of said policy, and personally to receive the full benefit thereof without the consent of any person or persons named therein as assignee or assignees, and that in the event of the death of the said assignee or assignees before the policy became due, then and in that case the proceeds thereof should be payable, when due, to the insured, his executors, administrators or assigns."

"The defendant Brophy said that this assignment was not according to his agreement with Cromar, that by it he was entitled to an absolute assignment, but that he submitted to taking it rather than have any trouble."

At the trial judgment was given in favour of the plaintiff company ordering the policy to be delivered up to be cancelled and dismissing the defendant's counterclaim by which he demanded payment of the amount of the policy and such further and other relief as was necessary and proper. The Court of Appeal affirmed this judgment but varied it by ordering the company to return the premiums paid on the policy with interest. The defendant appealed and the company gave notice of cross-appeal against the order for return of the premiums.

Daniel O'Connell and *Butler* for the appellant. Brophy had only a partial interest in the policy to which the Act 14 Geo. 4, ch. 48, sec. 1, does not apply. *Vezina* v. *New York Life Ins. Co.* (1)

The Act does not apply to an endowment policy. *Simons* v. *New York Life Ins. Co.* (2); *North American Life Ins. Co.* v. *Craigen* (3); *Manufacturers' Life Ins. Co.* v. *Anctil* (4).

In any event the company cannot retain the premiums if the policy is declared void. *Feise* v. *Parkinson* (5); *Dowker* v. *Canada Life Ins. Co.* (6).

Kerr K.C. and *Paterson* for the respondent. As to returns of premiums see *Palyart* v. *Leckie* (7); *Anderson* v. *Fitzgerald* (8).

Return of premiums was not asked by the counterclaim and cannot be ordered. *Knights of Macabees* v.

(1) 6 Can. S. C. R. 30.
(2) 38 Hun. (N.Y.) 309.
(3) 13 Can. S. C. R. 278.
(4) 28 Can. S. C. R. 103.
(5) 4 Taun. 640.
(6) 24 U. C. Q. B. 591.
(7) 6 M. & S. 290.
(8) 4 H. L. Cas. 484.

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Hilliker (1); *Allen* v. *Merchants Marine Ins. Co.* (2). The policy is void under the Act. *McFarlane* v. *Royal London Friendly Society* (3); *Evans* v. *Bignold* (4).

TASCHEREAU J.—This is an appeal and cross-appeal from the judgment of the Court of Appeal for Ontario, reported at page 559, vol. 2, of the Ontario law reports.

The appellant, Brophy, appeals from that part of the judgment which decrees the cancellation of the policy and dismisses his counter-claim for the amount thereof, and the company appeal from that part of it which orders them to return the premiums they have received upon it.

I would dismiss the principal appeal. As held by this court in the *North American Life Assurance Co.* v. *Craigen* (5), it is only when a person insures the life of another that the question of interest in that life becomes important, and any one may lawfully *bonâ fide* insure his own life and make the insurance payable to one who is totally without an insurable interest in his life. *Vézina* v. *The New York Life Insurance Co.* (6); *Stuart* v. *Sutcliffe* (7). Here, however, it is plain, by uncontroverted evidence, that the arrangement between the appellant and Cromar was that he, the appellant, who had no interest in Cromar's life, should insure it for his own benefit, he, the appellant, paying the premiums. That it is consequently a wagering policy, immoral in its nature and tendency, and void, as found by the two courts below, is not, in my mind, susceptible of doubt. The evidence satisfies me that this transaction was only a part of a wide scheme between the appellant and Cromar to engage in the wholesale business of speculating on

(1) 29 Can. S. C. R. 397.
(2) 15 Can. S. C. R. 488.
(3) 2 Times L. R. 755.
(4) L. R. 4 Q. B. 622.
(5) 13 Can. S. C. R. 278.
(6) 6 Can. S. C. R. 30.
(7) 46 La. An. 240.

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wagering insurances. Counsel for appellant strenuously relied upon the tontine feature of this insurance with the respondents, and the fact that the tontine privileges accrued to Cromar. Some remarks in the opinion of Gwynne J., in *The Manufacturers Life Insurance Co.* v. *Anctil* (1), would appear to give support to the contentions in favour of the appellant on that point, but, in the Privy Council (2), in answer to the argument that as at the end of the endowment period the insured would have a proprietary interest, it was, therefore, not a gaming policy, Lord Watson said:

> That may be so, but his interest was contingent upon his surviving the date of the policy for a period of fifteen years. In the event of his death at any time during that period, the sole owner of the policy was the appellant, Anctil.

And the judgment of this court, declaring the policy there in question void as being a wagering policy, was affirmed.

I would dismiss Brophy's appeal, and we are all of that opinion.

Upon the company's appeal, I would allow it, and restore the decree of Street J., at the trial.

The court *a quo* orders the company to return the premiums *ex proprio motu*, without any plea by the defendant to that effect, upon the ground that as they had fired the first shot and filed a bill to get the policy cancelled, before action by Brophy, they cannot get the relief asked for without returning the premiums, for the reason that where equity relieves in ordering an instrument to be cancelled, the general rule is that the party in whose favour the decree is made must do equity by returning the consideration. A question arose in the Court of Appeal as to the power to make such a decree in this case in the absence of a tender of the premiums, or of sufficient conclusions in the

(1) 28 Can. S. C. R. 103. (2) [1899] A. C. 604.

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bill, but, in the view I take of the case, it is unnecessary for us to consider that point, which, I may say, however, would appear to be one upon which this court would probably not interfere with the judgment of the court of the province.

Then, had it been necessary to do so, this would most likely have been a case for us to exercise the power to amend given by sections 63 and 64 of the Supreme Court Act, by adding to the conclusions of the bill the words necessary to sustain the court's action in the matter. However, this is immaterial from my point of view, as I am of opinion, with deference, that there is error in the decree of the Court of Appeal, by which the company are ordered to return the premiums. It cannot be controverted that the appellant could not have maintained an action to recover them

not from any merit of the company which justifies them in retaining the moneys which do not justly belong to them, but from the demerit of the appellant, who, as a punishment for his illegal act, is denied a remedy to draw these moneys out of the company's hands.

Per Washington J. of the United States Supreme Court, in *Schwarts* v. *The United States Insurance Co.* (1).

Upon this well established principle, it was held in *Taylor* v. *Chester*, (2), that a plaintiff cannot recover moneys paid out on an illegal consideration to which he himself was a party, where the illegality must appear by his own allegations,

for the courts will not assist an illegal transaction in any respect.

See also *Lowry* v. *Bourdieu* (3); *Palyart* v. *Leckie* (4); *Paterson* v. *Powell* (5); *Sykes* v. *Beadon* (6); *Begbie* v. *The Phosphate Sewage Co.* (7); *Scott* v. *Brown* (8). That decision rests upon the maxim "*in pari delicto melior est causa possidentis*," which, however, does not

(1) 3 Wash. C. C. Rep. 170.
(2) L. R. 4 Q. B. 309.
(3) Doug. 468.
(4) 6 M. & S. 290.
(5) [1832] 2 L. J. C. P. 13.
(6) 11 Ch. D. 170.
(7) L. R. 10 Q. B. 491.
(8) [1892] 2 Q. B. 724.

apply, for here there is no "*delictum*" on the part of the company. The rule that governs in this case is "*cessat quidem condictio, quum turpiter datur.*" Pothier, Pand. lib. 12, tit. 5, art. 12, par. 8. The law is not so irrational as to make the *causa possidentis* less favourable when he is not *particeps criminis*, than when he is as guilty as the other party.

In *Howard* v. *The Refuge Friendly Society* (1), the plaintiff claimed the repayment of premiums upon a wagering policy which he had discontinued. "How can he bring an action upon such a transaction?," said Mathew J for the court, and the action was dismissed.

The case of *Dowker* v. *The Canada Life Assurance Co.* (2), is not in a contrary sense. Draper C. J., expressly says that if the plaintiff in that case was entitled to recover the premium it was because the policy in question, though null and void, was not a wagering policy nor one obtained by fraud.

The recent case of *The British Workman's and General Assurance Company* v. *Cunliffe* (3) depended on its own special circumstances and has no application.

Nothing further need be added upon that point. There is no room for controversy upon it. So that, the conclusion of Brophy's counter-claim "for such further and other relief as may be deemed necessary and proper" (assuming it to be sufficient to include, alternatively, a claim for these premiums), must be dismissed. That being so, it would seem singular that, in the same case, a judgment would dismiss his claim for the premiums, and at the same time order the company to return them to him. It is upon a broader ground, however, that I rest my opinion, that, in this case, the want of equity is no bar to the company's relief, leaving out of consideration altogether the appellant's counter-claim.

(1) 54 L. T. 644. (2) 24 U. C. Q. B. 591.
(3) 18 Times L. R. 425-502.

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Where a company asks the cancellation of a policy on the ground of fraud and misrepresentation by the insured the rule of the courts of equity, as laid down by the Court of Appeal, has its full application. Such are the cases of *Barker* v. *Walters* (1); *Whittingham* v. *Thornburgh* (2), *DeCosta* v. *Scandret* (3); *Wilson* v. *Ducket* (4); *The Prince of Wales etc. Association* v. *Palmer* (5); *The British Equitable Assurance Co.* v. *The Great Western Railway Co.* (6); *London Assurance* v. *Mansel* (7), wherein the premiums received by the insurers who were seeking to set aside the policies on the ground of fraud had to be returned to the insured as a condition of their relief, though in the analogous cases of *Willyams* v. *Bullmore* (8); and *W*—— v. *B*—— (9), that does not seem to have been required.

But where a policy is cancelled upon the ground that it covers a wagering contract (especially without any guilty participation by the company, as found in this case by the two provincial courts), a distinction should be made, in my opinion, and the company, in such a case, should not be ordered to return the premiums. An insurance company is then acting in the public interest, as well as in its own. It is as against public policy that such an instrument is void, and in their endeavours to put a stop to acts which the law reprobates it is a duty to the public that the company perform. It is an offence against the state, a fraud against the law, that they ask the court to punish by the cancellation of all the claims that the offender might otherwise have against them. They are allowed to waive all the rights that fraud or misrepresentation by the insured would

(1) 8 Beav. 92.
(2) 2 Vern. 206.
(3) 2 P. Wms. 170.
(4) 3 Burr. 1361.
(5) 25 Beav. 605.
(6) 38 L. J. Ch. 132.
(7) 11 Ch. D. 363.
(8) 33 L. J. Eq. 461.
(9) 32 Beav. 574.

have entitled them to, but the law denies them the right to waive the nullities that it has enacted for the common weal. Cf. *St. John* v. *St. John* (1). A court of equity should therefore, in such a case, relax its general rule and consider it superseded by refraining from imposing upon a relief which the public interest requires a condition which might have the effect of hindering and impeding a company in the performance of their duty to the state. An interference, in the name of equity, to alleviate the offender's punishment by ordering the return of the premiums into his guilty hands would seem to me an inconsistency. The insured is not in a position to ask the assistance of the court, nor to invoke rules of equity the sole effect of which would be then to benefit the sole culprit. He has received no consideration from the company for the moneys he has paid, it is true, but he owes his loss to his own turpitude, and the court should have no pity upon him and no mercy for him, under any circumstances. I would apply to him the rule that he who has committed iniquity cannot claim equity.

We are in the matter unfettered by authority. Not a single case has been quoted at bar, and after much labour I have not been able to find any, in which, where such a document has been cancelled at the suit of the company as being a wagering policy, it has been held contradictorily that a company are bound to return the premiums.

In *The Prince of Wales etc. Association* v. *Palmer* (2), though it would seem that the policy was of a wagering character, yet the suit seems to have been instituted and determined upon the ground of fraud, as the assignee of the policy had murdered the insured to get the insurance, a fact which would have had no importance, if the policy had been a

(1) 11 Ves. Jr. 525. (2) 25 Beav. 605.

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wagering policy. And there, the company did not oppose the repayment of the premiums; they probably had tendered it by their bill. In the case of *Desborough* v. *Curlewis* (1), there are dicta that would seem to support the view that premiums have to be returned, but no direct decision upon the point.

Under these circumstances, in expounding the law for this Dominion, this Court should, in my opinion, determine that an insurance company is not bound to tender before action, or to deposit in court, the premiums they have received on a policy the cancellation of which is asked upon the ground of its being a wagering contract and void as against public interest and the positive enactments of the statute.

There is another ground taken at bar on behalf of the company upon their contention that they should not, in this case, be liable for the repayment of the premiums.

The appellant Brophy did not and could not, at the trial, consistently claim to be repaid these premiums, as he was throughout claiming the amount of the policy as a valid policy. If he had claimed the premiums, or if he may be now considered as claiming them, the respondent might invoke the express condition thereof

that if any fraudulent or materially incorrect averment has been made, or any material information has been withheld by the insured, all sums which shall have been paid to the company on account of the insurance made in consequence hereof shall be forfeited.

The appellant, Brophy, and the deceased, Cromar, undoubtedly made fraudulent and incorrect averments and withheld material information upon the initiation of this contract, in not informing the respondents that the policy, from its very inception, was taken out by Cromar ostensibly on his own life, but really by the

(1) 3 Y. & C. Ex. 175.

appellant Brophy, for his own benefit, he agreeing to pay all premiums and contracting to get all the benefits, and in not fully disclosing to the respondents all the facts and circumstances of the case which made the professed contract of insurance a gambling contract. The judgment of the court which absolves the respondents of any guilt in the matter necessarily imports that they were deceived.

Upon the authority of *Duckett* v. *Williams* (1), and *Venner* v. *The Sun Life Insurance Company* (2), I would think that under this clause alone the company were not obliged to tender or pay into court premiums that were forfeited by an express stipulation of the contract, any more than if the forfeiture were decreed by a statutory enactment, as was the case, for instance, in *United States* v. *Minor* (3). However, as I think they were not obliged to do so under any circumstances, it is unnecessary for me to consider hypothetically what should be the result of the case if it depended upon that clause.

The appeal is dismissed with costs, the cross-appeal is allowed with costs, and the judgment of Street J., is restored, the costs in the Court of Appeal to be against the appellant.

SEDGEWICK J.—I entirely concur in the judgment of my brother Taschereau, but I wish to add a few words.

In Ontario, as in England, since the Judicature Acts, the filing of a bill in chancery, or the bringing of a suit to restrain an action at law in a Superior Court, is an impossibility. The jurisdiction formerly possessed by the Courts of Chancery, Queen's

(1) 2 Cr. & M. 348.
(2) 17 Can. S.C.R. 394.
(3) 114 U. S. R. 233-238.

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Bench, Common Pleas and Exchequer, (and other courts as well), has been fused and is now exercisable, not by a court of law or by a court of equity, but by the High Court of Justice alone. The machinery for enforcing civil rights and redressing civil wrongs is, in these acts, duly provided for and a litigant, in pursuing his remedies (speaking generally), is not required to have recourse to the old common law or chancery rules of practice—different and repugnant as they usually were—but avails himself of the new procedure specially created for the amalgamated court.

In the case before us, we have the court in one breath declaring that Father Brophy is not entitled to receive back the insurance premiums and in another breath that he is. It was for the purpose of abolishing this and other anomalies in the administration of justice that the Judicature Acts were passed, and, although the legislatures gave their confirmation and preference to equitable doctrines in regard to civil rights in preference to common law doctrines, where there was a difference, there was no similar declaration, either in favour of or against the old machinery and procedure, by the use of which these rights were thereafter to be determined and enforced.

The Chancellor had, from the first, claimed jurisdiction to set aside and cancel agreements upon the ground of fraud, forbidding, at the same time, the parties in fault from suing thereon. That claim was eventually, after much conflict, acquiesced in by the common law courts, and this jurisdiction, so established in Ontario, is now vested (the Court of Chancery, as such, having been abolished), in the High Court of Justice. It was in virtue of this specially transferred jurisdiction that the plaintiff company brought this suit and asked, in effect, for a declaratory judgment as to the respective rights of Father Brophy and itself in regard to the

policy in question. The assured was then dead. His assignee, Father Brophy, had, as I understand, delivered his proofs of loss and fulfilled all the conditions antecedently necessary to entitle him to payment. The only question in dispute was as to the company's liability for the full amount insured. Father Brophy had never asked, he repudiated as satisfaction of his claim, for the payment to him of premiums paid to the company. The company likewise repudiated any obligation to do even that. The issue then was one which could only be adjudicated upon and determined by a judicial tribunal—in the present case, the High Court of Justice.

What *then* were the rights and liabilities of the disputants? That was the only question. Why the company began hostilities, instead of waiting for Father Brophy to make the first attack, has not been explained. Had the latter begun, making his counterclaim his statement of claim his action would have been dismissed and no return of premiums would have been decreed. That, as I understand, is the opinion of the trial judge, and of every judge of the Court of Appeal and of this Court. But it was within the company's right to begin. The Chancery Court had given it and the Judicature Acts had confirmed and ratified it. Nevertheless, the judgment of the court below has imposed upon the company, as a condition of success in its rightful claim, the payment of a sum of money which, in the same judgment, it has found the claimant not entitled to and the company does not owe

We have hitherto been taught that *vigilantibus non dormientibus equitas subvenit*, but the lesson now is that in litigation, the Fabian policy is the right one, and that he who, in the exercise of his rights has

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taken the opposite course, is to be punished for his vigilance.

There are, of course, many cases in which a plaintiff may be ordered to pay money as a condition of relief. If in the present case, the ground upon which the cancellation is asked had been that there never was a real policy, owing to lack of the consensus *ad idem* at its inception, in such a case a refund of the premium might be ordered, these moneys never having been the company's property, and he that seeks equity must do equity.

Here, however, the money in question was the company's money, validly received by it in consideration of a policy lawfully issued and renewed by it. It was money held by the company, for the purposes of the company—for the benefit and security of and in trust for its shareholders and policy holders. It would, under such circumstances, have been a breach of trust upon the part of the company's executive had they made a present of it to Father Brophy, or to any one else. How can a court of justice order the violation of that trust by decreeing a refund?

I have gone over the cases referred to by Mr. Justice Osler. Most of the English cases were decided before the Judicature Act, the only one since was that of *London Assurance* v. *Mansel* (1), before Sir George Jessel, M.R., where the question in controversy here was never argued and the refund was made by consent.

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

(1) 11 Ch. D. 363

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DAVIES J.—I concur in the judgment dismissing this appeal but I am of opinion that the cross-appeal should be dismissed and the judgment of the Court of Appeal for Ontario sustained. I have nothing useful to add to the reasons given by the Court of Appeal for its judgment.

MILLS J.—I concur in the opinion of my brother Davies

Appeal dismissed with costs and cross-appeal allowed with costs.

Solicitor for the appellant: *Daniel O'Connell.*

Solicitors for the respondent: *Kerr, Davidson, Paterson & Grant.*

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

AND

THE ALGOMA CENTRAL RAILWAY COMPANY (SUPPLIANT).... RESPONDENT.

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*Mar. 27.

*May 6.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Customs' duties—Duties on Goods—Foreign-built ships—Customs' Tariff Act, 1897, *s.* 4.

A foreign-built ship owned in Canada which as been given a certificate from a British Consul and comes into Canada for the purpose of being registered as a Canadian ship is liable to duty under section 4 of the Custom's Tariff Act, 1897.

A taxing Act is not to be construed differently from any other statute.

APPEAL from the judgment of the Exchequer Court of Canada (1) in favour of the Suppliant.

*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

(1) 7 Ex. C. R. 239.

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The record on this appeal contained the following admissions of the facts by the parties.

"1. The suppliant company is, and was at the times hereinafter mentioned, a body corporate established under and subject to the laws of the Dominion of Canada, having been incorporated by special Act of the Parliament of Canada, being 62 & 63 Victoria, chapter 50, and the powers of the suppliant company are thereby defined."

"2. The suppliant company since its incorporation as aforesaid has always had its chief place of business at the town of Sault Ste. Marie, in the District of Algoma, and Province of Ontario."

"3. The suppliant, on or about the 10th of October, 1899, became the owner by purchase, at Marquette, in the State of Michigan, United States of America, of a certain steam vessel named the "*Minnie M*," which vessel was built in the year 1884, at the City of Detroit, in the said State of Michigan; United States bill of sale of 10th of October, 1899, and United States Customs certificate of 12th May, 1900, to go in evidence."

"4. On or about 16th October, 1899, the British Consular Office at Chicago, in the State of Illinois, granted to the said vessel a provisional certificate, copy of which, dated the 16th October, 1899, to go in evidence."

"5. The said vessel afterwards arrived at the Port of Sault Ste. Marie, in Canada, which is a post of registry for British ships under the provisions of "The Merchants' Shipping Act, 1894."

"6. After the said vessel had arrived at Sault Ste. Marie, and while she was still there, the suppliant campany applied to the Collector of Customs of the said port of Sault Ste. Marie, who is the registrar of shipping there, for British registry of the said vessel in Canada, and the Collector of Customs thereupon informed the suppliant company that upon application

for such registry the vessel would be chargeable with the duty imposed by item 109 of "The Customs Tariff, 1897." This claim of the Collector of Customs was and is upheld by the Government. The Collector of Customs being instructed by the Commissioner of Customs that "The Customs Tariff, 1897," required payment of duty before registration, stated to the suppliant company that he was so instructed, and declined to register the vessel without duty first paid."

"7. The suppliant company urged, on the other hand, that the vessel was not subject to duty either before or after registration, but the Collector, maintaining the position stated in the preceding paragraph, the suppliant company did, on the 5th May, 1900, enter the said vessel upon application for Canadian register for duty at customs under protest. Copy of the said entry of 5th May, 1900, with the protest thereon, also copies of the company's letter to the Collector of Customs of 4th May, 1900; the Collector's reply of the same date, and the company's reply of the 5th May, 1900, to go in evidence."

"8. The vessel was thereupon registered as desired by the suppliant company at the Port of Montreal, in Canada, being a port of registry for British ships in Canada duly authorized under the provisions of "The Merchants' Shipping Act, 1894." Copy of the registry to go in evidence."

"9. The suppliant company thereupon paid the sum of $3,500, being the proper duty imposed under provisions of the said item 409 of "The Customs Tariff, 1897."

"10. The suppliant company has always contended and does contend that the said vessel, in the circumstances stated, was entitled to British register in Canada without the payment of any duty. On the other hand, the Government has always contended and

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does contend that the said vessel, in the circumstances stated, was liable to the duty paid."

"11. The Government still hold and claim the right to retain the said customs duty so paid as aforesaid, amounting to $3,500."

"12. No question arises as to the amount of duty, assuming that the vessel was liable to any duty."

The material provisions of the Customs Tariff 1897 under which the question arises whether or not the customs officers were entitled to exact the duty are as follows:—

"Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

"4. Subject to the provisions of this act and to the requirements of *The Customs Act*, chapter 32 of the revised statutes, as amended, there shall be levied, collected and paid upon all goods enumerated, referred to as not enumerated, in Schedule A to this act, the several rates of duties of customs set forth and described in the said schedule, and set opposite to each item respectively, or charged thereon as not enumerated, when such goods are imported into Canada or taken out of warehouse for consumption therein."

"Schedule A."

"Goods subject to duties."

"409. Ships and other vessels built in any foreign country, whether steam or sailing vessels, on application for Canadian register on the fair market value of the hull, rigging, machinery and all appurtenances; on the hull, rigging, and all appurtenances, except machinery, 10 per cent ad valorem; on the boilers, steam engines and other machinery, 25 per cent ad valorem."

The Exchequer Court judge held that Parliament had not used apt words to subject a ship entering Canada for registry to taxation under the above section

and gave judgment for the suppliants for the amount of the duty paid but refused interest and damages for detention. The Crown appealed and the suppliant gave notice of cross-appeal for the interest.

Newcombe, K.C., Deputy Minister of Justice, for the appellant.

Nesbitt, K.C., and Rose for the respondent.

(It was agreed that the cross-appeal should stand and be argued only if the appeal by the Crown should be dismissed.)

TASCHEREAU J.—This case comes up upon an appeal by the Crown from a judgment of the Exchequer Court in favour of the respondents, suppliants, on a petition of right based upon the following admission of facts.

1. The suppliant company is, and was at the times hereinafter mentioned, a body corporate established under and subject to the laws of the Dominion of Canada.

2. The suppliant company, since its incorporation, has always had its chief place of business at the town of Sault Ste. Marie, in the district of Algoma, and province of Ontario.

3. The suppliant, on or about the tenth of October, 1899, became the owner, by purchase, at Marquette, in the State of Michigan, United States of America, of a certain steam vessel named the "Minnie M," which vessel was built in the year 1884, at the city of Detroit, in the said State of Michigan.

4. On or about the sixteenth of October, 1899, the British Consular Office at Chicago, in the State of Illinois, granted to the said vessel a provisional certificate, dated the sixteenth of October, 1899, under section twenty-two of the Imperial Merchants' Shipping act of 1894.

5. The said vessel afterwards arrived at the port of Sault St. Marie, in Canada, which is a port of registry for British ships under the provisions of "The Merchants' Shipping Act, 1894."

6. After the said vessel had arrived at Sault Ste. Marie and while she was still there, the suppliant company applied to the Collector of Customs of the said port of Sault Ste. Marie, who is the registrar of shipping there, for British registry of the said vessel in Canada, and the Collector of Customs, thereupon, informed the suppliant company

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that upon application for such registry the vessel would be chargeable with the duty imposed by item 409 of "The Customs Tariff, 1897." This claim of the Collector of Customs was and is upheld by the Government. The Collector of Customs being instructed by the Commissioner of Customs, that "The Customs Tariff, 1897" required payment of duty before registration, stated to the suppliant company that he was so instructed, and declined to register the vessel without duty first paid.

7. The suppliant company urged, on the other hand, that the vessel was not subject to duty either before or after registration, but the Collector maintaining the position stated in the preceding paragraph, the suppliant company did, on the fifth May, 1900, enter the said vessel upon application for Canadian registration for duty at customs under protest.

8. The vessel was, thereupon, registered as desired by the suppliant company, at the port of Montreal, in Canada, being a port of registry for British ships in Canada, duly authorized under the provisions of "The Merchants' Shipping Act, 1894.'

9. The suppliant Campany, thereupon, paid the sum of $3,500, being the proper duty imposed under the provisions of the item 409 of "The Customs Tariff, 1897."

10. The suppliant company has always contended and does contend that the said vessel, in the circumstances stated, was entitled to British registry in Canada without the payment of any duty. On the other hand, the government has always contended, and does contend that the said vessel, in the circumstances stated, was liable to the duty paid.

11. The government still hold and claim the right to retain the said customs duty so paid as aforesaid, amounting to $3,500.

The respondent company claim by their petition of right that they are entitled to recover back the $3,500 they so paid. They rest their claim upon two grounds. 1st. That the provisions of the Customs Tariff of 1897 (60 & 61 Vict. ch. 16), under which this duty was collected, are *ultra vires* as conflicting with provisions of the Imperial Merchants' Shipping Act of 1894. 2ndly. That, in fact, no duty on a foreign ship, as claimed on the part of the appellant, has been imposed by the said Customs Tariff of 1897.

This last contention, I deem it rational, should be examined first. If a foreign ship is not dutiable, *cadit lis*.

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I may at once refer to the often repeated assertion relied upon by the respondents that a taxing Act must be construed strictly. Now, I do not see how it is possible to contend that a taxing Act is to be construed differently from any other Act. *Attorney General* v. *Carlton Bank* (1). The Interpretation Act expressly decrees that

> every Act and every provision or enactment thereof (including Acts imposing taxes), shall be deemed remedial * * * and shall accordingly receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit.

Moreover, the Customs Act itself, R.S.C. ch. 32, sec. 2, enacts that

> all the expressions and provisions of this Act, or of any other law relating to the customs, unless the context otherwise requires, shall receive such fair and liberal construction and interpretation as will best insure the protection of the revenue and the attainment of the purpose for which this Act or such law was made according to its true intent, meaning and spirit.

It cannot be doubted that the true intent, meaning and spirit of the Customs Tariff of 1897, is to impose a duty on every article imported into Canada, except those that the Act puts on the free list (sec. 13, ch. 32, R.S.C. Secs. 4, 5, of the Customs Tariff of 1897). And ships are not to be found in the enumeration of goods contained in schedule "B" of the said Act, that may be imported into Canada without the payment of any duties thereon. The respondent company claim, therefore, an exemption from the taxes imposed by a statute under which taxation is the rule and exemption the exception. Now, all exemptions must be strictly construed, and the burthen of establishing that the ship in question could be imported into Canada free of duty might perhaps well be said, upon an action of this

(1) [1899] 2 Q.B. 158, 164.

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nature, to be upon the respondents. However, the appellant's case need not rest on that ground. If the Crown had to show that this ship was dutiable (Elmes sect. 29, 60), in my opinion that has been incontrovertibly established. The Act of 1897 is unambiguous and puts a duty on any foreign ship imported into Canada in terms that leave no room for doubt.

In the list of goods subject to duties upon importation (for the Act coupled with "The Customs Act" is an Act relating to such duties), item No. 409 expressly enumerates "ships and other vessels built in any foreign country." The statute thus classifies ships as being goods that can be imported. So that the respondents' contention that such ships are not dutiable on the ground that ships are not *goods* in the ordinary sense of the word, or that ships cannot be said to be imported, is rebutted by the express words of the statute It is to me as clear as if the interpretation clause said that the word "goods" includes "foreign ships brought into Canada." As to their further contention that the statute contains no substantive provision imposing a duty on the importation of foreign ships, I cannot see any foundation for it. Section four enacts that there shall be levied upon all goods enumerated in schedule "A," the several rates of duties of customs set forth in the said schedule, when such goods are imported into Canada Now, when schedule "A," which, it cannot be controverted, is a part of the statute, enumerates "ships and other vessels built in any foreign country," I fail to see how it could be decreed in clearer terms that such ships are liable to duty, and with deference, I think that the judgment of the Exchequer Court in favour of the respondents on this branch of the case, is erroneous.

In a case of *Vanderbilt* v. *The Conqueror* (1), the federal authorities claimed the right to collect cus-

(1) 49 Fed. Rep. 99.

toms duties upon a yacht bought in England by Vanderbilt, a citizen of the United States. The court determined that the yacht was not dutiable, but expressly upon the ground that in none of the tariff Acts of the United States, were ships or vessels mentioned in the schedule of imports, the court holding that ships or vessels were and had always been regulated by statutes independent of the customs laws and under a different system of legislation, and did not fall within the scope of the tariff upon importation. And though the vessel in question there was declared not to have been dutiable, the case shows clearly that if ships had been enumerated in the schedule to the tariff Act that governed that case as they are in Canada under the "Tariff Act of 1897," the decision would have been the other way.

Having come to the conclusion that the ship in question was dutiable under the Act of 1897, there remains to be considered the contention of the respondents, that the provisions of that Act relied upon by the appellant to levy duties upon her are *ultra vires*, as conflicting with the provisions of the "Merchants' Shipping Act of 1894."

The respondents argue that under this last Act they had the right to a certificate of British registry without any payment of duty to the Canadian Government, and that the statute of 1897, which purports to impose the payment of duties upon foreign ships, as a condition precedent to the right of obtaining a certificate in Canada of British registry, conflicts with the Imperial enactment. On this part of the case the learned judge of the Exchequer Court has dismissed the respondents' contention, and has given an elaborate judgment, now reported at page 239 of volume 7 of the Exchequer Court reports, to which I do not see that anything could be usefully added. In the actual

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state of the statutory law upon the subject, the words "on application for Canadian register" in the Act of 1897, must be construed as meaning "on application for British register in Canada."

The Government of Canada, it must be conceded, has the right to impose duties upon foreign ships, and that being so, it has the right to say when, how and by whom that duty shall be collected. And that is all that the Act of 1897 enacts. The right of the Imperial Parliament to regulate the mode of registering in Canada a foreign ship as a British ship and the right of the Canadian Parliament to impose duties upon the importation into Canada of such ships are co-existent; and the Imperial Parliament never intended to, in any way, abrogate or lessen Canada's rights in the matter.

If the registrar had granted the certificate without demanding the amount of these duties, the Crown would have an action against the company for the amount thereof. R. S. C. ch. 32, sec. 7. And the company could not defeat that action by pleading their certificate, on the ground that because the registrar had neglected his duty they were released from the customs dues.

I would allow the appeal with costs and dismiss the petition of right with costs.

SEDGEWICK and GIROUARD JJ. concurred.

DAVIES J.—The S.S. "*Minnie M.*" was a foreign built steamer purchased by the respondent company and bought by it under a provisional certificate granted by the British Consul at Chicago, in the United States of America, to the Port of Sault Ste. Marie, in Canada.

This port being a port of registry for shipping in Canada, the provisional certificate ceased to have effect on her arrival there and application was at once made

for a certificate of registry for the steamship under the Imperial Merchants' Shipping Act, 1894, and other statutes relating to the granting of such certificates.

The chief officer of customs at the Port of Sault Ste. Marie was also the Registrar of shipping and he demanded the payment of the customs duties from the applicant owner under the Customs Tariff Act, 1897, which were paid under protest. The questions which arose under these facts were whether or not the Customs Tariff Act of 1897 justified the exaction of the payment of the duty, and secondly, if it did, whether it was not *ultra vires*, as being repugnant to the Imperial Merchants' Shipping Act, 1894.

The learned judge of the Exchequer Court, while upholding the power of the Parliament of Canada to pass a law requiring the payment of duty on foreign built ships when brought into Canada, was of opinion that such duty had not been duly imposed by the Customs Tariff Act, 1897. His reasons are that ships are not included in the words "goods" and

> that is clear whether we have regard to the ordinary meaning of the word or to the meaning that may be assigned to it in the Act, (The Customs Tariff, 1897) by reason of the interpretation given to the word in the second section of "The Customs Act" and made applicable to "The Tariff Act."

He further thought that it could not be said with propriety that a ship could be "imported" and that the words of the fourth section of the Tariff Act were "wholly inapplicable to a ship as a ship," and that as item 409 of the schedule to the Tariff Act of 1897 contained no substantive provision imposing a duty and the substantive clause in the Act imposing duties did not embrace nor cover ships, the duty was not recoverable and should be returned.

After careful examination of the statutes above referred to, I am not able to reach that conclusion.

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The Customs Tariff Act, 1897, enacts, in its fourth section at follows :—

Subject to the provisions of this Act and to the requirements of *The Customs Act*, Chapter 32 of the Revised Statutes, as amended, there shall be levied, collected and paid upon all goods enumerated, referred to as not enumerated, in Schedule A, to this Act, the several rates of duties of customs set forth and described in the said schedule, and set opposite to each item respectively or charged thereon as not enumerated, when such goods are imported into Canada or taken out of warehouse for consumption therein.

That Act has four schedules, Schedule "A," which is headed "Goods subject to duty," Schedule "B," headed "Free goods," Schedule "C," "Prohibited goods," and Schedule "D," "Reciprocal Tariff," or goods which, by reason of being productions of certain countries, were admissible under specified favourable rates.

In one or another of these schedules, are to be found all the goods of any kind which could be imported into Canada, with the rates of duty, if any, chargeable upon them, and also, all goods the importation of which was prohibited.

The word "goods" is defined by the Customs Act, R.S.C. ch. 32, to mean, unless the context otherwise requires,

goods, wares and merchandise or moveable effects of any kind, including carriages, horses, cattle, and other animals, except where these latter are manifestly not intended to be included by the said expression.

It is further provided by the Customs Act, section two, that all the expressions and provisions of this Act, or of any other law relating to the customs, unless the context otherwise requires,

shall receive such fair and liberal construction and interpretation as will best insure the protection of the revenue and the attainment of the purpose for which this Act or such law was made according to its true intent meaning and spirit.

And

there shall be levied, collected and paid upon all goods enumerated (or) referred to as not enumerated in Schedule A, to this Act, the several rates of duties of customs set forth and described in the said schedule and set opposite to each item respectively, or charged thereon as not enumerated, when such goods are imported into Canada, or taken out of warehouse for consumption therein.

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In my opinion. if any doubt existed whether or not the term "goods," as thus defined and interpreted covered ships, such doubt was entirely removed by the express insertion in schedule "A" of the Tariff Act of "goods subject to duties," article 409 of which reads as follows :—

Ships and other vessels built in any foreign country, whether steam or sailing vessels, on application for Canadian register on the fair market value of the hull, rigging, and all appurtenances, except machinery, ten per cent *ad valorem;* on the boilers, steam engines, and other machinery, 25 per cent *ad valorem.*

I cannot see how it can be successfully argued in the fact of this article of schedule "A," that foreign built ships were not goods subject to duty and within the substantive enactment of section four above quoted. When brought into port, under the circumstances and for the purposes in which the SS. *Minnie M.* reached Sault Ste. Marie, they seem to me to be "imported into Canada" within the meaning of that phrase as used in clause four of the Act above quoted, equally as well as a railway car brought into Canada as part of a train crossing the Niagara Bridge may be said to be imported.

It was argued on behalf of the Attorney General, that the schedule was complete in itself and would have been effective to collect the duty without clause four at all. That schedule is headed "Goods subject to duties," and article 409 specifies ships, the rate of duty and the time and conditions when payable. There is much in the argument which commends it to my judgment. But I cannot doubt that the schedule,

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when read in connection with section four, removes any reasonable doubt which might exist if that section had been omitted.

It is argued, however, for the respondent, that article 409 cannot be invoked to render the *Minnie M.* liable to duty, because, by its express words, the duty is only payable "on application for Canadian register," and that no such application was made here but, on the contrary, an application for a British register.

The learned judge of the Exchequer Court was of opinion that this must mean an application for a ship's register in Canada, and I agree with him that the words cannot have any other meaning. There is no such thing as an independent Canadian register and there never was any such thing since the tariff on ships was first enacted in 1879. There is only one register or certificate of registry to be had in Canada. It is called Canadian register, because issued by a Canadian officer in Canada, but it is the only register a foreign built ship or in fact any ship can obtain, and there is no possibility of there being any mistake or misunderstanding.

Before the Dominion of Canada was constituted by the British North America Act of 1867, there had been provided for ships trading in the inland waters of the old Province of Canada, a special register, but as long ago as 1873, the Act enabling this register to be issued was repealed and from that day to the present time there is only one certificate of registry obtainable in Canada for ships It is the same certificate of registry as is issued in Great Britain or in Ireland or in Newfoundland. Colloquially, it might be called a Canadian or a Newfoundland or an Irish or a British register, depending upon the port where issued but, no matter where issued, it is the same certi-

ficate of registry and confers the same rights and advantages.

Although, therefore, the phrase "application for Canadian register" may not be happily chosen, I do not think that there can be any doubt as to its meaning.

Then it was argued on behalf of the respondent that the clause in the schedule conflicted with the provisions of the Imperial Merchants' Shipping Act, 1894, and, not having been approved by His Majesty in Council, derived no support from section 735 of this Act, and, to the extent that it so conflicted, must be held to be *ultra vires*. But I do not agree with the contention that there is any such conflict and, on this point, I am in full accord with the learned judge below. The article of the Tariff Act in question was enacted by the Parliament of Canada in the exercise of its undoubted jurisdiction to raise money by any mode or system of taxation. The use of the phrase in the schedule to the Tariff Act declaring that the duty payable in respect of foreign built ships should be payable on application for register had only reference to the time. It does not pretend to make the payment of the duty a condition precedent to the granting of the certificate.

It may well be, as contended by counsel for the respondent, that the Imperial statute is express and explicit, and that on the production of the necessary papers, it became the duty of the registrar to make the necessary entries in the register and to grant the necessary statutory certificate of registry. But there is nothing necessarily inconsistent in the Parliament of Canada declaring that, in such case, and on such an application, customs duties upon the value of the ship must also be paid. The Tariff Act, in using the words referring to the application for registry, merely designated the time when the duty became payable. It did

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not make the payment a condition precedent to the issue of the certificate.

There are many other fees which such a ship would have to pay, such as harbour dues and pilotage dues; many other conditions its owner would have to comply with in the employment of certificated masters, mates and engineers. But all these are obligations and duties arising out of the exercise by the Parliament of Canada of its right to legislate on matters relating to navigation and shipping and it would be idle to contend that because the ship could not obtain a clearance until she had paid all these fees and complied with all these conditions that, therefore, they were in conflict with the Merchant's Shipping Act, 1894.

The owner of the foreign built ship, for his own purposes and at his own option, choses to elect to make a Canadian Port of Registry the Port of registry of his ship. He brings his ship into a Canadian port for that purpose and, by so doing, submits her to the Canadian tariff law. It is of no avail for him to say "I might have selected a port in Great Britain or Ireland or Newfoundland and so escape the duty." The simple answer is that he has not done so but has elected to bring his foreign-built ship into a Canadian port, elected to make that port her port of registry, applied for registration and so become subject to the Canadian tariff law.

I am therefore, of opinion that the learned judge was right in upholding the power of the Canadian Parliament to impose a duty upon foreign built ships registering in a Canadian port, but I am also of opinion that he was wrong in holding that Parliament had failed effectively to exercise its powers.

In the result, the appeal should be allowed with costs and the petition dismissed.

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MILLS J.—This is the case of an appeal by the Crown from a judgment of the Exchequer Court. The steamship *Minnie M.* was built in the United States of America. She was purchased by the Algoma Central Railway Company. A provisional certificate was granted by the British Consul at Chicago, to the port of Sault Ste Marie, in Canada. Sault Ste Marie is a port for registration of ships under the Imperial Merchants' Shipping Act of 1894. The chief collector of customs at the port of Sault Ste. Marie is also the registrar of shipping. He demanded payment of the customs charges which the proprietors paid under protest, contending that, as the ship was entitled to registration, it was *ultra vires* of the Parliament of Canada to charge customs duties upon her admission into the country.

The judge of the Exchequer Court, while admitting that the Parliament of Canada had power to impose a duty upon foreign built ships, that that duty had, nevertheless, not been imposed; that the ship could not be included in the word "goods" and that the word "imported" was wholly inapplicable to a ship as a ship, and that item 409 of the schedule of the tariff Act (1897), contained no substantive provision imposing a duty, and so the duty collected should be returned.

I know of no reason for supposing that the Parliament of Canada is not as competent to impose a duty upon foreign built ships as upon any other foreign article of merchandise. The words of the Customs Act are, in section four and in schedule "A," item 409, as follows:—

4. Subject to the provisions of this Act, and to the requirements of *The Customs Act*, chapter 32, of the Revised Statutes, as amended, there shall be levied, collected and paid upon all goods enumerated, referred to as not enumerated, in schedule A to this Act, the

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several rates of duties of customs set forth and described in the said schedule and set opposite to each item respectively, or charged thereon as not enumerated, when such goods are imported into Canada, or taken out of warehouse for consumption therein.

409. Ships and other vessels, built in any foreign country, whether steam or sailing vessels, on application for Canadian register, on the fair market value of the hull, rigging, machinery and all appurtenances; on the hull, rigging and all appurtenances, except machinery, ten per cent *ad valorem*; on the boilers, steam engines and other machinery, twenty-five per cent *ad valorem*.

These are put in the schedule as goods subject to duties. Section two of the Customs Act enacts that all the expressions and provisions of this Act or any other law relating to the customs, unless the context otherwise requires,

shall receive such fair and liberal construction and interpretation as will best insure the protection of the revenue and the attainment of the purpose for which this Act or such law was made, according to its true intent, meaning and spirit.

The words employed imposing a duty on ships are apt and operative words for the purpose. The learned judge of the Exchequer Court says a ship cannot be imported. I dissent from this view. It may be imported, although not carried in another vehicle, as much as animals that are driven across the border, or as a wagon drawn by a team of horses. I think a fair construction of the provisions of the Customs Act which I have quoted, do impose a duty upon foreign built ships quite as distinctly as other provisions of it impose duties upon foreign manufactured goods, and the fact that such a vessel may be entitled to registration in Canada, under the Merchants' Shipping Act of 1894, does not exempt it from the duties which parliament has imposed. I am, therefore, of opinion that the appeal should be allowed with costs and that the petition of right should be dismissed with costs.

Appeal allowed with costs.

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

Solicitor for the respondent: *H. C. Hamilton.*

THE TOWNSHIP OF ELIZABETHTOWN (PLAINTIFF)..... } APPELLANT;

AND

THE TOWNSHIP OF AUGUSTA (DEFENDANT)..... } RESPONDENT.

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*Nov. 12.
1902
*Mar. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Drainage—Removal of obstruction—Municipal Act, 1883, *s.* 570 (*Ont.*) *Mun. Amendment Act*, 1886, *s.* 22—*Report of engineer.*

In 1884 a petition was presented to the Council of Elizabethtown asking for the removal of a dam and other obstructions to Mud Creek into which the drainage of the township and of Augusta adjoining emptied. The Council had the creek examined by an engineer who presented a report with plans and estimates of the work to be done and an estimate of the cost and proportion of benefit to the respective lots in each Township. The Council then passed a by-law authorizing the work to be done which was afterwards set aside on the ground that the removal of an artificial obstruction was not contemplated by the law then in force, sec. 570 of the Municipal Act, 1883. In 1886 the Act was amended and a fresh petition was presented to the Council of Elizabethtown which again instructed the engineer to examine the creek and report. The engineer did not again examine it (its condition had not changed in the interval) but presented to the Council his former report, plans, specifications and assessment and another by-law was passed under which the work was done. In an action to recover from Augusta its proportion of the assessment :

Held, affirming the judgment of the Court of Appeal (2 Ont. L. R. 4) Strong C. J. dissenting, that the amendment in 1886 to sec. 570 of the Municipal Act, 1883, authorized the Council of Elizabethtown to cause the work to be done and claim from Augusta its proportion of the cost.

Held, further, reversing said judgment, that the report of the engineer was sufficient without a fresh examination of the creek and preparation of new plans and a new assessment.

* PRESENT :—Sir Henry Strong C.J. and Sedgewick, Girouard and Davies JJ.

(Mr. Justice Gwynne was present at the hearing but died before judgment was given).

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

The facts of this case are stated by Armour C. J. O. in the Court of Appeal, as follows:

Mud Creek flows from Mud Lake in the Township of Elizabethtown, in an easterly direction through lots 28 to 14, inclusive, and through part of lot 13 in the 8th concession of the said township, and thence through part of lot 13 and through lots 12 to lot A inclusive, in the 9th concession of the said township, and thence across the town line between the Townships of Elizabethtown and Augusta; thence through lot 37 in the 9th concession of Augusta and across the concession line between the 8th and 9th concessions, and thence through part of lot 37 and through lot 36 in the 8th concession of the last mentioned township, on which last mentioned lot was a mill-dam owned by one Bellamy, which penned back the waters of the said creek and caused them to overflow a large quantity of land in the said townships. Negotiations were had with the said Bellamy for the removal of the said dam, who agreed to do so for the sum of $5,000.

In 1884, a petition having been presented to the Council of Elizabethtown, for the removal of obstructions, the principal of which was the said dam, which prevented the free flow of the waters of the said creek, the Council acting in accordance, as they thought with the law as it then was—The Consolidated Municipal Act, 1883, section 570—procured one Willis Chipman, an engineer, to make an examination of the creek from which it was proposed to remove obstructions, and procured plans and estimates to be made of the work by such engineer and an assessment to be made by him of the real property to be benefited by such work,

(1) 2 Ont. L. R. 4.

stating, as nearly as might be in his opinion, the proportion of benefit to be derived therefrom by every road and lot or portion of lot, Thereafter, in April, 1885, the said engineer made his report to the Council of Elizabethtown with the said plans and estimates and the assessment made by him, and the Council of Elizabethtown thereupon passed a by-law for the aforesaid purpose and having served the Council of the Township of Augusta with a copy of the report, plans, specifications, assessment, and estimates, of the said engineer, the last mentioned council appealed and the arbitrators appointed determined that the law did not apply to the removal of an artificial obstruction, such as the dam above mentioned, and so the proceedings became abortive. And in order to remedy this difficulty, the Municipal Amendment Act, 1886, section 22, was passed amending section 570 of the Consolidated Municipal Act, 1883, by adding thereto subsections 18, 19 and 20, therein set forth.

Thereafter, on the 4th September, 1886, a petition was presented to the Council of Elizabethtown, purporting to be of a majority of the persons shown by the last revised assessment roll to be the owners of the property to be benefited by the work therein mentioned, setting forth that a stream known as Mud Creek, running through the Township of Elizabethtown, and from thence to the Township of Augusta, in the County of Grenville, was obstructed by a certain dam belonging to one John B. Bellamy, erected on lot number 36, in the 8th concession of the said Township of Augusta, then known as Bellamy's mill-dam, and by other obstructions which said dam and obstructions prevented the free flow of the waters of the said creek. That the said John B. Bellamy had agreed in consideration of five thousand dollars, to take down and remove said dam.

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That the taking down and removal of said dam, and of the other obstructions in said creek from said dam to the east side line of lot number 30, in the 8th concession of the said Township of Elizabethtown, would benefit a large tract of land, to wit: lots numbers 5 to 29, inclusive, in the 8th concession of the said Township of Elizabethtown, and lots numbers 1 to 16, inclusive, in the 9th concession of the said Township of Elizabethtown, and lots 37 to 33, inclusive, in the 8th and 9th concessions of the said Township of Augusta. And the petitioners prayed that the said mill-dam and other obstructions in said creek might be removed (said mill-dam being removed by carrying out and completing said proposed arrangement with said John B. Bellamy) from the said dam of the said John B. Bellamy, up to the east side line of lot number 30, in the 8th concession of said Township of Elizabethtown, and that for that purpose all proper steps might be taken in pursuance of the Municipal Act, and the sections thereof relating to drainage, and all proper by-laws passed and surveys made. It was admitted that the last revised assessment roll of the Township of Elizabethtown at the time of the presentation of this petition was that of the year 1886, and that this petition was signed by a majority in number of the persons shown by that roll to be the owners, whether resident or non-resident of the property to be benefited in the Township of Elizabethtown. The owners to be benefited in the Township of Augusta were not taken into account. The Council of Elizabethtown thereupon instructed the said Chipman to make an examination of the creek from which it was proposed to remove the said obstructions, and procured plans and estimates to be made of the work by turn and an assessment to be made by him of the real property to be benefited by such work, stating as

nearly as might be, in his opinion, the proportion of benefit to be derived therefrom by every road and lot or portion of lot. Chipman did not proceed, under these instructions to make another examination of the creek, and fresh plans and estimates and a new assessment, but on the 19th May, 1887, made a new report, accompanying it with the plans, estimates and assessment he had previously made, and dating them as he dated the report. This report showed $4,986 to be assessable against lands and roads in Elizabethtown, and $764 against lands and roads in Augusta.

The Council of Elizabethtown thereupon passed the prescribed by-law in due form and on the 20th July, 1888, the Council of the Township of Elizabethtown served the head of the Council of the Township of Augusta with a copy of the report, plans, specifications and estimates of the said engineer which were not appealed from. The Council of the Township of Augusta never passed any by-law as required by section 581 of the said Act for raising the sum named in the report as assessable against the real property in that township benefited by the said work, nor did they pay over the same or any part thereof to the Township of Elizabethtown, and the Council of the Township of Elizabethtown having paid the whole cost of the work, seeks in this action to recover against the defendants the sum named in the report as assessable against the lands and roads in the Township of Augusta. The action was tried before Street J., at Brockville, on the 14th June, 1900, who dismissed the action with costs, His Lordship being of opinion that the proceedings were not authorized by the Municipal Act.

The plaintiffs appealed from the judgment to the Court of Appeal in which their Lordships unanimously held against the ruling of Mr. Justice Street as to the

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statute law, but were equally divided in opinion on a ground not previously taken, Osler and Leslie JJ. holding that the engineer should have made a fresh examination and prepared a new assessment before reporting to the council the second time, while Armour C.J.O. and Moss J. were of opinion that the plaintiff should succeed. The judgment at the trial therefore stood affirmed and the plaintiff appealed to the Supreme Court.

Watson K.C. and *H. A. Stewart* for the appellant.

J. A. Hutcheson for the respondent.

The CHIEF JUSTICE (dissenting) :—If we could accept the construction placed on the statute in question here by Galt J. in the case of *The Township of West Nissouri* v. *The Township of North Dorchester* (1), namely, that the jurisdiction of the County Council under section 598 of 46 Vict. ch. 18 was exclusive and that the case was not one falling within section 570 and the following sections of the same Act, there would be no difficulty in deciding the present appeal. But although that would have seemed to have been a much more reasonable provision and much more just and equitable in its results as regards landowners in the servient townships, yet such a construction cannot be adopted in the face of the permissive terms of section 598 especially when we find that section 570 and those sections which follow expressly include a case like the present, and however unfair and unjust the consequences we are, therefore, bound to follow the plain language of the statute. Consequently this view although concurred in by the Divisional Court in the case cited, cannot prevail.

Neither for the same reason can we adopt the ingenious interpretation of the learned Chancellor and

(1) 14 O. R. 294.

hold that the landowners benefited in the two townships are to be considered as forming for the purposes of the Act, one mass, or a quasi-municipality, and that a majority of the whole body of owners in both townships (not a double majority as suggested by Henry J. in *The Township of Chatham* v. *The Township of Dover* (1), but a majority of the whole) should be held to be necessary to put the machinery of the Act in motion. This again would have been an improvement upon the actual enactment, but it manifestly was not the intention of the legislature, and so to hold would be making the law and not merely construing the statute as we find it.

Mr. Justice Street was, however, bound by the judgment of the Divisional Court in the *West Nissouri Case* (2) and could not have done otherwise than follow it.

Then, adopting the construction which all the judges of the Court of Appeal have placed upon the Act, namely, that section 570 and the following sections of the amended Municipal Act of 1883 (so amended by the Act of 1886 as to include obstructions caused by Mill Dams) applied, I am still of opinion that the appeal should be dismissed.

The very harsh operation of those sections as applied to the present case, by which not only are the landowners in Augusta supposed to be benefited though against their will and made liable for what they did not want, but all the ratepayers of the Township of Augusta are compelled to contribute to the expense of the removal of this dam though their properties were miles away from Mud Creek, alone make it incumbent on the court to see that the appellants have made out their case when tested in the strictest manner. In the first place I agree entirely with Mr. Justice Lister in

(1) 12 Can. S. C. R. 321 at p. 334. (2) 14 O. R. 294.

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holding that the prerequisites to the respondents' liability have not been performed. I agree in the quotation from Mr. Justice Gwynne's judgment in *The Township of McKillop* v. *The Township of Logan* (1), when he says that these pre-requisites must be found to have been complied with "in the minutest particular."

Then, it is not proved that Mr. Chipman, the engineer, ever made the examination, prepared the plans and estimates or made any assessment of the properties to be benefited at any time after the statute of 1883 had been so amended by that of 1886 as to include obstructions caused by Mill Dams. What he had done some years before when no statutory provision applied to such a case cannot on any known principles of law be utilized as a compliance with the statute. It is enough to say the requirements of the legislature were never complied with. It is not, however, merely a dry technical objection but one which may be of great substantial importance to landowners for in the interval between the date of the actual survey made by Chipman and the passing of the second bylaw, ownerships might have changed, values altered and many other things have occurred making it material that there should have been a proper compliance with the Act by an actual examination, assessment and estimates subsequently to the amending Act.

Then, I do not agree with the learned Chief Justice that a debt obliging the municipality as a corporation was created. The duty of the municipality if it did not appeal was to enforce the assessment imposed on the landowners who profited by the supposed improvement. The statutory debt created was a burden upon these landowners and upon them alone. No words

(1) 29 Can. S. C. R. 702.

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are to be found in section 580 or in any part of the Act imposing any duty upon the municipality beyond that stated. The case of *The Borough of Salford* v. *The County of Lancashire* (1), is in my judgment precisely in point to show that the only remedy against the respondents by way of action was one in the nature of the common law action upon the case to which the statute of limitations, which is pleaded, would be a bar.

As to a mandamus, the case is altogether too stale to warrant any interference in that way even if all the statute required had been complied with.

A further objection which appears to have been taken at the trial and which was also taken in the reasons of appeal and in the respondents' factum here, was that it nowhere appears in proof that a majority of the owners benefited in Elizabethtown alone joined in the petition. I can discover no evidence upon which an answer to this objection can be based, and as it goes to the very root of the proceedings it must be considered fatal.

In my opinion the appeal should be dismissed.

This judgment, however, is a dissenting one since my learned brothers, Sedgewick, Girouard and Davies differ from me. In their opinion the appeal should be allowed.

The judgment of the majority of the court, (Sedgewick, Girouard and Davies JJ.) was delivered by:—

DAVIES J.—Two questions only arose upon this appeal. One was of a substantive character and went to the root of the action. It was based upon the proposition that the proceedings taken by the Township of Elizabethtown for the removal of the dam in the Township of Augusta were *ultra vires* and were not covered

(1) 25 Q. B. D. 384.

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or cured by the amendment of 1886 to the Municipal Act, and that therefore the plaintiff could not recover from defendant any share of the expenditure incurred by it in the removal of that dam and other obstructions in such parts of Mud Creek as were situated in Augusta Township.

The other objection was as to the regularity of the proceedings, it being contended that the engineer had not made such a survey of the lands to be affected by the improvements as was required by the statute. It is upon this latter objection only that there appeared to be any difference of opinion in the Court of Appeal for Ontario.

We are of opinion, for the reasons given by Mr. Justice Moss, that the proceedings on the part of the engineer must be taken to have been legal and effective, and for the reasons given by Chief Justice Armour on the main ground we think that the amendments of 1886 to the Municipal Act gave the plaintiff ample authority to take the proceedings it did for the removal of the dam and other obstructions, and to maintain this action against the defendant (respondent) for the amount of the cost assessable against lands and roads in Augusta Township.

The appeal therefore will be allowed with costs in this court and in the Court of Appeal and judgment entered for the plaintiff in accordance with the judgment of Chief Justice Armour.

Appeal allowed with costs.

Solicitor for the appellant: *H. A. Stewart.*

Solicitors for the respondent: *Hutcheson & Fisher.*

JOHN G. GRIMMER AND G. DUNELL GRIMMER, ADMINISTRATORS OF THE ESTATE OF GEORGE S. GRIMMER, DECEASED (PLAINTIFFS) } APPELLANTS;

AND

THE COUNTY OF GLOUCESTER (DEFENDANT) ..... } RESPONDENT.

1902
*Feb. 20.
*May 15.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Municipal bond—Form—Statute authorizing—Construction.

An Act of the New Brunswick Legislature authorized the County Council of Gloucester County to appoint Almshouse Commissioners for the Parish of Bathurst, in said county, who might build or rent premises for an almshouse and workhouse the cost to be assessed on the parish. The municipality was empowered to issue bonds, to be wholly chargeable on said parish, under its corporate seal and signed by the warden and secretary-treasurer, the proceeds to be used by the commissioners for the purposes of the Act. G. purchased from the secretary-treasurer of the county a bond so signed and sealed and headed as follows: "Almshouse Bonds, Parish of Bathurst." It went on to state that "This certifies that the Parish of Bathurst, in the County of Gloucester, Province of New Brunswick, is indebted to George S. Grimmer," * * pursuant to an Act of Assembly (the above mentioned Act) etc. In an action by G. on said bond

Held, reversing the judgment of the Supreme Court of New Brunswick, that notwithstanding the above declaration that the parish was the debtor, the County of Gloucester was liable to pay the amount due on the bond.

APPEAL from a decision of the Supreme Court of New Brunswick setting aside a verdict for the plaintiff at the trial and ordering a judgment of nonsuit to be entered.

The sole question for decision on the appeal was whether or not the Municipality of the County of

*PRESENT:—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills JJ.

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Gloucester was liable on a bond issued under An Act to provide an Almshouse for the Parish of Bathurst. The material provisions of the Act and the bond in full are set out in the judgment of the court.

The plaintiff had a verdict at the trial but the court *en banc* set it aside, the majority of the judges holding that the Act did not make the county liable and the remaining judge, while deciding that it did, being of opinion that the wording of the bond exempted it from liability.

Currey K.C. for the appellant.

Teed K.C. for the respondent.

The judgment of the court was delivered by:

SEDGEWICK J.—In 1878 the Legislature of New Brunswick passed a statute (1) authorising the establishment, operation and maintenance of an Almshouse in the Parish of Bathurst, one of the parishes of the defendant municipality. Its provisions so far as they affect this case are as follows:

1. The commissioners to be appointed as hereinafter mentioned are hereby authorised and empowered to lease or purchase a suitable building, farm and lands, situate in the vicinity of the Town of Bathurst, in some suitable place, the ownership, or title and property to which lands shall be vested in "The Almshouse Commissioners of the Parish of Bathurst," in trust, and to be used and occupied for the purposes of an almshouse and workhouse for the Parish of Bathurst, in the said county, and the said commissioners are also hereby authorised to agree for the erecting on the said farm a proper building or buildings for an almshouse and workhouse, and to fix on a certain sum of money for defraying the costs and expense of the purchase of the said farm, or for the annual rent to be paid therefor, and the erection thereon of the said building or buildings, the whole not to exceed, with the expense of assessing and collecting the same, the sum of three thousand dollars; and the county council of the said municipality are hereby authorised and required, at any regular meeting or

(1) 41 V. c. 102 (N.B.)

at any special meeting called for that purpose, to order the said sum to be assessed on the said Parish of Bathurst, either extending over two years or more, but not to exceed ten years, as may be deemed most desirable; which amount so ordered to be assesssed, shall be assessed, levied and collected on the Parish of Bathurst as other parish rates are assessed and collected.

2. The said County Council may cause bonds to be issued by the municipality, entitled "Almshouse Bonds," Parish of Bathurst, *which bonds shall be wholly chargeable* on the said parish and shall bear such interest, be in such form, and for such amount, and be payable at such time and places as the said commissioners may recommend, but within ten years from the first issue of the bonds of indebtedness, and shall be signed by the warden and secretary-treasurer, and have the corporate seal affixed thereto, and be placed in the hands of the secretary-treasurer of the municipality to be disposed of for the purpose of this Act; and the proceeds of such bonds shall be placed to the credit of the said commissioners and be paid out on their order for the purpose of this Act and for no other purpose.

3. The said County Council are hereby required and authorised to order, make and levy upon the inhabitants of the said Parish of Bathurst, liable to be rated or assessed, in any year a sum sufficient to pay the principal sum falling *due upon any bond issued under this Act* in that year, and also a sum sufficient to pay the interest due on the whole loan, until the whole sum and interest be paid off; the said sums, when collected to be held and paid by the secretary-treasurer for the purposes of this Act and no other purpose.

4. It shall be lawful for the County Council, and they are hereby required on the joint recommendation of the County Councillors for the Parish of Bathurst, to appoint three fit and proper persons, residents of the Parish of Bathurst, to be commissioners for purchasing or leasing a farm and lands in the Parish of Bathurst, and for erecting thereon a proper building or buildings for an alms and workhouse for the said Parish of Bathurst, and supporting and managing the same.

5. The commissioners shall at the meeting of the County Council in January in each year, lay before the said council an account, to be audited by a committee composed of the councillors of Bathurst Parish and the county auditor, of the expenses incurred by them for the support and maintenance of the poor in said almshouse and workhouse for the past year, together with an estimate of the sum or sums that may be needful for the maintenance and employment of the poor of the said house, including contingent expenses for the current year; and the amount of the said account, when audited and allowed

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by the said committee, shall be apportioned on the said Parish of Bathurst, and assessed, levied and collected from the inhabitants thereof in the manner provided by law for assessing, levying and collecting parish rates, and when received shall be paid by the collector of the said parish into the hands of the secretary-treasurer for the use of the said commissioners and for no other purpose.

Sections eight, nine, ten, eleven and twelve provide further details for the working out of the Act, and by section thirteen it is expressly provided that the commissioners may recover from the overseers of any parish in any other county, in an action at law, the amount expended in the support of any pauper belonging to any other parish.

Section fourteen provides that any vacancy in the board from death, resignation or otherwise, may be filled by the county councillors from Bathurst.

After the passing of the statute and at the annual meeting of the County Council of Gloucester, held in the month of January, A.D. 1879, a resolution was passed whereby, after referring to the statute in question and reciting that it was desirable to erect the almshouse, it was resolved that the county council should order that bonds be issued for the purposes of the Act, payable from time to time, as the commissioners might recommend, and for such sum or sums as they deemed necessary, not to exceed in the whole three thousand dollars, and the warden and secretary-treasurer of the municipality were ordered to sign such warrants and affix thereto the corporate seal; said bonds to be placed in the hands of the secretary-treasurer to be disposed of by him to the best advantage and the proceeds thereof to be placed to the credit of the commissioners and paid out on their order for the purposes of the Act and for no other purpose.

Three almshouse commissioners were also appointed by the county council at said January meeting.

At this time John Young was warden and John Sivewright secretary-treasurer of the defendant municipality. The almshouse commissioners, in pursuance of sec. 3 above set out, recommended to the municipal officers the amount to be borrowed ($3,000), the rate of interest, the form of the bonds and the time and place of payment. Thereupon Sivewright, the secretary-treasurer, prepared the bonds in the form hereinafter set out, and sold the same to one George S. Grimmer (of whom the plaintiffs are the personal representatives), he paying into the hands of Sivewright $3,000, the face value of the bonds. Two of these were paid. The one now in suit was not. It was signed by the warden and the secretary-treasurer and had affixed the corporate municipal seal and was in form as follows:

$1,000. No. 1.

ALMSHOUSE BONDS, PARISH OF BATHURST.

This certifies that the Parish of Bathurst, in the County of Gloucester, Province of New Brunswick, is indebted to George S. Grimmer in the sum of one thousand dollars, current money of the Province of New Brunswick, which is payable to George S. Grimmer, or order, on or before the sixth day of April, one thousand eight hundred and eighty-four, together with interest at the rate of seven per centum per annum, payable half-yearly, at the Bank of New Brunswick, St. John, on presentation of the proper coupons for the same, as hereunto annexed, pursuant to an Act of Assembly made and passed in the forty-first year of the reign of Her Majesty Queen Victoria entitled "An Act to provide for the erection of an Almshouse and Workhouse in the Parish of Bathurst, Gloucester County."

In witness whereof, the county council, at the instance of the almshouse commissioners of the Parish of Bathurst, have caused the seal of the Municipality of Gloucester to be affixed hereunto, under the hand of the warden and secretary-treasurer, this tenth day of April, one thousand eight hundred and seventy-nine.

JOHN SIVEWRIGHT, *Secretary-Treasurer.* JOHN YOUNG, *Warden.*

Action having been brought on this instrument the case was tried before Mr. Justice Hanington and a

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jury and a verdict rendered for the plaintiff. Upon appeal to the court *en banc* the verdict was set aside. Hence this appeal.

The only inquiry we have to make here is as to the proper interpretation of the bond and statute in order to ascertain whether the municipality is directly and immediately liable to the bondholder for the amount of the loan.

The Parish of Bathurst is not a corporation; it cannot sue or be sued; it is a mere territorial area, one of the many into which the county is divided for the purposes specified in the various statutes relating to or affecting their respective ratepayers and inhabitants. The County of Gloucester on the other hand is a corporation having all necessary machinery for carrying on all municipal business including the assessment and collection of all municipal taxes whether for general or special purposes.

Let me now consider the true construction of the Act in question. Was it intended by the legislature that the municipality should give its corporate obligation to the tenderers of the money authorised to be borrowed?

Now I understand a bond to be a written instrument under seal whereby the person executing it makes a promise or incurs a personal liability to another. Now here, the statute referring to these bonds speaks of them as "bonds to be issued by the municipality" as "bonds of indebtedness," and instruments to be "signed by the warden and secretary-treasurer and have the corporate seal affixed thereto," as bonds which are to "be placed in the hands of the secretary-treasurer to be disposed off," (that is sold,) by him as bonds the proceeds of which, having first been received by the secretary-treasurer as an officer of the municipality, should be by him, as such officer, placed

to the credit of (*i. e.* paid over to) the body entitled to receive them. I can hardly conceive words stronger than these to express the intention of the legislature that the bonds issued under the Act were to be the immediate and direct obligations of the municipality to the bondholder. If that was not the intention, who was to be the sponsor of or liable for them? Not the Parish of Bathurst, it was incapable of making a promise; and certainly not the almshouse commissioners, whether corporate or not, inasmuch as that liability was not imposed on them. Can it be imagined that no one was to be responsible? Besides, this is the common way by which legislatures authorise municipalities to borrow money for the purpose of carrying out local improvements. The county having greater credit can borrow at a lesser rate of interest than the parish — the improvement though for the special benefit of the parish is as well for the general benefit of the county. But more important than all, if money is to be borrowed for the benefit of the parish, it has no machinery to collect money to refund it. No assessors or collectors or treasurers, and the county machinery is most appropriately used therefor. And even this too adds force to the view of corporate liability. It is upon the county council alone that the duty is cast of raising funds to pay interest and the bonds themselves as they mature. Section 3 particularly provides for this. The money necessary is to be assessed and collected by whom? By the same officers as assess and collect the general rates. And this money is to be paid by whom? By the secretary-treasurer. And to whom? To the persons entitled to the interest and principal. And this consideration appears to me conclusive. The secretary-treasurer (the money being collected) was bound to pay the interest and principal to the bondholders and to them alone. That is as

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clear and explicit a statement of the county's liability as words can make.

I entirely agree with so much of Mr. Justice Gregory's judgment, on this part of the case, as in my view it is an admirable exposition of the meaning and design of the Act.

I now turn to the bond itself. It is most certainly a clumsy, imperfect and obscure instrument. Its form is not a credit to the commissioners by whom it was, under the statute, drafted. But that is not the question. We have to determine whether in such a form there is an obligation on the part of the municipality to pay the bond.

Now as I view it, the most important statement in the instrument, executed as it was by the municipality, is that it is issued in pursuance of the Act. We therefore have to refer to the Act and construe them both together. We read the Act into the bond and then proceed to ascertain whether there is or is not a municipal promise or obligation. So that when we read in the certificate that the Parish of Bathurst is indebted to George S. Grimmer, (an extraordinary statement to make if the parish is not an entity capable of being indebted to anybody), we turn to the statute for relief and instruction and we there find that the parish is, in a certain sense, the debtor of Grimmer inasmuch as it will be from the ratepayers of the parish that the money to pay the present loan will eventually come, the bonds authorised by the statute to be issued by the municipality being "*wholly chargeable on the parish.*" And, inasmuch as we are bound to give some meaning to the words of a contract unless they are in fact meaningless, we conclude that it was in that sense the words were used. That granted, as there is no express statement as to *who* would pay Grimmer, only a statement that the thousand dollars "*is payable* to Grim-

mer," we look to the statute and we find that it is payable by the secretary-treasurer of the municipality out of the special fund to be raised from the Bathurst taxpayers. That is sufficient authority therefore, to read into the bond after the words "which is payable," the other words "by the Municipality of Gloucester." And thus we have an absolute covenant for payment on the part of the municipality.

If the Act authorises the contract and is to be read into it, then there is presented to us such an instrument as the legislature, in my view, most certainly intended, as expressed in its language, an instrument, which otherwise would be a mockery and snare, converted into one of honest intent and legal force—its ambiguities removed and its obscurities made plain.

But suppose the interpretation, I have ventured with great deference to give the bond, is erroneous. There is another ground upon which the county's liability may be rested.

Take the abbreviated words of the bond:—"This certifies that the parish is indebted to Grimmer in the sum of $1,000, payable to Grimmer with interest on April 6th, 1884."—What do these words "this certifies" mean? Give them any meaning at all and they are synonymous or equivalents of such phrases as these;—"we promise," or "we contract," or "we guarantee" or "we declare it to be the truth." In other words, "we, having borrowed from you $1,000, promise that the Parish of Bathurst will repay you with interest." There is then a contract by the municipality that a third party will pay. It has not paid; the breach has happened, and the municipality must make good its promise.

It may be said that the statute does not authorise such a contract, but we must look to the substance rather than to the form. The statute authorised the

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municipal bond as security for the municipal loan. The form of this obligation was left to the municipality's appointees. Giving effect to this contract so formed gives effect likewise to the legislative intent and the bondholder gets his debt from the municipality.

I am of opinion that the appeal should be allowed and the verdict at the trial restored, the appellants to have their costs in all the courts.

Appeal allowed with costs.

Solicitor for the appellants: *W. C. H. Grimmer.*

Solicitor for the respondent: *N. A. Landry.*

THE BOSTON RUBBER SHOE COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

THE BOSTON RUBBER COMPANY OF MONTREAL (DEFENDANTS).... } RESPONDENTS.

1902
*Feb. 25,
*May 15.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Trade-mark—Infringement—Use of Corporate name—Fraud and deceit—Evidence.

The plaintiffs, incorporated in the United States of America, have done business there and in Canada manufacturing and dealing in india rubber boots and shoes under the name of "The Boston Rubber Shoe Company" having a trade line of their manufactures marked with the impression of their corporate name, used as a trade-mark, known as "Bostons," which had acquired a favourable reputation. This trade-mark was registered in Canada, in 1897. The defendants were incorporated in Canada, in 1896, by the name of "The Boston Rubber Company of Montreal," and manufactured and dealt in similar goods to those manufactured and sold by the plaintiffs, on one grade of which was impressed the defendants' corporate name, these goods being referred to in their price lists, catalogues and advertisements as "Bostons," and the company's name frequently mentioned therein as the "Boston Rubber Company" without the addition "Montreal." In an action to restrain defendants from the use of such mark or any similar mark on the goods in question, as an infringement on the plaintiffs' registered trade-mark,

Held, reversing the judgment appealed from, (7 Ex. C. R. 187), that under the circumstances, defendants' use of their corporate name in the manner described was a fraudulent infringement of plaintiffs' registered trade-mark calculated to deceive the public and so to obtain sales of their own goods as if they were plaintiffs' manufactures, and, consequently, that the plaintiffs were entitled to an injunction restraining the defendants from using their corporate name as a mark on their goods manufactured in Canada.

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*PRESENT:—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills JJ.

1902

BOSTON RUBBER SHOE CO. v. BOSTON RUBBER CO. OF MONTREAL.

APPEAL from the judgment of the Exchequer Court of Canada (1), dismissing with costs the plaintiffs' action for damages and an injunction to restrain the defendants from infringing the plaintiffs' trade-mark registered in Canada.

The plaintiffs were incorporated in the State of Massachusetts in the year 1853, for the purpose of manufacturing and selling rubber boots and shoes, and ever since have carried on that business throughout the United States of America and Canada, using a trade-mark upon their rubber boots and shoes the essential features of which consist, as alleged, of the words "Boston Rubber Shoe Company." In October, 1897, the plaintiffs registered said trade-mark in Canada as a specific trade-mark for rubber boots and shoes. The statement of claim alleged further that on the 21st October, 1896, the Toronto Rubber Shoe Manufacturing Company registered in Canada, as a specific trade-mark for rubber boots and shoes, the word "Boston," and transferred the same to the plaintiffs by assignment dated the 20th September, 1897; that the defendants in 1899 manufactured and sold in Canada, rubber boots and shoes similar to those made and sold by plaintiffs and applied thereto a mark as follows, "The Boston Rubber Co., Montreal, Ltd." placing the same on the same part of the boot or shoe made by the defendants as the plaintiffs on their boots and shoes were accustomed to place their said trade-mark; that the defendants have not registered the said mark in Canada; that the mark so used by the defendants is, in its essential features, the same as the plaintiffs' said trade-marks, or so closely resembles the same as to be calculated to mislead the public in Canada and elsewhere into believing that in purchasing goods made by the

(1) 7 Ex. C. R. 187.

defendants and so marked they were purchasing goods made by the plaintiffs, and that defendants made large profits by reason of purchasers being misled by said mark into purchasing said goods believing them to have been manufactured by plaintiffs.

The defendant pleaded that the plaintiffs' trade-marks were registered in Canada after the defendants had begun to use the mark complained of and denied that defendants' profits have been made by reason of purchasers being misled into purchasing its goods believing them to be plaintiffs' goods. The defendants further pleaded that defendants' mark is composed in effect of defendants' corporate name, that the user thereof was not fraudulent, and that, prior to the incorporation of defendants, a company was in existence in the United States for the manufacture of rubber boots and shoes called "The Boston Rubber Co.", that the plaintiffs endeavoured by suits in the courts of the United States to prevent the use by The Boston Rubber Company of their corporate name in connection with the manufacture of rubber boots and shoes, but failed, and that the Boston Rubber Company continued to imprint their name on rubber boots and shoes prior to registration by plaintiffs of its trade-mark in Canada, that the promoters of the defendant company purchased the plant of The Boston Rubber Company and adopted the mark complained of as the dies purchased by The Boston Rubber Company bore the name of that company.

The defendants having demurred to the plaintiffs' statement of claim the demurrer was overruled (1).

(1) 7 Ex. C. R 9.

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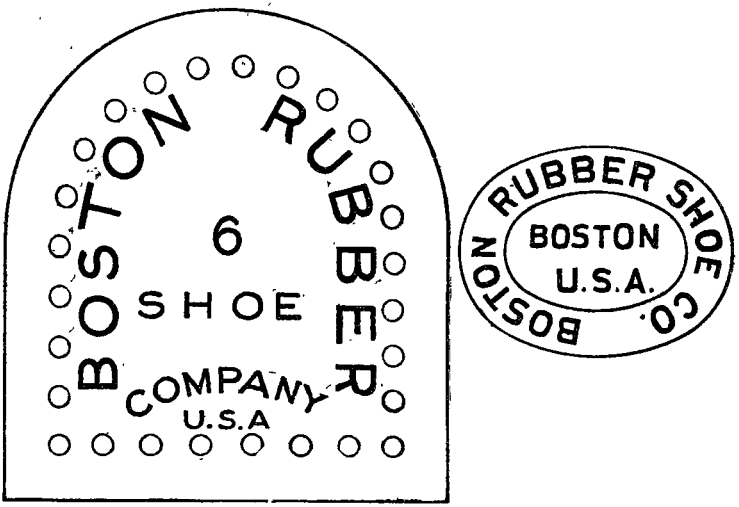
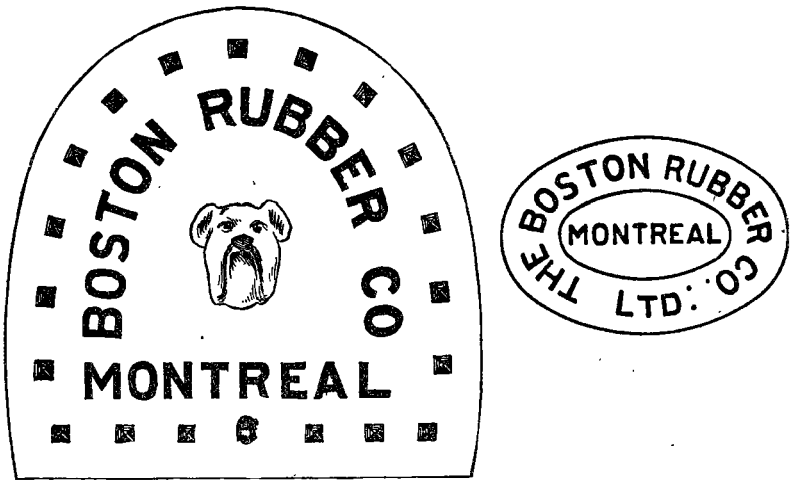
The marks of the plaintiff company were impressed upon its goods, generally arranged as follows:



Those impressed by the defendant upon the goods in question of its manufacture were generally as follows:



The marks being placed on the same part of its boots and shoes and those impressed upon the plaintiff's manufacture.

The questions at issue in the present appeal are stated in the judgment reported.

Sinclair for the appellants. It is not necessary to prove fraudulent adoption or adaptation The injury to the owner of a trade-mark is just as great when the infringement is innocent as when it is intentional. "*Singer*" *Machine Manufacturers* v. *Wilson* (1), *Millington* v. *Fox* (2), Kerly on Trade Marks, (1 ed.), pp. 4, 14, 316, 349; Sebastian on Trade Marks, (4 ed.), p. 124; 26 Am. & Eng. Encly. of Law, p. 444.

The fact that the plaintiffs' trade-mark was not registered in Canada until after the incorporation of the defendant company is not a reason for denying the relief sought. The plaintiffs had a perfectly good trade-mark in Canada for years before the defendants were incorporated. Section 19 of the Trade-Mark Act, R. S. C., cap. 63, only imposes a condition precedent to the right to sue, the plaintiffs' trade-mark in Canada and the United States existed long prior to the date of the incorporation of the defendant company, although by reason of the Trade Mark Act it had to be registered before the plaintiffs could sue in respect of infringement. *Barlow and Jones* v. *Jabez Johnson & Co.* (3), at pages 405 and 411. Damages can be recovered for infringements occurring prior to registration, *Smith* v. *Fair* (4), per Proudfoot J. at page 736. The fact that the defendants use the word "Boston" or "Bostons" in its advertisements and catalogues, that word being the essential portion of the plaintiffs' registered mark as applied to their product, and omit from their books and catalogues the words "of" and "Montreal" in many instances shows that even if the original choice of name was not made for the purpose of gaining the benefit of the plaintiffs' reputation, the subsequent

(1) 3 App. Cas. 376.
(2) 3 My. & Cr. 338.
(3) 7 Cutl. P. Cas. 395.
(4) 14 O. R., 729.

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use made of it by the defendants contains those garnishings of fraud referred to in the judgment of Lord Esher in *Turton* v. *Turton* (1), at page 134, which will enable the Court to conclude that the defendants are endeavouring to pass off their goods as the goods of the plaintiffs. The defendants' mark is so like that of the plaintiffs that purchasers cannot tell when purchasing which company has made the goods. The intentional dropping of the words "of" and "Montreal" is evidence that the defendants are acting in bad faith and fraudulently marking their goods so as to deceive purchasers. See the remarks of Bradley J. in *Celluloid Mfg. Co.* v. *Cellonite Mfg. Co.* (2); *Burgess* v. *Burgess* (3); *Hendriks* v. *Montagu* (4); *Manchester Brewery Co.* v. *North Cheshire and Manchester Brewery Co.* (5); Kerly on Trade-Marks, (1 ed.) pp. 320, 380, 389, 423; (2 ed.) pp. 466, *et seq.* It is not necessary to prove that the defendants have sold or attempted to sell their goods as those of the plaintiffs otherwise than by shewing the sale of such goods under the name by which plaintiffs' goods are known in the market. *Reddaway* v. *Banham* (6); *Wotherspoon* v. *Currie* (7); *Massam* v. *Thorley's Cattle Food Co.* (8); *Warner* v. *Warner* (9).

When there is, as in this case, an appropriation of a material or substantial part of a trade-mark the appropriator is bound to use such precautions as to avoid the probability of error and deception and the onus is on him to shew that the purchasers of goods will not be deceived. *Orr Ewing & Co.* v. *Johnston & Co.* (10); Brown on Trade-Marks, (2 ed.), sec. 387. See also the

(1) 42 Ch. D. 128.
(2) 32 Fed. Rep. 94.
(3) 3 De G.M. & G. 896.
(4) 17 Ch. D., 638.
(5) [1898] 1 Ch. 539.
(6) [1896] A. C., 199.
(7) L. R. 5 H. L. 508.
(8) 14 Ch. D. 748.
(9) 5 Times L. R., 327, 359.
(10) 13 Ch. D. 434.

remarks of Lord Esher M. R. in *Pinto* v. *Badman* (1). As to the right in Canada to assign a trade-mark in gross, see *Smith* v. *Fair* (2); Sebastain on Trade-marks, (4 ed.), p. 15 note; *Hohner* v. *Gratz* (3). Under the Trade-Mark Act, R. S. C., cap. 63, s. 3, the proprietor of a registered trade-mark is entitled to the exclusive right to use the same to designate articles manufactured and sold by him.

If the court should be of the opinion that the original choice of name by the defendants was innocent the plaintiffs are entitled to damages from the 21st September, 1900, when the defendants were notified of the infringement.

As to proof of fraud being no longer necessary in order to enable the court to restrain a person from trading under his own name, see Kerly on Trade-Marks, (2 ed.) pp. 500-514; *Valentine Meat Juice Co.* v. *Valentine Extract Co.* (4); *J. & J. Cash. Ld.* v. *Cash* (5).

When the plaintiffs' goods are known by a name suggested by his trade-mark the defendants may be restrained from using a mark calculated to cause the same name to be applied to their goods. Kerly (2 ed.) pp. 240-253, p. 379.

As to restraining infringement caused by defendants' catalogues, price lists and advertisements, see Kerly (2 ed.) pp. 39, 369; "*Singer*" *Machine Manufacturers* v. *Wilson* (6); *Jay* v. *Ladler* (7).

As to form of injunction in such cases, see Kerly on Trade-Marks (2 ed.) pp. 751, 754 and 756.

It is not a question whether the use of the defendants' mark is necessarily deceptive but whether there is not a strong probability of its causing deception.

(1) 8 Cutl. P. Cas. 181.
(2) 14 O. R. 729.
(3) 50 Fed. Rep., 369.
(4) 17 Cutl. P. Cas. 673.
(5) 18 Cutl. P. Cas. 213.
(6) 3 App. Cas. 376, at p. 392.
(7) 6 Cutl. P. Cas. 136.

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Cf. Cotton L.J. in *The Upper Assam Tea Co.* v. *Herbert & Co.* (1); Kerly (2 ed.) pp. 373-374.

Where the plaintiff's trade-mark is geographical the defendant not carrying on business at the same place may be restrained; *The Whitestable Oyster Fishery Co.* v. *The Hayling Fisheries, Ld.* (2); Am. & Eng. Encly. vol. 26 p. 331; *Montgomery* v. *Thompson* (3).

As to restraining the use of a portion of a registered trade-mark, see *Crawford* v. *Shutlock* (4); *Carey* v. *Goss* (5).

Béique K.C. and *McGouin K.C.* for the respondents. It was not until October, 1897, that the appellants registered their trade-mark in Canada, and even in the United States they registered only in April, 1897, mor than five months after the incorporation of the Canadian Company. Plaintiffs' action is based entirely on the provisions of our statute by section 3 of which trade-marks are defined, registration permitted, and it is declared that *thereafter* the person registering shall have the exclusive right to the use of the name. However this might affect the persons, it cannot affect the vested rights of the respondents to continue to use the name they had been using from the time of incorporation. Sebastian (3 ed.) p. 27; *Burgess* v. *Burgess.* (6). Marks in use before registration come under the same rule as old marks under the English statute. It is essential that the mark should be claimed and registered precisely in the form in which it has been used. Sebastian (3 ed.) p. 103; note (*l*) to section 64 of the P. A., 1883, cited at page 366.

The decisions in *The Boston Rubber Shoe Co.* v. *The Boston Rubber Co.* (7); *Converse* v. *Hood* (8); and *Converse* v. *The Boston Rubber Co.* (8); were that

(1) 7 Cutl. P. Cas. 183.
(2) 17 Cutl. P. Cas. 461.
(3) [1891] A. C. 217.
(4) 13 Gr. 149.
(5) 11 O. R. 619.
(6) 3 De G., M. & G. 896.
(7) 149 Mass. 436.
(8) 149 Mass. 471.

the Boston Rubber Shoe Company could not deprive the Boston Rubber Company of the right to manufacture boots and shoes and even to stamp them with their name. This was pleaded, and copies of the documents forming the record in that case are produced.

As to the trade-mark on the word "Boston" registered by the Toronto Rubber Shoe Manufacturing Company and purchased by the plaintiffs, it is to be observed, first, that the word was in use both by the plaintiffs and by the company from which the defendants bought their plant for many years before said registration.

It is certainly hypercritical to observe that in the price lists and catalogues the full name has not been always repeated. It is impossible that a single manufacturer should be allowed to arrogate to himself the exclusive use of a name which he shares in common with many other persons, and from this circumstance the rule is deduced that while against persons bearing a different name a manufacturer's right in his trade-mark is absolute and exclusive, as against persons bearing the same name, no such exclusive right can be set up. *Burgess* v. *Burgess*, (1).

The court below has followed the French courts in *Erard* v. *Erard* (2), which followed an earlier holding, *Salignac* v. *Levannier* (3) affirming the *arrêt* of the Court of Appeal in *Lagorée* v. *Perrin* (4). See also *Erard* v. *Erard* (5), and *Partlo* v. *Todd* (6).

The respondents have done precisely what the court ordered in these cases, they have put the name "Montreal" in clear large type and the abbreviation "Ltd." in the middle of the mark adopted by them, thus making the distinctive features the most prominent part of their

(1) 3 De G. M. & G. 896.
(2) Dal. 78, 1, 231.
(3) Dal. 54, 1, 252.
(4) Dal. 54, 2, 86.
(5) Dal. 80 1, 80.
(6) 17 Can. S. C. R. 196.

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mark. On this point, the absence of fraudulent intention, the judgment of the court below is emphatic, and there is nothing in the record that can weaken this holding.

For all these reasons the judgment of the court below must be affirmed, that it should be declared that the defendants have acted throughout with perfect honesty and in absolute good faith, and the appellants should pay the costs of the demurrer as well as the costs already adjudged and the costs of this appeal.

The judgment of the court was delivered by:

DAVIES, J.—The plaintiffs (appellants) brought their action in the Exchequer Court seeking to restrain the respondents (defendants)

> from continuing to use the Trade Mark of the plaintiffs (the essentia feature of which were alleged to consist of the words "Boston Rubber Shoe Company,") "or any other mark similar thereto upon rubber boots and shoes or any other goods made or sold by the defendants and from in any other way infringing the plaintiffs' registered marks or either of them."

They also claimed damages and "such further or other relief as might be considered just."

As regards the plaintiff company, the learned judge states the facts of follows:—

> The plaintiff company was, in 1853, incorporated under the laws of the Commonwealth of Massachusetts, by the name of "The Malden Manufacturing Company" for the purpose of manufacturing cotton, silk, linen, flax or india-rubber goods at the Town of Malden. In 1855 its name was, by an Act of the Commonwealth, changed to "The Boston Rubber Shoe Company." Since that time it has continued to do business by that name, and its business has prospered. In rubber boots and shoes it manufacturers two grades or lines of goods; the one that which is spoken of as "The Boston Rubber Shoe line," and the other "The Bay State line." The former are known to the trade, and have been since as early as 1865 at least, as "Bostons." The other grade is known as "Bay State." The company's annual output of rubbers is about twelve million pairs. Mr. Sawyer puts it at from ten

to fifteen millions. Of this quantity about half are "Bostons" and half "Bay State." These goods are sold in the United States, in Europe and in Canada. But the sale in Canada is not, I infer from the evidence, large.

In the year 1896, one Charles L. Higgins purchased from another company in the United States of America, called The Boston Rubber Company, all its calendars, blocks, dies, patterns, moulds and all furniture and tools specifically adapted for the manufacture of rubber boots and shoes.

This Boston Rubber Company had, at one time, included, in the goods they manufactured, rubber boots and shoes, but after some litigation with the plaintiffs connected with their right to use the name (but not, so far as it appears, in consequence of such litigation) had gone out of the business of manufacturing boots and shoes and sold their blocks, dies, &c., to Higgins.

In 1896, Higgins applied for and obtained for himself and others incorporation under "The Companies Act," (R.S.C. c. 119), by the name of The Boston Rubber Company of Montreal, Limited. This company manufactures, amongst other goods, two grades of rubber boots and shoes at their works in St. Jerome, in the Province of Quebec. On the better grade are impressed the words "The Boston Rubber Company, Montreal, Limited," and these goods in the company's catalogues, price lists and advertisements are referred to as "The Boston." In the illustrated catalogue, Exhibit No. 15, will be found the following:—

Our Neptune brand is everything we claim for it—a high grade second, not so good as the Boston, but a clean, well made, stylish rubber that will give excellent satisfaction for the money;

and in the same catalogue, as well as in the price list, (Exhibit No. 16), the words "Boston Rubber Company" without any addition of the word "Montreal", frequently occur.

The learned judge found as a fact, and the evidence fully justifies the finding, that

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although the sales of the plaintiffs' goods in Canada do not appear to be, or so far as the evidence goes, to have been considerable, the term "Boston" or "Bostons" has come in some way to have a commercial value as attached to rubber boots and shoes and this value has been given to it by the plaintiffs' enterprise and business.

He further says with respect to the use of that term or terms that it seemed to him reasonably certain that

> the plaintiff company was the first to make use of the term in that connection, and that any value it had acquired in that connection, any secondary meaning that it has come to have as denoting excellence in rubber boots and shoes, has been derived from its use in the plaintiffs' business;

and further

> that the defendant company as honest manufacturers and traders ought to discontinue its use except so far as it forms part of the corporate name of the company.

Having reached these conclusions of fact and expressing these opinions however, the learned judge went on to say

> that this action was not brought to restrain the use of the word "Boston" or "Bostons" in the company's catalogues, price lists and advertisements, but to restrain it from using upon goods of its own manufacture what, in substance, is its corporate name, the only difference being the omission of the preposition "of" before Montreal.

The learned judge accepted the explanation of Mr. Higgins as to the circumstances under which the corporate name of the defendants was adopted and acquitted him and the company of any intentional or fraudulent adaptation of any part of the plaintiffs' corporate name. He further says that there is no evidence of any attempt by the defendant company to sell their goods as those of the plaintiffs, and that the question he had to determine was whether the company might or might not impress their corporate name upon goods of their own manufacture. He answered it in the affirmative in the absence of any fraud or bad faith.

It seems to me, with great respect, very difficult on the evidence in this case to find that fraud and bad faith were absent; and if I were compelled to find specifically on the point I would strongly incline to the opinion that the particular corporate name which Mr. Higgins selected for his company was selected by him because of the special value which had attached to the term "Boston" in connection with rubber boots and shoes by the enterprise, energy and business of the plaintiffs. I can hardly conceive of any legitimate use of the word "Boston" in the corporate name of a Canadian company established to do a manufacturing business in the Province of Quebec. The object of using the name by stamping it upon each of the products of their manufacture and offering them for sale so stamped may not have been to deceive purchasers into the belief that they were buying the goods of the Boston Shoe Co., but that such would have been the result, I entertain no reasonable doubt. If so, it would bring the case directly within the rule laid down by Lord Kingsdown in *Leather Cloth Co.* v. *American Leather Cloth Co.* (1), quoted approvingly by Lord Herschell in *Reddaway* v. *Banham* (2), viz.:

> The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot therefore (in the language of Lord Langdale in the case of *Perry* v. *Truefitt* (3)), be allowed to use names, marks, letters, or other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person,

and entitles the person aggrieved to an injunction to restrain its use.

The term "Boston" or "Bostons" attached by the plaintiff company to their rubber boots and shoes was an "invented or fancy word" and not a descriptive one, and had come in time as found by the learned

(1) 11 H. L. Cas. 523, at p. 538. (2) [1896] A. C. 199.
(3) 6 Beav. 66.

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judge, to have a well understood meaning in the trade and to apply to a special class of rubber boots and shoes which the plaintiffs manufactured and sold. Comparing the name and diagram stamped by the defendant company on their boots and shoes with the name and diagram stamped by the plaintiff company on theirs, I can have no doubt that an ordinary purchaser would be deceived. The deception would be caused by the use of the term "Boston," and that this would be so would seem to have been well known to the defendants from the fact that the boots and shoes so stamped by them are referred to in the company's catalogues, price lists and advertisements as "Bostons."

The distinction between an "invented or fancy word" as a Trade Mark and a really descriptive one is of great importance in determining, where that is necessary, the presence or absence of fraud. But with all respect to the learned judge I doubt very much that it is necessary to find "fraud or fraudulent intent" on the defendants' part in order to grant relief.

The general rule that a single manufacturer will not be allowed to arrogate to himself the exclusive use of a name which he shares in common with many others, has of course been qualified in *Holloway* v. *Holloway* (1), by the statement that the free use even of a man's own name will be hindered and restrained if it is shewn that the person using it is doing so for the purpose of fraud. But I doubt much that such general rule, even without the qualification, could be invoked by the defendant company in a case such as this.

The whole question of the use of a name which had acquired a special meaning with respect to a special class of goods was exhaustively reviewed by the House of Lords in the late case of *The Cellular Clothing Company, Limited* v. *Maxton & Murray* (2), where nearly

(1) 13 Beav. 209.

(2) [1899], A. C. 326.

all the leading cases on the subject are referred to. The distinction between an invented or a fancy name and a *bonâ fide* descriptive one is pointed out and it was there held that the word "cellular" was an ordinary English word which appropriately described the cloth of which the goods sold by the respondents were manufactured, and that the term had not been proved to have acquired a secondary or special meaning so as to denote only the goods of the appellants.

In the case now under consideration by us, the term "Boston" or "Bostons" was a fancy word used with respect to a special class of goods manufactured by the plaintiffs in or near the City of Boston, and has come to have a special meaning in the trade as denoting only such goods. In giving judgment in the case just cited the Lord Chancellor says, on page 334, referring to the necessity for fraudulent intention being proved:—

> The only observation that I wish to make upon that part of the argument is that it seemed to be assumed that a fraudulent intention is necessary on the part of the person who was using a name in selling his goods in such a way as to lead people to believe that they were the goods of another person. That seems to me to be inconsistent with a decision given something like sixty years ago, by Lord Cottenham, who goes out of his way to say very emphatically that that is not at all necessary in order to constitute a right to claim protection against the unlawful use of words or things—I say things because it is to be observed that not only words but things, such as the nature of the wrapper, the mode in which the goods are made up, and so on, may go to make up a false representation; but it is not necessary to establish fraudulent intention in order to claim the intervention of the court. Lord Cottenham says in that case, *Millington* v. *Fox*; "I see no reason to believe that there has, in this case, been a fraudulent use of the plaintiffs' marks. It is positively denied by the answer, and there is no evidence to show that the defendants were even aware of the existence of the plaintiffs as a company manufacturing steel; for although there is no evidence to show that the terms 'Crowley' and 'Crowley Millington' were merely technical terms, yet there is sufficient to show that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does

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not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names; and therefore, I stated that the case is so made out as to entitle the plaintiffs to have the injunction made perpetual." That, my Lords, I believe to be the law. It was the law then, and it has not been qualified or altered by the fact that the Trade Marks Act has since been passed, which gives a feasible and perfectly facile mode of remedy in cases in which Trade Marks apply.

And again, on page 336 :—

There has not been any question, nor can there be any question as to what the state of the law is. It is laid down in *Burgess's Case* (1), the Anchovy Sauce case, with great precision. The simple proposition is this : That one man is not entitled to sell his goods under such circumstances, by the name, or the packet, or the mode of making up the article, or in such a way as to induce the public to believe that they are the manufacture of some one else. The proposition that has to be made out is that something amounting to this has been done by the defendant, and if that proposition is made out the right to relief exists.

And in the same case Lord Shand says, page 338 :—

There is a vital distinction in cases of this class between invented or fancy words or names, or the names of individuals such as "Crowley" or "Crowley Millington" attached by a manufacturer to his goods and stamped on the articles manufactured, and words or names which are simply descriptive of the article manufactured, or sold. The idea of an invented or fancy word used as a name is that it has no relation, and at least no direct relation, to the character or quality of the goods which are to be sold under that name. There is no room whatever for what may be called a secondary meaning in regard to such words, as the Lord Advocate pointed out in the course of his argument. The word used and attached to the manufacture, being an invented or fancy name and not descriptive, it follows that, if any other person proceeds to use that name in the sale of his goods, it is almost, if not altogether impossible to avoid the inference that he is seeking to pass his goods off as the goods of the other manufacturer. A person invents or applies the term "Eureka" as the name of a shirt in his sales. If you buy a "Eureka" shirt, that seems at once to mean that you are buying a shirt made by the particular maker who is selling shirts under that fancy name. The public come to adopt the word "Eureka" as applicable to the manufacture of the particular person who began to use it and as denoting the article he is

(1) 3 DeG. M. & G. 896.

selling, and if another person employs the word in the sale of the same or a similar article, it seems to follow that he is acting in direct violation of the law that no one, in selling his goods, shall make such representations as will enable him to pass them off as the goods of another, so as to get the benefit of that other's reputation.

A totally different principle must apply in the case of goods which are sold under a merely descriptive name.

He too states the question to be put as follows; page 340:—

It is true the question in issue in cases of this class may generally be broadly stated as: Did the defendants by their representations seek to induce purchasers to acquire their goods under the false belief that these goods were of the plaintiff's manufacture?

I have no hesitation myself, in the case now before us, in answering the question put in that form in the affirmative. The word "Boston" which they used and put in their corporate name and stamped on the rubber boots and shoes they offered for sale and advertised in their circulars and advertisements, amounted to an emphatic representation under cover of which they sought to induce purchasers to acquire their goods under the false belief that they were the plaintiffs' and I agree with the learned Judge of the Exchequer Court that

as honest manufacturers and traders they ought to discontinue its use except so far as it forms part of their corporate name.

I differ with him, however, as to their right under cover of their corporate name to stamp this invented or fancy word on the goods they offer for sale, unless it is so done as clearly to distinguish the goods from those of the plaintiffs, and also as to the power and duty of the Court to compel them to desist from their dishonesty. Lord Davey in the *Cellular Clothing Case* (1), from which I have been quoting, speaking of the logical foundation of this branch of the law, says at page 343:—

Shortly summed up, it is that a man shall not by misrepresentation pass off his own goods as those of his neighbour.

(1) [1899] A. C. 326.

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But there are two observations which must be made; one is that a man who takes upon himself to prove that words, which are merely descriptive or expressive of the quality of the goods, have acquired the secondary sense to which I have referred, assumes a much greater burden—and indeed a burden which it is not impossible, but at the same time extremely difficult, to discharge—a much greater burden than that of a man who undertakes to prove the same thing of a word not significant and not descriptive but what has been compendiously called a "fancy" word.

The same doctrine is to be found in a leading case in the House of Lords known as *The Camel Hair Belting Case, Reddaway* v. *Banham* (1), where it was held that the defendant should be restrained from using the words "Camel Hair" as descriptive of or in connection with belting made or sold by him and not manufactured by the plaintiff, without clearly distinguishing such belting from the plaintiff's. Lord Herschell in his judgment, at page 209, says:—

> Where the Trade Mark is a word or device never in use before, and meaningless, except as indicating by whom the goods in connection with which it is used were made, there could be no conceivable legitimate use of it by another person. His only object in employing it in connection with goods of his manufacture must be to deceive. In circumstances such as these, the mere proof that the Trade Mark of one manufacturer has been thus appropriated by another would be enough to bring the case within the rule, as laid down by Lord Kingsdown, and to entitle the person aggrieved to an injunction to restrain its use.

And again, as to the right of a man to use his own name, he says, page 211:—

> The authority replied on was the case of *Burgess* v. *Burgess* (2). When the judgments in that case are examined, it seems to me clear that no such point was decided. Turner, L. J., commences by saying: "No man can have any right to represent his goods as the goods of another person; but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another." He then points out that where a person is selling goods under a particular name and a person not having that name is using it, it may be presumed that he so uses it to represent the goods sold by himself as

(1) [1896] A. C. 199. (2) 3 DeG. M. & G. 896.

the goods of the person whose name he uses ; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. He adds : "It is a question of evidence in each case whether there is false representation or not." This I think, clearly recognizes that a man may so use even his own name in connection with the sale of goods as to make a false representation. In *Massam* v. *Thorley's Cattle Food Company* (1), James, L. J., said : "*Burgess* v. *Burgess* (2), has been very much misunderstood if it has been understood to decide that anybody can always use his own name as a description of an article whatever may be the consequences of it or whatever may be the motive for doing it or whatever may be the result of it." After quoting from the judgment of Turner, L. J. the passages to which I have just alluded, he said : "That I take to be an accurate statement of the law, and to have been adopted by the House of Lords in *Wotherspoon* v. *Currie* (3), in which the House of Lords differed from the view which I had taken."

Now it seems to me beyond doubt that Mr. Higgins could not, either himself personally or in association or partnership with the others who applied for and obtained letters patent of incorporation under the defendants' name, have used the plaintiff company's trade-mark, on rubber boots and shoes he might manufacture and offer for sale, without subjecting himself and themselves to the risk of an injunction. Nor am I able to see how he can, by obtaining for himself and his associates letters corporate under the statute, do under cover of the corporate name what he otherwise would be prevented from doing. The defendant company has the right to use its corporate name for all lawful and legitimate purposes. It has not the right to use it however, by stamping it upon goods it has manufactured and offered for sale, if by so doing it causes the purchasing public to believe that the goods are those of the plaintiff company. The stamping of their corporate name, which embraces the plaintiffs' trade-mark, upon the rubber boots and shoes manu-

(1) 14 Ch. D. 748. (2) 3 DeG. M. & G. 896.
(3) L. R. 5 H. L. 508.

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factured by them would almost certainly lead purchasers to believe that the defendant company was a branch of the plaintiff company carrying on business in Montreal.

I think the prayer of the plaintiffs in the statement of claim sufficiently broad to cover the infringement charged of the plaintiffs' registered trade-mark in the advertisements, circulars and price lists issued by the defendants, calling attention to their goods as "Boston" or "Bostons" and that the defendants should be restrained from the use of such words either by stamping them upon their goods or advertising them in circulars, price lists or otherwise.

I do not think the damages alleged to have been sustained thus far sufficient to justify the expense of a reference.

The appeal should be allowed with costs here and below. Judgment should be entered in the Exchequer Court for the plaintiffs for an injunction restraining the defendants from using the words "Boston" or "Bostons" as descriptive of or in connection with rubber boots or shoes manufactured by them, or rubber boots or shoes (not being of the plaintiffs' manufacture) sold or offered for sale by them, either by stamping upon such rubber boots and shoes, or by circular, or advertisement or otherwise, without clearly distinguishing such rubber boots and shoes from the shoes of the plaintiffs.

Appeal allowed with costs.

Solicitor for the appellants: *R. V. Sinclair.*

Solicitors for the respondents: *McGoun & England.*

DANIEL M. FINNIE (PLAINTIFF)... } APPELLANT;

AND

THE CITY OF MONTREAL (DEFENDANT)..... } RESPONDENT;

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*Feb. 25, 26.

*May 15,

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

Pledge—Deposit with Tender—Forfeiture—Breach of Contract—Municipal Corporation—Right of Action—Damages—Compensation and set-off—Restitution of thing pledged—Arts. 1966, 1969, 1971, 1972, 1975, *C. C.—Practice on appeal—Irregular procedure.*

C. on behalf of J. C. & Co., a firm of contractors of which he was a member, deposited a sum of money with the City of Montreal as a guarantee of the good faith of J. C. & Co. in tendering to supply gas for illuminating and other purposes to the city and the general public within the city limits at certain fixed rates, lower than those previously charged by companies supplying such gas in Montreal, and for the due fulfilment of the firm's contract entered into according to the tender. After the construction of some works and laying of pipes in the public streets, J. C. & Co. transferred their rights and privileges under the contract to another company and ceased operations. The plaintiff, afterwards, as assignee of C., demanded the return of the deposit which was refused by the city council which assumed to forfeit the deposit and declare the same confiscated to the city for non-execution by J. C. & Co. of their contract. After the transfer, however, the companies supplying gas in the city reduced the rates to a price below that mentioned in the tender so far as the city supply was affected, although the rates charged to citizens were higher than the price mentioned in the contract.

Held, that the deposit so made was a pledge subject to the provisions of the sixteenth title of the Civil Code of Lower Canada and which, in the absence of any express stipulation, could not be retained by the pledgee, and that, as the city had appropriated the thing pledged to its own use without authority, the security was gone

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by the act of the creditor and the debtor was entitled to its restitution although the obligation for which the security had been given had not been executed.

On a cross-demand by the defendant for damages, to be set-off in compensation against the plaintiff's claim;

Held, that, as the city had not been obliged to pay rates in excess of those fixed by the contract, no damage could be recovered in respect to the obligation to supply the city; and that the breach of contract in respect to supplying the public did not give the corporation any right of action for damages suffered by the citizens individually.

Held, further, that prospective damages which might result from the occupation of the city streets by the pipes actually laid and abandoned were too remote and uncertain to be set-off in compensation of the claim for the return of the deposit.

The court also decided that, following its usual practice, it would not, on the appeal, interfere with the action of the courts below in matters of mere procedure where no injustice appeared to have been suffered in consequence although there might be irregularities in the issues as joined which brought before the trial court a *demande* almost different for the matter actually in controversy.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, which dismissed the plaintiff's action with costs.

The circumstances of the case and the questions at issue on this appeal are stated in the judgment reported.

Lafleur K.C. and *R. C. Smith K.C.* for the appellant.

Atwater K.C. and *Ethier K.C.* for the respondent.

The judgment of the Court was delivered by

GIROUARD J.—On the 11th of July 1893, John Coates, on behalf of tenderers John Coates & Co., a firm composed of himself and two nominal partners residing abroad, deposited with the City of Montreal the sum of $15,000

as a guarantee of the good faith of the tenderers and of the due fulfilment of their contract

as required by the specifications which form part of the contract.

By this contract John Coates & Co. agreed with the City of Montreal

to supply and furnish gas for lighting, cooking, heating or manufacturing purposes, *to the public* within the City of Montreal during a period of ten years to be computed from the first of May, 1895, at a price not to exceed one dollar per each thousand feet, subject to a rebate of five per cent for prompt payment.

The contract was signed by the City of Montreal and the said firm, acting through John Coates, on the 22nd day of December, 1893. It was stipulated that the city would not be liable for the gas supplied to the consumers

over and above the amounts to become due for gas furnished for the use of the buildings belonging to the city.

It was finally agreed that " the present contract does not apply to street lamps."

On the 17th of January, 1894, John Coates & Co. sold their contract, franchises, works, plant, mains and pipes to the Consumers Gas Co. (organized and controlled by Mr. Coates) who undertook to discharge and execute the liabilities and obligations of the said John Coates & Co. It is established that both John Coates & Co. and the Consumers Gas Co. did considerable work in the erection of gas works at Côte St. Paul and the laying of mains and pipes principally in some of the outside municipalities where they had secured similar franchises and privileges. As early as March 1894, the Consumers Gas Co. were supplying gas in the western parts of Montreal at one dollar, the price named in the concession, less five per cent for prompt payment. But, adds Mr. Coates, examined on behalf of the defendant,

as we came to each street that we supplied gas, the Montreal Gas Co. reduced their price to the citizens in that street only where we had our pipes and were supplying gas. As soon as this was done, many of the consumers who had promised to take gas from our company went back on their promises rather than have their grounds disturbed in front

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of the houses, saying that they could get it now at the same price from the old company. This was one of the factors that discouraged my directors from pursuing competition.

This unforeseen result induced Mr. Coates and his friends to sell out to the Montreal Gas Company, especially the works erected at Côte St. Paul and everything connected with them, for $347,483, paid in par value shares of the Montreal Gas Company, which at the time commanded a very high premium and permitted the shareholders of the Consumers Gas Co. to get their capital back and 15 per cent profit.

It is remarkable that the transfer comprises only the gas works at Côte St. Paul and the

rights, privileges and franchises for supplying gas to the said City of Ste. Cunégonde de Montréal and the Town of Saint-Henri.

No reference is made to the contract of John Coates & Co. with the Town of Westmount and the City of Montreal, for what reason does not appear. For the purposes the Montreal Gas Company had in view, namely, to stop competition in the gas supply in Montreal, it was probably thought sufficient to acquire the above property and rights. The Montreal Gas Co. had their own system of mains and pipes throughout the whole city, and, at that time at least, the two or three miles of pipes of the Consumers Gas Co. within its limits were to them of little value, if any. So the above assets of the Consumers Gas Co alone seem to have been purchased by the Montreal Gas Co., without any covenant on their part to carry out the obligations of John Coates & Co., or their substitutes.

Mr. Coates says, in his evidence, that the transfer was provisionally made and signed *sous seing privé* on the 22nd of September, 1894, by the legal advisers of the parties. His testimony is corroborated by a resolution of the Light Committee of the city of the 6th of February, 1895, wherein it is declared that the Consumers Cas Co.

have notified the city that they have sold to the Montreal Gas Co. all their plant, material, pipes, &c.

A notarial deed of transfer, which is alone produced, was signed on the 11th of March, 1895, and it is from that source that we have been able to comprehend the transaction between the two companies. Whether transferred in September 1894 or March 1895, the Montreal Gas Co. took possession and control of the whole gas system of the Consumers Gas Co., so far as completed, on the 22nd September, 1894, even using some of the pipes laid within Montreal, and abandoning others, and continued to charge the old rate to Montreal consumers, a course they could very well follow till the 1st of May, 1895, when their old franchise with the City of Montreal was terminating.

The whole summer of 1895 was spent in negotiations between the city and the Montreal Gas Co. At the same time, on the 11th of June, 1895, the city protested John Coates & Co., and requested them

to immediately fulfil their obligations resulting from the said agreement and to furnish gas to the public of the City of Montreal as they are bound by virtue of the said agreement; failing which the City of Montreal aforesaid shall take all steps and proceedings as it may think fit to protect its interest, shall forfeit the money deposited by the said John Coates & Company as a security for the fulfilment of the said obligations and shall take all other recourse for damages as of right against the said John Coates & Company.

John Coates & Co. took no notice of this protest.

The negotiations with the Montreal Gas Co. came to an end on the 15th day of November, 1895, when a new contract was entered into. The Montreal Gas Co. agreed to supply all the gas required within the city for ten years to be computed from the 1st of May, 1895,

1st. All the gas lamps and the gas therefor that the said City of Montreal may require during the existence of the present contract *for lighting the streets, lanes and public places* of the said city, at the rate of

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seventeen dollars per lamp per year; (and) 2ndly, gas for lighting, heating, cooking and manufacturing purposes *to the public* * * at a price which shall not exceed one dollar and twenty cents per each thousand cubic feet for lighting purposes, * * and of one dollar * * for cooking, heating and manufacturing purposes on prompt payment."

Then special concessions are provided for in favour of the poorer class under certain limitations.

It is in evidence that the Montreal Gas Co. did not always charge to the public the maximum price. As the secretary of the company explains,

if we supply a man taking a very large quantity, he gets it for less than other people.

As a rule, the company gets from the public $1.05 to $1.07 per thousand feet for lighting and heating, which is a higher price than the one agreed upon with John Coates & Co, namely $1 per thousand feet or 95 cents for prompt payment. The citizens therefore pay more, but the city does not.

Mr. Holt, the president of the Montreal Gas Co., says:

Q. Would you consider the fact that this contract was not executed, I mean Coates' contract, that there has been a loss to the city, and, if so, to what extent?

A. If it is to the city proper, the gas supplied by the Montreal Gas Company to the city—I think the Montreal Gas Company are supplying gas at less than was tendered for by Mr. Coates.

* * * * * * *

Q. Is it paying less than a dollar?

A. Oh, much less. They are only paying an average of seventy cents.

This testimony is not contradicted. Mr. Holt, being a witness adduced by the respondent, it required no corroboration; but it is fully corroborated by Mr. Moore, the secretary of the company, another witness of the respondent. No attempt was made to prove that the city paid more for lighting its buildings. As the Coates contract covered only gas used in buildings, whether ordered by the citizens or the city, and

not street lamps, we must reasonably infer from Mr. Holt's evidence that the contract with the Montreal Gas Co. was at least more favourable to the city than the Coates contract, even as to city buildings. Probably the parties contemplated that *the public* mentioned in the second clause of the contract referred to the inhabitants or citizens and not to the city as a corporation, who should be charged under the first clause, both as to streets, squares, parks and buildings. From the evidence at least, no distinction seems to have been made.

Such was the situation of the City of Montreal when, on the 1st April, 1896, Mr. John Coates, by his counsel, requested from them the repayment of his deposit of $15,000 made, as he alleges "with his tender for street gas lighting." Seven days after, the Finance Committee passed a resolution, which was not adopted by the council till the 19th of January, 1897, in the following words:

Qu'il a pris en considération une lettre de M. John Coates demandant le remboursement de la somme de $15,000 qu'il aurait déposée pour guarantir l'exécution du contrat intervenu entre lui et la cité relativement à l'approvisionnement du gaz, et qu'après mûre délibération votre comité est venu à la conclusion que, le dit John Coates n'ayant pas rempli ses obligations, la dite somme de $15,000 soit déclarée confisquée conformément aux conventions intervenues au profit de la cité.

On the 9th of June, 1896, the appellant, as transferee of Mr. John Coates, but in his interest and for his benefit, sued the city for reimbursement of the deposit made by him, it is alleged in the statement of claim, as security for the due execution of his tender for street gas lighting, which was not awarded to him, whereas, in fact, no such deposit or tender or contract was ever made by him. No allegation is made that the city had confiscated the deposit or otherwise abused the thing pledged.

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The respondents, instead of meeting this demand by a simple general denegation, placed before the court all the facts in controversy between the parties. They pleaded,

1st. Fraud and conspiracy between the different tenderers, which plea was abandoned in the first court as not proved ;

2ndly. That the said deposit was made by the said John Coates for and on behalf of the said firm of John Coates & Co., who failed to carry out their contract and that, consequently, the sum deposited became the property of the city ;

And 3rdly. That by reason of said failure the city had suffered damages to an amount larger than $15,000, which is offered in compensation or set-off.

The appellant fyled a long answer which amounts practically to a general denial.

Notwithstanding the irregularity of these issues, which brought before the trial court almost a different demand, all the facts connected with the said tender, deposit and contract of John Coates & Co., were fully investigated. On several occasions this court has declared that in matters of mere procedure, when no injustice is shewn, it will not interfere with the action or doings of the court below.

After having heard the parties, their witnesses and examined all the documents, that court dismissed the action with costs for the following reason :

Considérant que la première défense est bien fondée, que c'est bien pour John Coates & Co., que le dit John Coates a fait le dit dépôt et que les dits John Coates & Co., après avoir obtenu le contrat ne l'ont pas rempli et ne se sont pas mis en mesure de le remplir, et que la cité a dû avoir recours à l'ancienne compagnie du gaz comme elle le dit, à des conditions plus onéreuses que celles qui comportait le contrat Coates, spécialement pour les citoyens que la cité représente et dont les intérêts font partie de pareils contrats, en sorte que les dits John Coates & Co., n'ayant pas rempli leur contrat, la défenderesse était en droit de confisquer leur dépôt comme elle l'a fait.

This judgment was confirmed in appeal purely and simply. No notes from the learned judges have been transmitted to us.

The first question we have to examine is the one decided by the two courts below. Was the City of Montreal authorized to confiscate the deposit? For if they were, the action of the appellant is at an end.

This confiscation is certainly not authorized expressly or impliedly either by the terms of the contract or by those of the specifications or tender. They merely set forth that

a deposit shall be made with each tender, said deposit to be as a guarantee of the good faith of the tenderers and of the due fulfilment of their contract.

It was, therefore, a pledge, *nantissement* or *gage* for a special object well defined in the agreement between the parties. Our Civil Code clearly lays down the powers and rights of the creditor and debtor in such a case.

Article 1969 C.C. says:

The pawn of a thing gives to the creditor a right to be paid from it by privilege and preference before other creditors.

Article 1971 as amended:

Saving pawn-brokers, no creditor can, in default of payment of the debt, dispose of the thing given in pawn. He may cause it to be seized and sold in due course of law under the authority of a competent court and obtain payment by preference out of the proceeds * * * *The creditor may also stipulate that in default of payment he shall be entitled to retain the thing.*

Article 1972:

The debtor is owner of the thing pledged until it is sold or otherwise disposed of. It remains in the hands of the creditor only as a deposit to secure his debt.

It seems clear that, under these articles of the Civil Code, the City of Montreal could not confiscate the deposit of John Coates made for and on behalf of John Coates & Co.

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This proposition of law is so evident that the learned counsel for the respondent, after some hesitation, admitted it as correct, at the hearing before us. They finally relied upon the damages alleged in general terms in their pleas, which John Coates & Co., caused the city by not carrying out their contract. These damages are of two kinds:—First, special, direct and immediate to the city, inasmuch as the Coates contract was lower than the price mentioned in the contract with the Montreal Gas Co. If the respondent had shewn that, in consequence of the change, the city was paying more for lighting its buildings, I would not hesitate to allow it the excess or surplus price in compensation. We have seen that, as a matter of fact, it does get cheaper gas, about twenty-five per cent less than under the Coates contract. Therefore this branch of the claim of the respondent fails.

But they said: "Gas supplied to the citizens is undoubtedly higher by about seven cents per thousand feet." This kind of damages is not set up in the pleas, but as no exception or objection was raised, we will perhaps do justice to the parties by examining this claim. In the first place, how much is, or may be, due to the citizens, does not appear. There is no evidence whatever as to that fact Even if there was, how can the city, as a corporate body, claim the damages suffered by the citizens individually? True, a contract with a gas, telephone or railway company, may confer certain rights and privileges on the citizens individually which, if specially interested, they may assert in a court of justice; but there is no legal identity between a municipal corporation and the individual members thereof, and if the latter suffer any special damage by reason of a breach of the contract, they alone, individually, can demand its recovery.

(Am. & Eng. Ency. of Law, vo. Municipal Corporations, vol. 20 (2 ed) at p. 1133.)

Finally, the respondent sets up certain damages caused by the Coates pipes in the streets. According to Mr. St. George, the engineer of the city, and the only witness examined on the subject, these pipes will sooner or later form a serious nuisance, which cannot be removed for $15,000. He says:

> They (Coates & Co.) have caused damage to the city in this way, that they have laid gas pipes in those streets and have not supplied gas through them to the citizens, consequently those pipes occupy a position in the streets that is valuable to the city, for this reason, that our streets are so occupied now with sewers and gas pipes belonging to the Montreal Gas Company, our water pipes and conduits that some of them are in—the Bell Telephone Company, for example,—that if the city wants to give a franchise, or wants to permit other lighting companies or telephone companies to put their wires underground, we will have very little space to give them to do it.

Can it be seriously pretended that these remote and uncertain damages constitute a debt which is equally liquidated and demandable, within the meaning of article 1188 C.C.? No, they cannot be offered in compensation or set-off. It is indeed doubtful if they are recoverable. Whether they are or not, the respondent's only course was the direct action indicated in its protest or a cross-demand, *demande reconventionnelle* under Art. 217 of the Code of Civil Procedure.

The respondent, therefore, has entirely failed to establish that anything is due to it by reason of the breach of the Coates contract. How, then, can it keep and retain the deposit made in relation to the contract? It relies upon Art. 1975 of the Civil Code, and this is the last point to be examined. This article enacts that

> The debtor cannot claim the restitution of the thing given in pledge, until he has wholly paid the debt in principal, interest and costs; *unless the thing is abused by the creditor.*

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The debt in this particular case consisted in the supply of gas to the respondent and the citizens of Montreal at a certain price and in this respect John Coates & Co. are no doubt in default and must pay the damages caused by that default before they can claim the restitution of their deposit, *unless the thing pledged is abused by the creditor*. What greater abuse of a money deposit or pledge can be made than the appropriation of the same to his own use by the pledgee? If he was not called upon to hold it in a Savings Bank at interest, at least he was bound to keep it apart and take care of it, *en bon père de famille*; he cannot use the same and especially resort to confiscation, without a special stipulation to that effect. This confiscation was a gross abuse of the thing pledged. It is no answer to say that the City of Montreal, at all times, is able to produce its equivalent. The law makes no distinction between the rich pledgee and the poor one. It declares generally that the pledgee cannot abuse the thing pledged. Appropriation affords the clearest evidence of abuse within the meaning of Article 1975 of the Civil Code, corresponding to Art. 2082 of the Code Napoléon. This principle is not disputed; not a single authority to the contrary was cited at bar; it was practically conceded by counsel for the respondent when they admitted that it had no right to confiscate; it is finally laid down by all the French commentators and was applied by the Court of Review in *Leduc* v. *Girouard* (1), and also by the Court of Appeal in a judgment, confirmed by the Privy Council, in *Senécal* v. *Pauzé* (2). Even the mere use unauthorized by the debtor, is an abuse contemplated by the Code. Pothier, Nant. n. n. 23, 32, 51; Troplong, Nant. n. 468; 9 Marcadé, n. 1189; Baudry-Lacantinerie, Nant. n. 141; Pand. Fr. Rép. vo. "Gage," nn. 355, 409, 500. Laurent, vol. 28, n. 498 says:

(1) M. L. R. 2 S. C. 470. (2) 14 App. Cas. 637.

Il y a exception. dit l'article 2082, quand le détenteur du gage en abuse. Qu'entend-on ici par abus? Ce n'est pas une jouissance abusive comme celle de l'usufruitier (art. 618), puisque le gagiste n'a point le droit de jouir, à moins que le débiteur ne lui en ait donné la permission ; et, dans ce cas, il va sans dire qu'il doit se renfermer dans les limites de la faculté qui lui a été accordée. Hors ce cas, le fait seul d'user de la chose est un abus, puisque le créancier fait ce qu'il n'a pas le droit de faire.

Huc, Vol. 12, p. 457, after quoting article 2082 C. N,, likewise says :

Le débiteur peut donc réclamer la restitution du gage, avant l'extinction de la dette, si le créancier se sert de la chose engagée, ou si étant autorisé par le contrat à s'en servir, il en abuse. Le créancier qui est ainsi privé de son gage, par sa faute, n'a pas le droit d'en demander un autre ; c'est ce qui résulte des déclarations faites au corps législatif ; il ne peut pas davantage réclamer immédiatement le remboursement de ce qui lui est dû ; il est obligé d'attendre l'échéance. Il a donc encouru la perte de son gage avant d'être payé.

The respondent may perhaps recover certain damages in an action properly instituted—a point upon which we do not intend to offer any opinion—but it cannot retain the deposit. The debt may not be extinguished, but the security is gone by the act of the creditor, and the debtor is entitled to its restitution.

For these reasons, we are of opinion that the appeal should be allowed with costs. The respondent is condemned to pay to the appellant the sum of $15,000 with interest from the 8th day of June, 1896, date of the institution of this action, which is the only interest asked, and costs before all the courts.

Appeal allowed with costs.

Solicitors for the appellant : *Grienshields, Greenshields & Heneker.*

Solicitors for the respondent : *Ethier & Archambault.*

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*Feb. 26, 27.
*May 15.

THE MUTUAL LIFE ASSURANCE COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

MARIE ALMA GIGUÈRE (PLAINTIFF)..RESPONDENT.

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

Life insurance—Condition of policy—Payment of premium—Delivery of policy—Evidence—Art. 1233 *C. C.*

The production from the custody of representatives of the insured, of a policy of life insurance, raises a *primâ facie* presumption that it was duly delivered and the premium paid, but where the consideration of the policy is therein declared to be the payment of the first premium upon the delivery of the policy, parol testimony may be adduced to shew that, as a matter of fact, the premium was not so paid and that the delivery of the policy to the person therein named as the insured was merely provisional and conditional.

The reception of such proof cannot, under the circumstances, be considered as the admission of oral testimony in contradiction of a written instrument, and in the Province of Quebec, in commercial matters, such evidence is admissible under the provisions of article 1233 of the Civil Code.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Quebec, and maintaining the plaintiff's action with costs.

The action was to recover the amount of a policy of life insurance which declared that it was made in consideration, among other things, of the payment of the first premium upon the delivery of the policy. The policy was produced by the beneficiary from the cus-

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tody of the representative of the deceased person named therein as the insured.

The trial judge admitted parol testimony to shew that, as a matter of fact, the first premium had not been paid but that the policy had been left with the deceased for a few days for the purpose of examination on an understanding to that effect between him and the company's agent.

In the meantime the death occurred and the policy was found among deceased's papers.

In the Superior Court the action was dismissed and the present appeal is by the company against the King's Bench judgment reversing that decision.

Garrow K.C. and *Lane* for the appellants. There never was any consideration for the contract. The presumption arising from the possession of the policy is rebutted by proof that the delivery was merely provisional and conditional. The insured never accepted it, and the policy was a mere escrow.

This evidence as to conditional delivery of the policy was properly admitted by the trial judge, as life insurance, even by a mutual insurance company, for fixed premiums (art. 2470 C. C.) is a commercial matter, and art. 1233 C. C. applies. Proof by oral testimony could not be refused in regard to facts in relation to the delivery of the policy and the payment of the premium in consideration of which it was proposed that the contract should be made The fact of an understanding between the assured and the company's agent that the policy would be left with him for a few days, for examination, is a fact altogether independently of the terms of the policy and subsequent thereto, and the proof of this fact is not in contradiction nor at variance with the terms of the policy. The policy does not acknowledge that the premium had been received by the company but on the contrary, fixes the future date for payment.

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Until the deceased had accepted the policy which the company proposed to issue to him and complied with the condition precedent to the contract by paying the first premium, there was no existing contract. There never was an effectual delivery of the policy.

We refer to *Savage* v. *Howard Ins. Co.* (1); *Confederation Life Association of Canada* v. *O'Donnell* (2); *British Empire Mutual Life Assurance Co.* v. *Bergevin* (3); *London and Lancashire Life Assurance Co.* v. *Fleming* (4); *McGeachie* v. *North American Life Ass. Co.* (5); *Tiernan* v. *People's Life Ins. Co.* (6); *Reese* v. *Fidelity Mutual Life Association* (7); *Wood* v. *Ploughkeepsie Mutual Ins. Co.* (8); *Home Ins. Co.* v. *Field* (9); *Frank* v. *Sun Life Assurance Co.* (10).

T. Chase Casgrain K.C. and *Alexandre Taschereau* for the respondent. Parol evidence cannot be received to vary a written contract, Art. 1234 C. C. *Bury* v. *Murray* (11). The possession of the policy is proof of the receipt of the premium by the insurer. *Anderson* v. *Thornton* (12); *Compagnie d'Assurance des Cultivateurs* v. *Grammon* (13); *Massé* v. *Hochelaga Mutual Ins. Co.* (14); *Agricultural Ins. Co. of Watertown* v. *Ansley* (15); *Herald Co.* v. *Northern Assurance Co.* (16); *Ouimet* v. *Glasgow and London Ins. Co.* (17); *Liverpool and London and Globe Ins. Co.* v. *Valentine* (18).

The delivery of the policy completed the contract and was a waiver of any condition as to its coming into

(1) 44 How. N. Y. 40.
(2) 10 Can. S. C. R. 92; 13 Can. S. C. R. 218.
(3) Q. R. 5 Q. B. 55.
(4) [1897] A. C. 499.
(5) 22 O. R. 151; 20 Ont. App. R. 187; 23 Can. S.C.R. 148.
(6) 26 O. R. 596; 23 Ont. App. R. 342.
(7) 111 Ga. 482.
(8) 32 N. Y. 619.
(9) 42 Ill. App. 392.
(10) 20 Ont. App. R. 564; Cout. Dig. 127.
(11) 24 Can. S. C. R. 77.
(12) 8 Ex. 425.
(13) 3 Legal News 19.
(14) 22 L. C. Jur. 124.
(15) 17 R. L. 108.
(16) M. L. R. 4 S. C. 254.
(17) 19 R. L. 27.
(18) Q. R. 7 Q. B. 400.

force. There was also waiver by the company accepting proofs of the claim under the policy, thus recognizing it as an existing contract.

In any case rules as to proof in commercial cases do not apply to insurances by mutual companies; see Arts. 2471, 2478 and 2585 C. C.

The judgment of the court was delivered by:

GIROUARD J.—Il s'agit de savoir si, lorsque la police déclare que la prime sera payée lors de sa livraison et que la police est produite par le bénéficiaire de l'assuré, la preuve testimoniale est admissible pour établir que la prime n'a pas été payée, et que la livraison de la police n'a été que provisoire ou conditionnelle. La cour de première instance (Routhier J.) a décidé dans l'affirmative, et ce sentiment fut partagé par M. le juge Bossé en Cour d'Appel. La majorité de cette cour (Lacoste J. C., Hall, Würtele et Ouimet JJ.) a été d'un avis contraire et a infirmé le jugement de la Cour Supérieure. La question se résume à ceci: La preuve du paiement de la prime, résultant de la livraison de la police et de ce qui y est exprimé, est-elle si complète et parfaite que la preuve testimoniale contredirait le document écrit, car, on le sait, on ne peut contredire un document écrit par la preuve orale, non seulement dans les causes civiles mais aussi dans les affaires commerciales, sans un commencement de preuve par écrit, qui n'existe pas ici (1). Il faut bien remarquer que la police ne contient pas une déclaration de paiement de la prime fait par l'assuré au moment où elle est signée, ou avant, mais elle énonce purement et simplement que ce paiement sera fait dans un avenir indiqué,

in consideration of the application for this policy, which is made a part of this contract, and of the payment of one hundred and eight dollars *on the delivery of this policy*, etc.

(1) Arts. 1206, 1233, 1234 C. C.

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La police réfère donc à un événement futur qui arrivera ou n'arrivera peut-être pas. La demanderesse, veuve de l'assuré, et bénéficiaire, produit la police comme preuve de cet événement futur. On ne peut nier que *primâ facie* cette production constitue une présomption que la police a été dûment livrée et que le paiement de la prime a été bien effectué (1), mais comme toutes les autres présomptions de faits, elle peut être détruite par la preuve positive du contraire. Ce n'est donc pas contredire le document écrit que de permettre la preuve orale du contraire de cette présomption, savoir, que cette livraison ne fut faite que provisoirement quelques jours seulement avant l'accident dans un ascenseur qui lui coûta la vie, et sous la condition que la prime serait payée et que de fait elle ne le fut jamais. Où est là la contradiction de l'écrit? La police ne dit pas que la prime a été payée, mais qu'elle le sera lorsque la police sera livrée à l'assuré, qui, sur paiement de la prime, en devient propriétaire. A-t-il payé, oui ou non?

Il s'agit donc d'établir purement et simplement un fait relatif à une affaire commerciale, et il est impossible, à mon avis, de refuser la preuve testimoniale en face de l'article 1233 du Code Civil, étant admis que cette affaire est d'une nature commerciale (2).

Enfin, comme l'observe M. le juge Bossé, l'application de l'assuré, qui fait partie du contrat, prévoit spécialement le cas où le montant de cette première prime n'aurait pas été payé:

And I further agree to accept the policy when presented and pay the stipulated premium therefor, and that the said assurance shall not take effect or be binding until the first premium shall have been paid to the said company or a duly authorized agent thereof during my lifetime and good health.

Nous sommes donc d'avis d'accorder l'appel et de rétablir le jugement de la Cour Supérieure. L'action

(1) Art. 1242 C. C. (2) Arts. 2469, 2470 C. C.

de l'intimée est renvoyée avec dépens devant toutes les cours.

Appeal allowed with costs.

Solicitors for the appellants: *Lane & Galipeault.*

Solicitors for the respondent: *Fitzpatrick, Parent, Taschereau, Roy & Cannon.*

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JOSEPH O. TOUSSIGNANT ET AL. (PLAINTIFFS)..... } APPELLANTS;

AND

THE COUNTY OF NICOLET (DEFENDANT)..... } RESPONDENT.

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*May 13.

*May 14.

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

Appeal—Jurisdiction — Annulment of Procès-verbal—Matter in controversy.

The Supreme Court of Canada has no jurisdiction to entertain an appeal in a suit to annul a *procès-verbal* establishing a public highway notwithstanding that the effect of the *procès-verbal* in question might be to involve an expenditure of over $2,000 for which the appellants' lands would be liable for assessment by the municipal corporation.

Dubois v. *The Village of Ste. Rose* (21 Can. S. C. R. 65); *The City of Sherbrooke* v. *McManamy* (18 Can. S. C. R. 594); *The County of Verchères* v. *The Village of Varennes* (19 Can. S. C. R. 365) and *The Bell Telephone Company* v. *The City of Quebec* (20 Can. S. C. R. 230) followed.

Webster v. *The City of Sherbrooke* (24 Can. S. C. R. 52,268) and *McKay* v. *The Township of Hinchinbrooke* (24 Can. S. C. R. 55) referred to.

Reburn v. *The Parish of Ste. Anne* (15 Can. S. C. R. 92) overruled.

APPEAL from the judgment of the Court of King's Bench, reversing the judgment of the Superior Court, District of Three Rivers, and dismissing the plaintiffs' action with costs.

* PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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The action was for the annulment of a procès-verbal establishing a public highway in the County of Nicolet, providing for the opening of the road and charging the lands of the appellants with the expenses of construction, amounting to $2,000, and of maintenance of the road, estimated at about $400 per year.

When the appeal came on for hearing on the merits, a motion was made on behalf of the respondent to quash the appeal on the ground that an appeal did not lie under the Acts relating to the Supreme Court of Canada where the question was a claim by a private party for setting aside a *procès-verbal* for the opening of a public road.

Lafleur, *K.C.*, for the motion.

Atwater, *K.C.*, contra.

The judgment of the court was delivered by:—

TASCHEREAU J.—Motion to quash. It must be allowed. The constant jurisprudence of this court is against our right to entertain the appeal. The fact that the *procès-verbal* attacked by the appellants' action may have the result to put upon them the cost of the work in question, alleged to be over $2,000, does not make the controversy one of $2,000. There is no pecuniary amount in controversy; in other words there is no controversy as to a pecuniary amount or of a pecuniary nature. It is settled law that neither the probative force of a judgment, nor its collateral effects, nor any contingent loss that a party may suffer by reason of a judgment are to be taken into consideration when our jurisdiction depends upon the pecuniary amount or upon any of the subjects mentioned in section 29 of the Supreme Court Act. *Fréchette* v. *Simmoneau* (1), and cases there cited. Compare *Ross* v.

(1) 31 Can. S. C. R. 12.

Prentiss (1) And there is here no title to lands or other matters or things of that nature, *ejusdem generis*, where the rights in future might be bound that the controversy relates to as these words of that section of the Act have been authoritatively construed. *Dubois* v. *The Village of Ste. Rose* (2) is a direct authority upon that point. See the jurisprudence to the same effect in analogous cases in the United States Courts, vol. 2, Cyc. of Law & Prac. page 552.

The fact that the lands of the appellants will be assessed for the cost of the work does not make the controversy one relating to the title to these lands nor to anything of that nature. That is the consequence of the judgment, but that is not the judgment. The consequence of any judgment for a sum over $40 is that a defendant's lands may be seized in execution thereof, or mortgaged by proper registration of the judgment, but that does not make the controversy one relating to the title to these lands, though it may have the consequence to affect it. An hypothecary action affects the land hypothecated, but, under the jurisprudence, is not a controversy relating to the title to the land under the Act; no one contests, in such a case, that the title is in the defendant.

The case of *Reburn* v. *Parish of Ste. Anne* (3), relied upon by the appellants, is not a governing authority since the *Dubois Case*, (*ubi supra.*), (2); and the cases of *Les Ecclésiastiques de St. Sulpice* v. *City of Montreal* (4); *Stevenson* v. *City of Montreal* (5); *Murray* v. *Town of Westmount* (6), and *Delorme* v. *Cusson* (7), have no application. The amendment to section 29 made by 56 Vict., ch. 29 does not help the appellants. Upon this and the various reasons which they have invoked

(1) 3 How. 771.
(2) 21 Can. S. C. R. 65.
(3) 15 Can. S. C. R. 92.
(4) 16 Can. S. C. R. 399.
(5) 27 Can. S. C. R. 187.
(6) 27 Can. S. C. R. 579.
(7) 28 Can. S. C. R. 66.

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in support of their claim to this appeal, I refer to *O'Dell* v *Gregory* (1); *Raphael* v. *Maclaren* (2); *Macdonald* v. *Galivan* (3); *Noel* v. *Chevrefils* (4); *Talbot* v. *Guilmartin* (5); *The County of Verchères* v. *The Village of Varennes* (6); *Flatt* v. *Ferland* (7); *Waters* v. *Manigault* (8), and *Cully* v. *Ferdais* (9).

The cases of *City of Sherbrooke* v. *McManamy* (10), and of *The Bell Telephone* v. *The City of Quebec* (11), with the *Dubois Case* (12), and *The County of Verchères* v. *The Village of Varennes*, (*ubi supra*), (6) are governing authorities against appellants' claim to this appeal based upon subsec. (*g*) of sec. 24 of the Act.

Then this is not a case of a by-law, but of a *procès-verbal*. And it is a private action, not a petition to annul under the Municipal Act. The distinction between these two proceedings was made in *Webster* v. *The City of Sherbrooke* (13), and *McKay* v. *The Township of Hinchinbrooke* (14).

Appeal quashed with costs.

Solicitors for the appellants: *Toussignant & Guillet.*

Solicitors for the respondent: *Martel & Comeau.*

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(1) 24 Can. S. C. R. 661.
(2) 27 Can. S. C. R. 319.
(3) 28 Can. S. C. R. 258.
(4) 30 Can. S. C. R. 327.
(5) 30 Can. S. C. R. 482.
(6) 19 Can. S. C. R. 365.
(7) 21 Can. S. C. R. 32.
(8) 30 Can. S. C. R. 304.
(9) 30 Can. S. C. R. 330.
(10) 18 Can. S. C. R. 594.
(11) 20 Can. S. C. R. 230.
(12) 21 Can. S. C. R. 65.
(13) 24 Can. S. C. R. 52, 268.
(14) 24 Can. S. C. R. 55.

JOHN LOUIS RENAUD (PLAINTIFF).....APPELLANT; 1902

AND *May 4, 5, *May 15.

GUSTAVE LAMOTHE ET AL., ÈS QUALITÉ (DEFENDANTS)..... } RESPONDENTS.

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

Will—Condition of legacy—Religious liberty—Public policy—Restrictions as to marriage—Education—Exclusion from succession.

In the Province of Quebec the English law rules on the subject of testamentary dispositions, and, therefore, in that province, a testator may validly impose as a condition of a legacy to his children and grandchildren, that marriages of the children should be celebrated according to the rights of any church recognised by the laws of the province, and that the grandchildren should be educated according to the teachings of such church and may also exclude from benefit under his will any of his children marrying contrary to its provisions and grandchildren born of the forbidden marriages or who may not have been educated as directed.

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

The action was taken by one of the grandchildren of the late Honourable Louis Renaud, deceased, against his testamentary executors for an account to the plaintiff as one of the residuary legatees of the deceased testator. By the will in question the testator left all his property to his widow in usufruct during her life, then to his children, as institutes under the substitution created by the will, and afterwards to his grandchildren as universal legatees. The plaintiff is a son

*PRESENT:—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills JJ.

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of one of the children of the testator whose marriage, subsequent to the execution of the will, had not been celebrated according to the rights and usages of the Roman Catholic Church. The plaintiff was not baptised according to the rights of the Roman Catholic Church, nor brought up in that religion, and does not profess it.

A clause of a codicil to the will is as follows :—"Je veux et ordonne que tous les enfants nés ou à naître de tous mariages que pourraient avoir contractés ou pourront contracter par la suite mes dits fils Louis, Zéphirin et Alfred Renaud contre ma volonté expresse ou qui n'auraient pas été contractés conformément aux lois et aux rites de la sainte-eglise catholique, apostolique et romaine, ou qui n'auraient pas été élvés et instruits dans cette religion, soient totalement exclus de ma succession et ne reçoivent aucune part dans le partage de mes biens, la substituton créée par mon dit testament ne devant pas s'appliquer à eux. J'exclus également de ma succession et du bénéfice de la substitution faite en faveur de mes petis-enfants, tous enfants qui pourraient naître de tous mariages que pourraient contracter quelques-uns de mes autres enfants d'une manière clandestine et contrairement aux lois et rites de la sainte religion catholique, apostolique et romaine, ou qui ne seraient pas élevés dans cette bonne religion."

In the Superior Court, Mr. Justice H. T. Taschereau maintained the plaintiff's action and ordered the executors to account but this judgment was reversed by the Court of King's Bench by the judgment from which the present appeal is asserted.

Lafleur K.C. and *White K.C.* for the appellant. Art. 760 C. C. limits the freedom of testamentary dispositions. An impossible condition, or one contrary to good morals, to law or to public order, in a will, is

considered as not written. See *Kimpton* v. *Canadian Pacific Railway Co.* (1).

The condition under discussion is, in a two-fold sense, illegal and contrary to public order, for not only is it in restraint of marriage but it is in restraint of religious liberty and, to give effect to such a clause, would be a violation of the public policy of this country which allows the free exercise of choice in the matters of marriage and religion. By the Consolidated Statutes of Canada, chap. 74, sec. 1, the free exercise and enjoyment of religious profession and worship, without discrimination or preference is, by the constitution and laws of the Province of Quebec, allowed to all Her Majesty's subjects therein. We refer to Saintespes-Lescot, des Donations entre Vifs, p. 212, nos. 137, 138; Coin-Delisle, Art. 900; 7 Aubry & Rau, no. 692; *Meyer* v. *Pfister* (2), Colmar, 9 Mars, 1827.

The statute 41 Geo. III., Chap. 4 (1801), subsequently reproduced in the Consolidated Statutes of Lower Canada, Chap. 34, sec. 2, and later embodied in art. 831, of the Civil Code, introduced free disposal of property. Under the old law the testator could only bequeath a certain portion of his property; a husband could receive nothing by will from his wife, and *vice versa*. All these restrictions have been swept away, and art. 831 of the Civil Code is the result. See also 5 Touillier, no. 264. This law is reproduced, word for word, in art. 3439 R.S.Q., under Title XIX, intituled "Religious Matters." The question decided by the *arrêt* of *Gellin* v. *Candy* (3), is quite different from that of *Meyer* v. *Pfister* and from the present case. This case was decided two years before *Meyer* v. *Pfister*, and the contrary was decided by the same Court by *arrêt* of 11th Aug. 1847. See Troplong, 1 Traité des Donations, p.

(1) 16 R. L. 361.
(2) 21 Jour. du P. 236.
(3) 19 Jour du P. 1071.

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265. In addition to these *arrêts*, the Cour Royale de Corse, by an *arrêt* on 2nd June, 1828, in *Rouaserra* v. *Rouaserra* (1), held that the condition imposed in a will upon the legatee to marry a designated individual, must be considered not written, as contrary to the liberty of choice.

The English law has little or no bearing on this case but, on reference to 2 Jarman on Wills, sec. 44, it will be seen that there is a distinction between devises of real estate and personal legacies, and that, as regards the latter, conditions in restraint of marriage are void, and that the rules of the civil law were in part adopted. In *Jones* v. *Jones* (2), it was stated by Blackburn, J., that there was a strong authority that, where the object of the will was to restrain marriage and to promote celibacy, the Court would hold such a condition to be contrary to public order and void.

The appellant submits that the clause in question should be read as a whole and one condition, and that the condition therein contained should be declared illegal and contrary to public order and as not written.

Belcourt, *K.C.*, and *Lamothe*, *K.C.*, for the respondents. As the appellant was born before the death of the testator he was personally excluded by the will. Troplong, 1 Traité des Donations nn. 190, 202, 208; 8 Duranton, n. 97; *Booth* v. *Meyer* (3); *Re*, *Brown's Settlement* (4). The validity of such a clause is admitted in the matter of an obligation, it should be equally admitted in the case of a will. All creeds are now on the same footing. They are equally free; and stipulations in regard to them have become free and legal. In abolishing a state religion and in granting liberty of conscience, public authority has placed the matter in that category of things concerning which stipulation is per-

(1) 21 Jour du P. 1511.
(2) 1 Q. B. D. 279.
(3) 38 L. T. 125.
(4) 18 Ch. D. 61.

missible. All preferences have vanished; the State, as a State, is disinterested, and the citizen enjoys, in this connection, the same liberties and privileges that he possesses in all matters, against which there exists no prohibitive law.

The French authorities have no application, and are misleading. The absolute freedom of disposing by will does not exist in France as it does in Canada. Nor does the decree of the Court of Colmar represent the unanimous opinion of the French courts. On 22nd Dec. 1825, the Royal Court of Grenoble gave a decision in an opposite sense in *Gellin* v. *Candy* (1). We also refer to Pandectes Françaises, vo. "Donations et Testaments," nos. 391 *et seq.*; 3 Massé et Verger, sur Zachariæ, p. 177, § 464; Troplong. Donations entre Vifs, p. 274, No. 255; 18 Demolombe. No. 261; Ricard, Dispositions Conditionnelles, t, 11, p. 147, No. 155. As the laws of the French Revolution of 1791 should not and cannot have any effect in Quebec, it is necessary and proper to disregard the authorities that still admit expressly, or even by implication, the force of those laws.

The English Courts, have not adopted the rule of the civil law, but have subjected it to various modifications. *Hodgson* v. *Halford* (2); *Re Knox* (3); *Wainwright* v. *Miller* (4). The authorities distinguish between conditions that prevent a marriage, in an absolute manner, and conditions which merely tend to direct the course of the marriage. The first named conditions are contrary to public order; the others are not, since they do not prevent the marriage. This decision has since been followed, see Theobald on Wills, p. 453; *Evans* v. *Rosser* (5); *Newton* v.

(1) 19 Jour du P. 1071.
(2) 11 Ch. D., 959.
(3) 23 L. R. Ir. 542.
(4) [1897] 2 Ch. D., 255.
(5) 2 Hem. & M. 190.

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Marsden (1); *Allen* v *Jackson* (2); *Sutton* v. *Jewks* (3); *Stackpole* v. *Beaumont* (4). Conditions against marriage with a Scotchman, or in a manner not in accordance with the rules of the Quakers, or with a person of a particular religion, or a domestic servant, are valid. *Perrin* v. *Lyon* (5); *Haughton* v. *Haughton* (6); *Duggan* v. *Kelly* (7); *Jenner* v. *Turner* (8).

We rely also on *Hamilton* v. *Plenderleath* (9); *Abbott* v. *Fraser* (10); 25 Demolombe, No. 294; 4 Aubry & Rau, 302; 17 Laurnt n. 32.

The judgment of the Court was delivered by—

GIROUARD J.—Il s'agit de savoir si un père de famille peut légalement apposer au legs qu'il fait à son fils la condition que son mariage sera célébré conformément aux rites d'une certaine église reconnue par la loi, et que ses enfants seront élevés dans le sein de cette église. Il n'est aucunement question de changer de religion; le fils ou le petit-fils peut le faire sans forfaire au legs; seulement le père prend des mesures de précaution pour conserver sa foi chez ses descendants. Voici, d'ailleurs, la clause du testament en toutes lettres :

Troisièmement.—Je veux et ordonne que tous les enfants nés ou à naître de tous mariages que pourraient avoir contractés ou pourront contracter par la suite mes dits fils Louis, Zéphirin et Alfred Renaud contre ma volonté expresse ou qui n'auraient pas été contractés conformément aux lois et aux rites de la sainte église catholique, apostolique et romaine, ou qui n'auraient pas été élevés et instruits dans cette religion, soient totalement exclus de ma succession et ne reçoivent aucune part dans le partage de mes biens, la substitution créée par mon dit testament ne devant pas s'appliquer à eux. J'exclus également de ma succession et du bénéfice de la substitution faite en

(1) 2 John. & H., 356.
(2) 1 Ch. D., 399.
(3) 2 Ch. Rep. 95.
(4) 3 Ves. 89.
(5) 9 East 170.
(6) 1 Moll. 611.
(7) 10 Ir. Eq. 295, 473.
(8) 50 L. J. Ch. 161.
(9) 2 Rev. de Leg. 1.
(10) L. R. 6 P. C. 96.

faveur de mes petits-enfants, tous enfants qui pourraient naître de tous mariages que pourraient contracter quelques-uns de mes autres enfants d'une manière clandestine et contrairement aux lois et rites de la sainte religion catholique apostolique et romaine, ou qui ne seraient pas élevés dans cette bonne religion.

Le premier point que nous avons à examiner est la position de l'église catholique romaine dans la province de Québec.

A l'époque de la cession de la colonie à la Grande-Bretagne, un pareil legs aurait été parfaitement valide, l'église catholique étant la seule religion reconnue au pays. Les capitulations de Québec et Montréal et le traité de cession n'ont pas, il est vrai, reconnu l'église catholique comme église de l'état, mais le libre exercice de cette église fut garanti, sans aucune restriction. Ces stipulations ont autant d'autorité que les statuts de l'empire et il n'est jamais venu à la pensée des légistes de les méconnaître. Bien au contraire, par l'acte de Québec, le droit à la dîme, qui avait été réservé par la capitulation de Montréal, fut consacré; et, par des lois subséquentes passées par la législature coloniale, bien avant la confédération, la construction des églises catholiques fut encouragée par la création d'un privilège comportant hypothèque sur les propriétés immobilières de ses membres. Ce droit n'a pas été accordé aux autres églises, pas même à l'église d'Angleterre, qui n'a pas non plus le privilège de prélever la dîme, privilège qu'elle réclama au début, mais qui lui fut refusé par les autorités anglaises.

On peut affirmer que si l'église catholique n'est pas la religion nationale de la grande majorité des habitants de la province de Québec, elle y est cependant établie par exception, et par les traités internationaux et par les lois de l'Empire Britannique (art. 4 du Traité de Paris, 1763; ss. 5 et 7 de l'acte de Québec 1774; sect. 35 de l'acte constitutionnel de 1791, et sect. 42 de l'acte d'union de 1840). Les statuts refondus du

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Canada, 1859, ch. 25 et 74—qui avaient surtout en vue les églises protestantes et l'église catholique du Haut-Canada,—n'ont rien d'incompatible avec cette position particulière de l'église catholique du Bas-Canada. Voir *Brown* v. *Les Curé et Marguillers de Notre Dame de Montréal* (1) et les documents sur les réserves du clergé publiés par le bureau des Archives du Canada, 1899, pp. 1 à 41.

L'Appelant soutient qu'un legs, comme celui fait aux fils Renaud, favorisant indirectement l'église catholique romaine ou aucune autre religion, est nul, comme étant contraire à l'ordre public, c'est-à-dire, à la liberté de conscience, et il cite l'article 831 du Code Civil et le chap. 74 des statuts refondus du Canada, 1859.

L'ordre public ou social—l'intérêt général—*public policy*—Voilà de grands mots, assez vagues, qui en droit doivent avoir cependant une signification définie. Que faut-il donc entendre par ces mots en matières civiles? Le Code ne le dit pas. Ne faut-il pas comprendre que pour qu'un acte soit contraire à *l'ordre public*, qui est l'expression consacrée par le Code, il faut qu'il y ait au moins violation d'une loi d'intérêt public? Or, il n'y a aucun texte de loi qui défende de semblables legs. Reste à examiner l'interprétation donnée par la jurisprudence.

Sera-ce toujours la jurisprudence française qui devra déterminer notre ligne de conduite, même lorsque nous avons adopté le droit anglais sur un sujet particulier? Nous avons décidé récemment dans une cause de *Glengoil Steamship Co.* v. *Pilkington*, (2) que l'ordre public, en matières civiles, n'est pas toujours tel que compris en France, ancienne ou nouvelle. Allons-nous décider que la capacité de donner et recevoir par testament, qui incontestablement est

(1) L. R. 6 P. C. 157.

(2) 28 S. C. R. 146.

d'ordre public et nous vient du droit anglais, doit être interprétée par la jurisprudence française ? Non, je ne puis accepter cette proposition, d'autant plus qu'il est de l'intérêt de la province de Québec et de toute la Puissance, que, sur un sujet comme celui que nous considérons, il y ait uniformité de jurisprudence. Singulier spectacle que serait celui où un legs, comme celui fait aux héritiers Renaud, serait valide dans toutes les provinces, à l'exception de Québec et ce pour raison d'ordre ou d'intérêt public. C'est ce que nous verrions cependant si le testateur eût laissé des immeubles situés dans Ontario, par exemple. Il ne peut en être ainsi à moins que la loi ne le dise clairement.

On oppose la jurisprudence française. En effet, les commentateurs et les tribunaux de la France moderne sont divisés sur la question que nous avons à décider. Je doute que l'on ne puisse accumuler autant d'autorités dans un sens comme dans l'autre. Supposons même qu'elles soient unanimes ; pour quelle raison devrions-nous les suivre dans l'espèce ? Il ne suffit pas qu'elles soient françaises, pour les recommander à notre jugement. Il faut voir d'abord si les lois, promulguées dans les deux pays sur la matière, sont à peu près identiques.

N'oublions pas que la révolution française changea bien des principes, particulièrement en ce qui concerne l'ordre public. Des principes nouveaux, que l'on est convenu d'appeler "les grands principes proclamés en 1789," sont venus changer l'ordre public, celui qui fut l'âme de notre jurisprudence. Une nouvelle liberté individuelle succéda à l'ancienne ; et pour n'en citer qu'un exemple qui nous intéresse le plus, la faculté même de tester disparut. Il est vrai que ces principes furent plus tard en partie abandonnés ou considérablement modifiés. On ne

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peut nier cependant qu'ils ont laissé une profonde impression sur le peuple français, sur ses législateurs et ses jurisconsultes. A plus de soixante ans de distance, l'article 1er de la constitution de l'Empire de 1851 proclamait de nouveau les principes de 1789.

Placés dans cette position de confusion et d'incertitude, quel est notre devoir sur une question d'ordre public? Lorsque le Code de la province de Québec est semblable au Code français, je comprends que la jurisprudence française doit être notre guide, au moins une haute autorité, qui a rarement été ignorée par cette cour, si jamais elle le fût, quelque différente qu'elle soit du droit anglais. (Voir *Consumers Cordage Co.* v. *Connolly* (1).

Mais si notre Code est différent, s'il décrète un principe du droit anglais, n'est-il pas raisonnable de recourir à la jurisprudence anglaise pour l'interpréter? Or,—et ceci n'est pas contesté,—la liberté pleine et entière de tester nous vient de l'Angleterre. La France ne l'a jamais connue. Peut-on alors mieux faire que de suivre les principes consacrés par le Conseil Privé dans une cause analogue, celle de *King* v. *Tunstall*, décidée en 1874, et rapportée aux *Law Reports*. (2) Ici, il s'agissait non seulement d'un legs contre l'ordre public, mais contre les bonnes mœurs, telles que comprises dans le droit français, de riches seigneuries, dépassant en valeur la limite des aliments de l'ancien droit, ayant été léguées à un enfant adultérin. Le jugement de la cour de première instance, rendu par un juge (Torrance J.) bien connu pour sa science en droit romain, se lit comme suit: (3)

Considering that by law and the jurisprudence of the courts of this province, the testator Gabriel Christie had, since the passing by the

(1) 31 S. C. R. 244. (2) L. R. 6 P. C. 55 at p. 60.
(3) 14 L. C. Jur. 197.

Parliament of Great Britain and Ireland, of the Act numbered chapter 83 of the Acts passed in the fourteenth year of the late reign of His late Majesty George III, capacity to dispose of his estate and property without reserve, restriction or limitation.

Considering that from and after the passing of the Act of the late Province of Lower Canada, numbered chapter IV of the Acts passed in the forty-first year of the reign of His said Majesty a testator had a right to bequeath in favour of any person or persons whatsoever all and every his or her lands, goods, or credits without reserve, restriction, or limitation.

L'opinion du juge Badgley, siégeant en appel dans la même cause est remarquable ; elle est citée au long au rapport de la décision du Conseil Privé (1) :

Reading the proviso as the substitute for the article, and considering its English origin, where entire freedom was observed in favour of devisees without distinction, the proviso could only have contemplated for this province the same enlarged power as was practised in England in such matters, and demonstrated the intent by omitting the qualifying words of the article as to the devisee, leaving the devisor free to give to whomsoever he might think proper to receive his liberality, and necessarily giving to these capacity freely to receive without restraint. This proviso was the only change effected upon the old re-introduced law, and seemed to be intended to make testacy in Canada as extended and beneficial as in England.

It has been objected against the enlarging effect of the enactment to remove the previous incapacity of devisors to make such a bequest, that the previous law, the French law, was a law of public order and morality, and could not be set aside except by express terms, specifically innovating upon the terms of the old law. It is sufficient to say that it was not a law so known, it was merely a French jurisprudence at any time, and, as shewn above, such bequests by parents were protected by the Parisian jurisprudence, up to and after April, 1663, when the law of the Custom was established here, at which time such bequest was not held to be against public order or morality as then known and practised in the Prévôté de Paris. It will likewise be borne in mind that the statutory provision originated in England, where such freedom of devise prevailed, and where neither law nor public order or morality incapacitated bastards, without distinction, from receiving bequests without restriction from their parents ; and the same capacity exists in the common law in the United States ; see Kent, Com. vol. ii, p. 209, *et seq* ; Redfield on Wills, vol. i ; and by

(1) L. R. 6 P. C. at p. 60.

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the decision of the Privy Council in *Durocher's Case* (1), it was held that the alleged incapacity of testators was removed by the Act of 1774. This Act was in force in the Province of Quebec in 1789, the date of the will and bequest in favour of the testator's natural son, William Plenderleath, and has not been repealed.....

Both statutes being general in their terms for devisors and devisees, they can be controlled by no limitations or exceptions, unless specially declared.....

It seems evident, therefore, that the alleged incapacity of William Plenderleath Christie, if it existed, had been removed by the effect of the general capacitating law existing in the province long anterior to 1835, the time of the opening of the substitution for his benefit, and enabled him to receive the bequest as any person whatsoever, and this is established by an undisturbed legislative and judicial concurrence, which may be resumed as follows:—First: Legislatively, by the statutory enactments of 1774 and 1801, condensed and combined in the 2nd section of chapter 34 of the Consolidated Statutes of Lower Canada of 1861, afterwards continued and adopted in *ipsissimis verbis* into the Civil Code, enacted and promulgated in 1866, and still in force, the whole without limitation or restriction upon the devisor to give or the devisee to receive. Secondly: Judicially, by the judgment of the Provincial Court of Appeal, in *Durocher* v. *Beaubien* (1), in 1826, composed of five judges, and confirmed by the judgment of the Privy Council in 1828, which has not since been disturbed; again, by the judgment in *Hamilton* v. *Christie* in the King's Bench of 1839, composed of three judges and supported on the merits by the unanimous opinion of the Provincial Court of Appeal, in 1845, composed of four judges; then by the opinion of the three judicial codifiers, as expressed in their report upon wills in January 1864, referred to above; then again in this cause, by the considered judgment of the court below, composed of one judge, from whose judgment this appeal to this court has been taken; and, finally, by this court, composed of five judges, four of whom are in concurrence, and the fifth, Mr. Justice Monk, dissented mainly upon the non-retroactivity of the Act of 1801, which, he admitted, removed disqualifications in devisees from that time. It would be difficult to present a more uniform and consistent legislative and judicial concurrence of interpretation in favour of the pretensions of the devisee litigated in this cause, and of his capacity to receive the bequest in his favour when his receiving power became legally effective.

Lord Justice James, parlant au nom du tribunal, observe, p. 90 :

(1) Stu. K. B. 307.

But beyond that, the law of England having from the earliest period, from the time when testamentary dispositions were introduced, given absolute power to a testator to deal as he liked with his property, wholly regardless of any moral or natural claims upon him, the English Legislature introduced that law into Lower Canada.

Puis, référant à la loi canadienne de 1801, le tribunal ajoute :

In this state of things the Canadian Legislature, having before it the English law, passed an Act which professed to explain as well as to amend the English Act ; and it proceeds to recite that doubts and difficulties had arisen with respect to the construction of the English Act. These doubts and difficulties it was perfectly within the competency of the Canadian Legislature to deal with as they thought fit, being a mere matter of disposition of property in the colony, not affecting any imperial policy. They recite the difficulties, and then they go on to declare and enact that it shall be lawful for a testator to give to any person or persons whomsoever, with the single exception of gifts in mortmain.

Indeed it was said that such a principle is not to be applied to this case ; that the attempt to make this gift is such a violation of law on the part of the testator that it is to be struck out just as if it were a gift *pro turpi causâ* or *contra bonos mores*. Their Lordships are unable to take that view. Nobody surely can suppose that it is crime in a man to express by his will his wishes as to what should be the devolution of his property after his death, or that it should go in a particular direction,—even although that direction should be in favour of an adulterine bastard, leaving it open to the law to say whether the wish shall or shall not take effect. There is nothing immoral, nothing wrong in the expression of such a wish, nothing to prevent the ordinary application of the ordinary principles of law to the case. And, therefore, even if the old incapacity of adulterine bastardy had not been effectually removed by the English Act, it had, before the substitution opened, been removed by the intervening Canadian Legislation.

Voir aussi *Abbott* v. *Fraser* (1).

Ainsi sur une question même de bonnes mœurs en matières civiles, telle que comprise dans l'ancien droit français et même le nouveau, c'est le droit anglais qui doit nous régir. Il doit en être de même

(1) L. R. 6 P. C. 96.

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sur une question d'ordre public, qui est le seul motif que les avocats de l'appelant ont invoqué. A mon point de vue les statuts de 1774 et 1801, reproduits au Code Civil, art. 831, 839, 872 et 899, ont complètement rangé la province de Québec dans le domaine du droit anglais, au sujet de la liberté de tester et de recevoir par testament. La jurisprudence de l'Angleterre et des Etats-Unis, où la liberté de conscience est proclamée aussi pleinement et libéralement qu'en France, au Canada ou ailleurs, est unanime à reconnaître la validité d'une condition comme celle qui est attachée au legs fait aux héritiers Renaud.

Pour ces raisons, nous sommes d'avis de confirmer le jugement dont est appel, avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *White, O'Halloran & Buchanan.*

Solicitors for the respondents: *Lamothe & Trudel.*

J. FRANK COLLOM (DEFENDANT).....APPELLANT; 1902

AND *Mar. 5, 6, 7.
*May 15.

MARK MANLEY (PLAINTIFF).....RESPONDENT

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mining law—Location of claim—Approximate bearing—Mis-statement—Minerals in place—B. C. "Mineral Act."

Accuracy in giving the approximate bearings in staking out a mineral claim is as necessary in the case of a fractional claim as in any other.

A prospector in locating and recording his location line between stakes No. 1 and No. 2 as running in an easterly direction whereas it was nearly due north does not comply with the statute requiring him to state the approximate compass bearing and his location is void. *Coplen* v. *Callahan* (30 Can. S.C.R. 555) followed.

Before a prospector can locate a claim he must actually find "minerals in place." His belief that the proposed claim contains minerals is not sufficient.

Judgment of the Supreme Court of British Columbia (8 B. C. Rep. 153) reversed,

APPEAL from a decision of the Supreme Court of British Columbia (1), affirming the judgment at the trial in favour of the plaintiff.

The facts of the case are as follows:—

One Robert Cooper on the 16th day of August, 1897, located the "Arlington Fraction" mineral claim, lying between the "Arlington" and "Burlington" mineral claims in the Slocan Mining Division of West Kootenay District, British Columbia, in the name of Charles A. Haller, who was then a free miner of British Columbia.

*PRESENT:—Sedgewick, Girouard, Davies and Mills, JJ.

(1) 8 B. C. Rep. 153.

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Subsequently and on the 29th day of November, 1897, while the "Arlington Fraction" was still a valid claim, the said Charles A. Haller filed a written abandonment of said location with the Mining Recorder, being the proper officer in that behalf.

On the same day, but subsequent in time to the filing of such abandonment, the said Robert Cooper relocated practically the same ground as had been covered by the "Arlington Fraction" for one John Halpin, who was then a free miner of British Columbia, calling it the "Native Silver Fraction" mineral claim.

On December 2nd, 1897, John Halpin by Bill of Sale conveyed a one-half interest in said "Native Silver Fraction" mineral claim to the said Charles A. Haller, and the same was duly recorded on the 4th day of December, 1897.

Haller did and recorded the necessary assessment work on said claim for the years ending 30th November, 1898, and 30th November, 1899, and on the 19th day of July, 1900, while still a free miner, sold his one-half interest in the claim to the Plaintiff, Manley, who was then a free miner of British Columbia.

Manley then did and recorded the necessary assessment work on the claim for the year ending 30th November, 1900.

On or about the 25th day of April, 1900, the defendant, Collom, entered upon and staked, or caused to be staked, the ground covered by said claim, calling it the "Arlington No. 1 Fraction," and caused work to be done and recorded on said claim, and applied for a certificate of improvements for same in the name of the "Arlington No. 1 Fraction." Collom had subsequently purchased a half interest therein from the then owner, Robert Cooper.

This action was then brought to adverse Collom's application.

The trial judge found—

That the "Native Silver Fraction" mineral claim was a good, valid and subsisting claim, and that the defendant Collom, had no interest in the lands covered thereby or the minerals contained therein except such interest as he had acquired by purchase in said claim, and that the plaintiff as a recorded owner of a half interest was entitled to possession as against the "Arlington No. 1 Fraction," and ordered that the "Arlington No. 1 Fraction" and the record thereof be set aside in so far as they affected the "Native Silver Fraction" miner claim.

From this decision the defendant appealed to the Supreme Court of British Columbia which dismissed the appeal and affirmed the judgment of the trial udge, Mr. Justice Drake dissenting.

The defendant now appeals from this decision.

Davis K.C. and *W. A. Macdonald K.C.* for the appellant, cited *Coplen* v. *Callahan* (1); *Callaghan* v. *George* (2); *Richards* v. *Price* (3); *Atkins* v. *Coy* (4); *Cranston* v. *The English Canadian Co.* (5); *Dunlop* v. *Haney* (6); *Clark* v. *Haney* (7); *Pavier* v. *Snow* (8); *Harmer* v. *Westmacott* (9); *DeGroot* v. *Van Duser* (10); *Langton* v. *Hughes* (11); *Madden* v. *Connell* (12); *Peters* v. *Sampson* (13); *Lawr* v. *Parker* (14).

Galliher for the respondent, cited *Gelinas* v. *Clark* (15); *Waterhouse* v. *Liftchild* (16); *Caldwell* v. *Davys*

(1) 30 Can. S. C. R. 555; 7 B. C. Rep. 422.
(2) 8 B. C. Rep. 146.
(3) 5 B. C. Rep. 362.
(4) 5 B. C. Rep. 6.
(5) 7 B. C. Rep. 266.
(6) 7 B. C. Rep. 1.
(7) 8 B. C. Rep. 130.
(8) 7 B. C. Rep. 80.
(9) 6 Sim. 284.
(10) 20 Wend. 390.
(11) 1 M. & S. 593.
(12) 30 Can. S. C. R. 109.
(13) 6 B. C. Rep. 405.
(14) 8 B. C. Rep. 223.
(15) 8 B. C. Rep. 42.
(16) 6 B. C. Rep. 424.

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(1); *Cranston* v. *English Canadian Co.* (2); *Peters* v. *Sampson* (3); *Granger* v. *Fotheringham* (4).

The judgement of the court was delivered by—

SEDGEWICK J.—In the case of *Coplen* v. *Callahan* (5), in considering the effect that should be given to the following sections of the British Columbia Mineral Act, viz., secs. 16 (*g*), 27 and 28, we held that every direction of sec. 16 was imperative that any deviations from or irregularity in respect to such directions were fatal to the location unless they came within the curative provisions of sub-section (*g*); that these were the only statutory provisions that could be invoked in favour of an otherwise invalid location; that section 28 did not include within its purview any area that had not been duly located but only those that had, and in consequence had become "mineral claims"; that the "irregularities" referred to must be such as occurred in the interval between the final location and registration of the mineral claim and the date of the record of the last certificate of work; and that, notwithstanding the certificate of work produced in that case, an inquiry might be had as to whether the provisions of section 16 had been so disregarded by the locator as to make his location invalid.

Nor did it appear to us that our interpretation of the section deprived it of its proper effect. It had not, so far as I know, ever been contended that section 28 in effect had repealed section 27. A prior duly located claim could not be displaced during the first year of its existence, by a subsequent location over the same ground and the production of an alleged certificate of work, even although the original locater and owner

(1) 7 B. C. Rep. 156.
(2) 7 B. C. Rep. 266.
(3) 6 B. C. Rep. 405.
(4) 3 B. C. Rep. 590.
(5) 30 Can. S. C. R. 555.

had no certificate at all. Nothing so monstrous as that could have been dreamed of, and we thought that section 28, notwithstanding these limitations upon its alleged universality and to the efficiency of its certificate as well, did fulfil a useful purpose, and particularly in the following way.

Assume a valid mineral claim. Its owner before a Crown grant issues is a tenant of the Crown. He must pay rent to the Crown. The legislature has permitted him to pay this rent either in money or work and to receive from a duly appointed agent of the Crown a certificate of work or payment. This really amounts to a receipt from the Crown of the tenant's annual rental. Whether the work was done or not, the money paid or not, was the business of no one except the Crown. And so it was, I think, reasonably enacted that whenever a dispute arose in which the payment of rent was concerned, the certificate of the Crown's officer as to the payment of the rent was to be conclusive against the world (the Crown included) unless the Crown, upon suit by the Attorney-General upon ground of fraud, had taken proceedings and succeeded in setting it aside.

In that case we, in effect, adopted the reasoning of Mr. Justice Drake in his judgment in the Court below, an opinion that was followed by Mr. Justice Martin in his dissenting judgment in *Gelinas* v. *Clark* (1), and again by Mr. Justice Drake in his dissenting opinion in the Court below in this case.

It may be that our late lamented brother Gwynne did not, as fully as he might, elaborate the propositions I have herein set out, but they are the conclusions to which we all eventually came when our judgment was pronounced. This being the case, I do not consider it proper to discuss further as to whether we

(1) 8 B. C. Rep. at p. 42.

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were right or wrong in *Coplen* v. *Callahan* (1). We have so decided and that is an end of it.

The question remaining to be determined is as to whether the defendant made and recorded a valid location of his alleged mineral claim, a question to be considered altogether independently of section 28.

The grounds upon which it was contended that the location in dispute was illegal are stated by Mr. Jussice Irving in giving the judgment of the court below, as follows:

> The irregularities complained of are,—
>
> (1) That the plaintiff in locating and recording the "Native Silver" described his location line between No. 1 and No. 2 (posts) as running in an easterly direction, whereas in truth and in fact it was very nearly due north. I do not think it can be denied that this is a very serious omission to comply with the statute, which requires the locator to stake the approximate compass bearing.
>
> (2) The second point is that one or more of the Free Miner's licenses under which the plaintiff derived his title was issued by a person without proper authority.
>
> (3) That the locator of the "Native Silver" did not in fact find mineral in place, and
>
> (4) That the "Native Silver" location was a location over an abandoned claim, by the same people, and was illegal under section 32.

For the purposes of this appeal it is necessary to consider the first and third of these grounds only.

Now, as to the first, I must again refer to *Coplen* v. *Callahan* (1). In that case the requirements of the statute, sec. 16, were not complied with inasmuch as the approximate compass bearings were not correctly marked upon the initial post and that the departure from the true bearing was so great that it was

> calculated to mislead other persons desiring to locate claims in the vicinity. Sec. 16 (*g*).

We therefore held the location void. The violation of the statutory requirements is greater in the present

(1) 30 Can. S. C. R. 555.

case. Even the learned judge whose statements of the points in dispute I have just now set out, says,—

> the plaintiff in locating and recording * * his location line between Nos. 1 and 2 as running in an easterly direction, whereas in truth and in fact it is very nearly due north * * (was guilty of) a very serious omission to comply with the statute, which requires the locator to stake the approximate compass bearing.

So that we must hold the location invalid unless there is a difference in fact between this case and *Coplen* v. *Callahan* (1).

The only difference contended for is that, this being a fractional mineral claim, inaccuracies in the markings and setting up of the initial post are not so necessary as in ordinary cases. I am unable to see the difference. The particular rule as to the staking of the approximate bearings was intended for the benefit not of the locator who had already staked his claim, but of the prospector searching for precious metals in the wild lands of the Crown. He finds a post, it appears to be a post connected with a fractional claim. He knows nothing of the boundaries of the regular claims in the vicinity. He has found mineral in place and he wants to place his stakes in a place where haply he may find vacant land. True, he may search the mountains for the stakes of the unbroken claims. He must beware of staking there. He then returns to the first found post. He will regulate his staking by the bearings stated there. That and that only is the best evidence upon which he can rely. He acts accordingly—plants his stakes, locates his claim in what he thinks is vacant land, and in the end finds that he has been the victim of his preceding prospector.

The rules as to staking apply as well to fractional as to other claims; unless these are observed strictly, in the case of fractional claims, the confusion is still

(1) 30 Can. S. C. R. 555.

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worse confounded and the persons for whom the rules were made lose the benefit of them and that benefit accrues to those who violate them. I am therefore of opinion that, on this ground, the disputed location is invalid.

Then as to the third ground:—The Mineral Act requires that no one can locate a claim unless he has actually discovered *mineral in place* on the claim; secs. 16 (*c*) and 16 (*g*). The curative provision expressly excludes from its operation a locator who has not made that discovery. The evidence satisfies me that he did not. It is true in his application to the mining officer he swore he did, but subsequently upon examination the question being put to him:

Did you discover mineral in place?

he refused to answer it categorically. The answer was,

I found mineral in places, I found float, lots of float in place,

and eventually the furthest he would go was

I am satisfied it was mineral in place.

That is in effect "I saw mineral in places, I saw float and that satisfied me it was mineral in place." The statute requires much more than the belief—the "satisfaction" of the locator; it requires a discovery in fact. The evidence fails to establish that. On this point as well as on the other I adopt the dissenting judgment of Mr. Justice Drake in the court below.

I am of opinion that the appeal should be allowed with costs and that judgment should be entered in the Supreme Court as prayed for in the defendant's statement of defence, with all costs in the court below.

Appeal allowed with costs.

Solicitors for the appellant: *Macdonald & Johnson.*

Solicitors for the respondent: *Galliher & Wilson.*

THE UNION STEAMSHIP COMPANY OF BRITISH COLUMBIA, (DEFENDANTS) ..... APPELLANTS;

AND

GORDON DRYSDALE (PLAINTIFF).....RESPONDENT.

1902

*Mar. 7, 8.

*May 15.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Shipping—Bill of lading—Limitation of time to sue—Damage from unseaworthiness—Construction of contract.

On a shipment of goods by steamer the bill of lading provided that all claims for damage to or loss of the same must be presented within one month from its date after which the same should be completely barred.

Held, reversing the judgment appealed from (8 B. C. Rep. 228) Mills J. dissenting, that this limitation applied to a claim for damage caused by unseaworthiness of the steamer.

APPEAL from a decision of the Supreme Court of British Columbia (1), reversing the judgment at the trial in favour of the defendants.

This is an action brought to recover the sum of $1416.18, being the admitted value of certain dry goods shipped by the plaintiff upon the defendants' steamship "Cutch" on the 5th June, 1899, to be transported from Vancouver, B.C., to Skagway, Alaska, for which the defendants issued a bill of lading, dated 5th June, 1899.

The plaintiff's goods were, during the voyage, completely destroyed by salt water, and he claims that the incursion of salt water was due to the fact that, at the time the goods were shipped and the voyage com-

*PRESENT:—Sir Henry Strong C J., and Sedgewick, Girouard, Davies and Mills JJ.

(1) 8 B. C. Rep. 228.

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menced, the "Cutch" was in an unseaworthy condition, and the plaintiff's cause of action is based upon the existence of an implied warranty that the vessel should be seaworthy at the time the voyage began.

The evidence, which is hereafter referred to in detail, clearly established the fact that the "Cutch" was unseaworthy and that the damage to the plaintiff's goods was directly caused by this unseaworthiness.

The conditions indorsed on the shipping receipt are as follows:—

"If the consignee is not on hand to receive the goods, package by package as discharged, then the master may deliver them to the wharfinger or other party or person believed by said master to be responsible, and who will take charge of said goods and pay the freight on the same, or deposit them on the bank of the river, or other usual place for delivering goods. The responsibility of said master shall cease immediately on the delivery of the said goods from the ship's tackles.

"The steamer on which the within goods are carried shall have leave to tow and assist vessels; to sail with or without pilots; to tranship to any other steamer or steamers; to lighter from steamer to steamer or from steamer to shore; to deliver to other steamers, companies, persons or forwarding agents any of the within goods destined for ports or places at which the vessel on which they are carried does not call. The master and owners shall not be held responsible for any damage or loss resulting from fire at sea, in the river or in port; accident to or from machinery, boilers or steam, or any other accident or dangers of the seas, rivers, roadsteads, harbours, or of sail or of steam navigation of what nature or kind soever.

"It is expressly understood that the master and owners shall not be liable or accountable for weight, leakage, breakage, shrinkage, rust, loss or damage aris-

ing from insecurity of package, or damage to cargo by vermin, burning or explosion of articles or freight or otherwise, or loss or damage on account of inaccuracy or omissions in marks or descriptions, effects of climate, or for unavoidable detention or delay, nor for the loss of specie, bullion, bank notes, government notes, bonds or consols, jewellery, or any property of special value, unless shipped under proper title or name and extra freight paid thereon.

"Live stock, trees, shrubbery, and all kinds of perishable property at owner's risk. Oil and all other liquids at owner's risk of leakage, unless caused by improper stowage.

"It is hereby understood that wool in bales, dry hides, butter and egg boxes, and all other packages, must be, each and every package, marked with the full address of the consignee; and if not so marked, it is agreed that the delivery of the full number of packages as within mentioned, without regard to quality, shall be deemed a correct delivery, and in full satisfaction of this receipt.

"It is agreed that in settlement of any claim for loss or damage to any of the within mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment.

"It is agreed that the person or party delivering any goods to the said steamer for shipment is authorized to sign the shipping receipt for the shipper.

"On delivery of the goods within enumerated, as provided herein, this receipt shall stand cancelled, whether surrendered or not.

"In consideration of the goods being carried by the company at a reduced rate, it is expressly agreed and declared that the shipper waives and abandons any right accorded by statute or otherwise to hold the company responsible in any manner for the keeping,

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or safe or prompt carriage of the goods, and waives and abandons all advantage and benefit accorded by the statute, 37 Vict. c. 25, to the shipper, and himself accepts all responsibility for the safe keeping and carriage of the goods, and agrees to hold the company absolved and discharged from delays, damages or losses, from whatever cause arising, including delays, loss or damage arising through negligence or carelessness, or want of skill of the company's officers, servants, or workmen, but which shall have occurred without the actual fault or privity of the company.

"It is expressly agreed that all claims against the said steamer or her owners for damage to or loss of any of the within merchandise must be presented to the master or owners thereof within one month from date hereof; and that after one month from date hereof no action, suit or proceeding in any court of justice shall be brought against the said steamer or the owners thereof for any damage to or loss of said merchandise; and the lapse of said one month shall be deemed a conclusive bar and release of all right to recover against the said steamer or the owners thereof for any such damage or loss."

The action was not brought within one month from the date of the bill of lading and was held by the trial judge to be too late. The full court reversed this, judgment, holding that the limitation did not apply to damage by unseaworthiness. The defendant appealed

Davis K.C. for the appellant. The question is merely one of construction. We rely almost entirely upon the judgment of the Divisional Court in *Tattersall* v. *The National Steamship Co.* (1), and upon *The "Maori King"* v. *Hughes* (2). Seaworthiness is always supposed to be before the minds of the consignor and

(1) 53 L. J. Q. B. 332: 12 Q. B. D. 297.

(2) 65 L. J. Q. B. 168; [1895] 2 Q. B. 550.

owner, and, the agreement contained in the bill of lading is made upon the basis of that understanding. The implication, indeed, only arises because it must necessarily be presumed that the contracting parties had the thing implied in their minds and contracted upon that basis, just as clearly and specifically as if it were set out in the written agreement. The condition limiting the time within which action must be brought, is intentionally inserted by the shipowners so that they may know, within a limited time, what claims may be brought against them for damages. The reason for the condition and its effect should not be limited in the manner suggested. It is nothing more than a statute of limitations concerned not with cases where there is no liability by reason, of the preceding clauses in the indorsement, but only with those cases where a liability has arisen, and, therefore, it must refer to something not mentioned in the preceding provisions of the indorsement. There is no cause of liability mentioned in the indorsement, and the paragraphs which treat of this subject merely provide for cases in which there shall be no liability. We must look outside of the conditions contained in the indorsement in order to get something for this limitation to operate upon, and it is shewn by the preceding condition that everything is eliminated except liabilities due to actual fault or privity of the company itself, such as not supplying a ship reasonably fit for the purpose for which it is required.

The distinction between the *Tattersall Case* (1) and the present, in short, is that the words "under no circumstances" are shewn by the context in that case to have a meaning limited as therein pointed out, whereas here, there is nothing in the context to limit the

(1) 53 L. J. Q. B. 332; 12 Q. B. D. 297.

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actions against the ship to which clause 10 applies except, of course, that they must be actions for damage to or loss of merchandise shipped.

It is submitted that Mr. Justice Martin errs in assuming, as he apparently does, that all exceptions in the bill of lading stand on the same plane, and that they all necessarily refer to what takes place during the voyage. Whether they do or not is merely a matter of construction, and every clause in that respect must stand on its own basis.

Some of the conditions indorsed on the shipping receipt here refer to various matters, such as what happens if packages are not properly addressed; other conditions deal with the question of certain circumstances under which the shipowner shall not be responsible for the loss of or damage to goods, but the last condition, the one in question, does not deal with the question of liability at all. It only comes in force when a liability has arisen, and deals with that separate branch, and that alone, stating that, under those circumstances, a liability having arisen (and there is nothing to limit the way in which such liability has arisen), the action must be commenced against the company within one month and not afterwards, and that the lapse of such month shall be deemed a conclusive bar and release of all right to recover against the steamer or the owners.

Sir Charles Hibbert Tupper K.C. for the respondent. The trial judge has, in effect, found that the ship was unseaworthy, and this finding was distinctly affirmed by the majority of the court appealed from which also decided that the damage resulted from such unseaworthiness, and that the condition in the bill of lading relied upon by defendants did not afford any ground of defence.

The judgment appealed from is right, chiefly upon the grounds that in cases of this kind there is always an implied warranty that the ship undertaking to carry goods is seaworthy and fit to perform the service at the time the service begins; that the clauses in the bill of lading limiting the liability of the carrier only come into force when a seaworthy ship has been provided, and cannot be pleaded as a defence to an action based solely upon the implied warranty of seaworthiness; and that the clause limiting time for the presentation of the claim stands precisely upon the same footing as any other clause in the bill of lading.

The bill of lading does not affect the primary duty of the shipowner respecting seaworthiness unless expressly so stated; MacLachlan on Shipping (4 ed.) p. 426. It is evidence of a contract to carry, but is not the contract; *Crooks & Co.* v. *Allan* (1); *Seiwell* v. *Burdick* (2); *Schmidt* v. *The Royal Mail SS. Co.* (3), at p. 648; *Kopitoff* v. *Wilson* (4). The obligation of the shipowner to warrant the fitness of the ship when she sails is not as carrier, but as shipowner. The courts lean against exceptions; *The Glengoil Steamship Co.* v. *Pilkington* (5). See also Carver on Carriers, p. 77; Scrutton on Bills of Lading, pp. 72, 171, 185, and *The "Glenfruin"* (6), per Butt J. at p. 108. Exceptions are not applicable when the ship is unseaworthy at starting through latent defect. *The Cargo ex "Laertes"* (7); *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (8); *Gilroy Sons & Co.* v. *Price & Co.* (9); *The "Maori King"* v. *Hughes et al.* (10); *Queensland National Bank* v. *Peninsular & Oriental*

(1) 5 Q. B. D. 38.
(2) 10 App. Cas. 74.
(3) 45 L. J. Q. B. 646.
(4) 1 Q. B. D. 377.
(5) 28 Can. S. C. R. 146.
(6) 10 P. D. 103.
(7) 12 P. D. 187.
(8) 12 App. Cas. 518.
(9) [1893] A. C. 56.
(10) 65 L. J. Q. B. 168; [1895] 2 Q. B. 550.

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Steam Navigation Co. (1); *Thames & Mersey Marine Ins. Co.* v. *Hamilton, Fraser & Co.* (2). The bill of lading must expressly refer to conditions respecting primary obligation to enable defendants to take advantage; *Phillips* v. *Clark* (3); *Czech* v. *General Steam Navigation Co.* (4).

As to warranty of seaworthiness, we refer to MacLachlan on Shipping, (4 ed.) pp. 383, 426 427 and *Lyon* v. *Mells* (5). Seaworthiness is an implied term as the foundation of the contract for carriage by sea; *Steel* v. *The State Line Steamship Co* (6).

The case of *Tattersall* v. *National Steamship Co.* (7) is conclusive that limitations or other conditions in the bill of lading, have no application to the claim for damages by reason of the breach of the warranty of seaworthiness. *The Glengoil Steamship Co.* v. *Pilkington* (8) had to do with a clause relating to negligence on the part of servants of the shipowner and does not directly deal with the point at issue here. So far as that case applies, it favours the respondent, as it is held there that the contract against liability for fault of servants did not affect the question of defective stowage. See remarks of Taschereau J. at pp. 158, 159, 160. We also rely upon the decisions in "*The Glenfruin*" (9); *Cargo on Steamship "Waikato"* v. *New Zealand Shipping Co.* (10); *Gleadell* v. *Thomson* (11).

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

DAVIES J.—The sole question argued before us was whether the 10th clause of the Shipping Receipt which

(1) [1898] 1 Q. B. 567.
(2) 56 L. J. Q. B. 626.
(3) 26 L. J. C. P. 168.
(4) L. R. 3 C. P. 14.
(5) 5 East, 428.
(6) 3 App. Cas. 72.
(7) 12 Q. B. D. 297.
(8) 28 Can. S. C. R. 146.
(9) 10 P. D. 103.
(10) [1898] 1 Q. B. 645.
(11) 56 N. Y. 194.

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contained the contract between the parties applied so as to exempt the carriers from liability for having provided an unseaworthy ship in which to carry the plaintiff's goods. It is a pure question of construction. The learned counsel for the appellant, Mr. Davis, based his argument upon the ground that if the warranty of seaworthiness had been expressly written in the contract the limitation of time within which suit was to be brought for damages sustained by the shipper would necessarily apply and he argued that, *a fortiori*, the limitation must be held as applicable to an implied warranty. Sir Hibbert Tupper, for the respondent, in whose favour the judgment of the court below was given, contended that the implied warranty of seaworthiness was a duty or obligation cast upon the shipowner outside of and independently of the contract and not affected or controlled by its provisions, the limitations of which only came into force when a seaworthy ship had been provided.

The learned judges of the court below felt themselves bound by what they held to be the decisions of the courts in England specially in the cases of *Steele* v. *The State Line Steamship Co.* (1); *The "Maori King"* v. *Hughes* (2); and *Tattersall* v. *National Steamship Co.* (3). But with every deference to the opinion of these learned judges, I am of opinion that these cases are clearly distinguishable from the one now before us. In all those cases it will be found that the actions were brought upon bills of lading which began to operate when and after the cargo was placed on board; and as was said by Lord Justice Smith in the quotation from his judgment in the case of *The "Maori King"* (2), made by Mr. Justice Martin:

> The exceptions in the bill of lading will apply after the ship sets sail. They are exceptions during the voyage when if any of the matters

(1) 3 App. Cas. 72.
(2) 65 L.J.Q.B. 168; [1895] 2 Q.B. 550.
(3) 12 Q. B. D. 297.

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mentioned take place, the ship owner is not liable. But if there is, as I think there is, an implied warranty that the machinery shall be fit for its purpose when the ship sets sail, then the exceptions do not apply and are no answer to a claim by the owner of the goods founded on the original unfitness of the machinery.

Now I do not presume to question that the above extract contains a correct declaration of the law as applicable to the document the learned judge had before him. That law is too well settled by a long and well known line of cases beginning with *Steele* v. *The State Line SS. Co.* (1) to permit of doubt being cast upon it. But does it apply to the contract we have before us? Is this shipping receipt which contains the contract between the parties on this appeal one which applies only when and after the ship sets sail? I think not. I think it was intended to cover and did cover all the period of time from and after the delivery of the goods by the shipper to the shipowner, even if that period should be partly anterior to the loading of the goods aboard the ship in which they might be placed. It reads as follow :

UNION STEAMSHIP COMPANY OF BRITISH COLUMBIA, LIMITED.

No. VANCOUVER, B.C., June 5th, 1899.

From Geo. V. Fraser, to be shipped on board the Union Steamship Co's (Ltd.) steamer *Cutch*, whereof Capt. Newcombe is master, or on board any other steamer of the company, or on board of any steamer the company may employ, the following property in apparent good order, except as noted, (value, weight, contents and condition, being unknown to said master), marked as indicated below, to be delivered at S. P. Brown, in transit to Dawson, for Geo. V. Fraser or assigns, care subject to the conditions printed on back of this receipt.

Here follows a description of the property.

The 10th clause of the conditions, printed on the back of this receipt and on the construction of which he dispute arises, reads :

It is expressly agreed that all claims against the said steamer or her owners for damage to or loss of any of the within merchandise mus

(1) 3 App. Cas. 72.

be presented to the master or owners thereof within one month from date hereof; and that after one month from date hereof no action, suit or proceeding in any court of justice shall be brought against the said steamer or the owners thereof for any damage to or loss of said merchandise; and the lapse of said one month shall be deemed a conclusive bar and release of all right to recover against the said steamer or the owners thereof for any such damage or loss.

Now when does the liability of the steamship company arise under this receipt? Clearly not from the sailing of the ship on board of which the goods might be loaded or from the loading of the cargo aboard, but from the receipt of the goods. They were received by the company *to be shipped* on board one or other of their ships as soon as reasonably possible. They might remain for sometime in the warehouse of the company before being shipped. Would not the liability of the company attach from the moment they received the goods? Clearly in my opinion it would. The cases therefore which were cited and relied upon by the respondent and which were each and all based upon the proposition that the liability of the shipowner on the respective bills of lading, on which the several actions were brought, did not attach until after the loading of the goods aboard the ship, and cannot apply to the case of this shipping receipt where the liability began the moment the goods were received by the shipowner. The conditions limit the company's liability very much. The condition preceding the one as to the time within which any suit must be brought declares (*inter alia*) that, in consideration of the goods being carried at a reduced rate, the shipper himself

accepts all responsibility for the safe keeping and carriage of the goods, and agrees to hold the company absolved and discharged from delays, damages or losses, from whatever cause arising, including delays, loss or damage arising through negligence or carelessness, or want of skill of the company's officers, servants, or workmen, but which shall have occurred without the actual fault or privity of the company.

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It was argued, with some force, that this exempts the company from all liability except that arising from their own actual fault or privity and that they were practically liable for little or nothing beyond their liability to provide a seaworthy ship on which to load the goods, or a suitable warehouse in which to keep the goods till shipment, and that the next clause limiting the time for bringing an action, in cases where there was a liability, was practically confined to just such a case as this is, viz. failure to provide a seaworthy ship. But without placing too much reliance on that argument, I desire to base my decision upon the construction I give to the shipping receipt sued upon and holding, as I do, that the shipowner's liability under this contract arises from the moment of the receipt by him of the goods and that, if the goods were damaged through his privity or default after such receipt and before they were loaded he would be liable, it follows that his obligation or duty, afterwards, to load the goods aboard of a seaworthy ship is a subsequent and not an antecedent duty or obligation, that it is such arising out of the contract made and not independently of it, and being so is within and covered by the limitation of the 10th clause as to the time within which a suit may be brought.

MILLS J. (dissenting).—This case came before Mr. Justice Irving on the 5th of June, 1899, who gave judgement in favour of the appellants. It was heard by the Supreme Court of British Columbia, in April, 1901, and the full court gave judgment in favour of the steamship company, Chief Justice McColl dissenting. The plaintiff, Mr. Drysdale, here the respondent, is a merchant in the City of Vancouver who shipped by the steamer goods to the value of $1,478.18 to Skagway, thence to be forwarded to Dawson, in the Yukon

country. The company contracted with him to carry the goods to Skagway upon the conditions set out in the bill of lading. These goods were shipped on board upon conditions, the chief of which are the following:

The steamer on which the within goods are carried shall have leave to tow and assist vessels; to sail with or without pilots; to tranship to any other steamer or steamers; to lighter from steamer to steamer or from steamer to shore; to deliver to other steamers, companies, persons, or forwarding agents, any of the within goods destined for ports or places at which the vessel on which they are carried does not call. The masters and owners shall not be held responsible for any damage or loss resulting from fire at sea, in the river or in port; accident to or from the steamer, boilers or steam or any other accident of dangers of the seas, rivers, roadsteads, harbours or of sail or steam navigation of what nature and kind soever.

It is expressly understood that the master and owners shall not be liable or accountable for weight, leakage, breakage, shrinkage, rust, loss or damage arising from the insecurity of package or damage to cargo, by vermin, burning or explosion of articles of freight, or otherwise, or loss or damage on account of inaccuracy, or omission in marks or descriptions, effects of climate or from unavoidable detention or delay, nor for the loss of specie, bullion, bank notes, government notes, bonds or consols, jewellery, or any property of special value unless shipped under proper title or name and extra freight paid thereon. * * * * *

In consideration of the goods being carried by the company at a reduced rate, it is expressly agreed and declared that the shipper waives and abandons any right accorded by statute or otherwise, to hold the company responsible in any manner for the keeping or safe and prompt carriage of the goods, and waives and abandons all advantages and benefit, accorded by the statute, 37 Vict. c. 25, to the shipper, and himself accepts all responsibility for the safe keeping and carriage of the goods, and agrees to hold the company absolved and discharged from delays, damages or losses from whatever cause arising, including delays, loss or damage arising through negligence, or carelessness or want of skill, of the company's officers, servants or workmen, but which shall have occurred without the actual fault or privity of the company.

It is expressly agreed that all claims against the said steamer or her owners for damage to or loss of any of the within merchandise, must be presented to the master or owners thereof within one month from the date hereof; and that after one month from date hereof, no

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action, suit or proceeding in any court of justice shall be brought against the said steamer or the owners thereof for any damage to or loss of the said merchandize; and the lapse of said one month shall be deemed a conclusive bar and release of all right to recover against the said steamer or the owners thereof, for any such damage and loss.

The goods were placed on board the steamer. The sea-cock by which water is admitted into the water tank at the bottom of the ship was not properly closed before the ship sailed. The man-hole at the top had not the India rubber, which is under the cover, in its place, and when the goods arrived at Skagway they were in several feet of water. The boxes in which the goods were packed weighed far more at Skagway than at Vancouver, additional freight had to be paid for their carriage through to Dawson in consequence, and when they reached their destination, they were found upon being unpacked, to be absolutely worthless, but the month mentioned in the bill of lading had expired, and the company have since been told that Mr. Drysdale had absolutely bound himself by his agreement not to bring any action against the company for the damage and loss which had been sustained. The words are very comprehensive, and if the seaworthiness of the vessel is embraced in its terms, the right of action is undoubtedly gone. The question is one of not a little difficulty. This is evident from the fact that the judges in the Supreme Court of British Columbia were equally divided upon the sub ject. It will, therefore, become necessary to examine the cases with care and to see whether the contract or bill of lading does really have the effect of preventing any redress being had.

There are many cases in which it has been held that agreements exempting the owners of a ship from liability because of the carelessness of those in charge do not apply to questions relating to the seaworthiness of the ship when she begins her voyage, but these cases

do not apply to the present, because what is here done, is not to take away the remedy, but to shorten the period within which redress may be had. Our business is to see whether this attempt to escape responsibility has been successfully accomplished.

In the case of *Steel et al.* v. *The State Line Steamship Co.* (1), that company agreed to carry a cargo of wheat in a steamship called "The State of Virgininia," from New York to Glasgow, providing by the bill of lading that they should not be accountable for leakage, breakage, etc., however caused; not responsible for the bursting of bags, or consequences arising therefrom, or for any of the following perils, whether arising from the negligence, default or error in judgment of the pilot, master, mariners, engineers or persons in the service of the ship, or for whose acts the ship owner is liable, or otherwise, namely, risk ofcraft, hulk, or transshipment, explosion, heat or fire at sea in craft, hulk or on shore, boilers, steam and machinery, or from consequence of any damage or injury thereto, however such damage or injury may be caused, collision, straining or other perils of the sea, rivers, navigation or land transit of whatever nature or kind soever, and however caused, excepted. One of the port holes had been left open. The sea had come in, and the cargo was greatly injured. The owners of the ship refused to pay for the damage, and in January, 1877, the case was tried before Lord Young and a verdict returned in which it was found that the orlop deck ports had been insufficiently fastened whereby the sea water was admitted. The jury found that, as the ship was loaded, the said port was about a foot below the water line and that had it been sufficiently fastened it would have been water-tight and the wheat would have sustained no damage. It was argued that the negligence which gave rise to the

(1) 3 App. Cas. 72.

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loss occurred before the wheat had been put on board; that the loss, therefore, was not due to the perils of the sea, but because the ship as loaded was not seaworthy and fit to carry the cargo; that the charterers had undertaken to supply, and there was an implied promise, on the part of the shipowners, that the vessel was fit for the purpose for which she had been employed.

The case was considered by the House of Lords, and Lord Cairns said:

> I did not understand the learned counsel for the respondent to be able to say that that was not the relative position of the owner of the goods and the shipowners; that, on the one hand, the owner of the goods was not entitled to refuse to put his goods on board, and on the other hand, the owner of the ship did not incur liability by not having a ship fit to fulfil the engagement he had entered into. But my lords if this is so, it must be from this, and only from this, that in any contract of this kind there is implied an engagement that the ship shall be reasonably fit for performing the service which she undertakes. In principle, I think, there can be no doubt that this would be the meaning of the contract, and it appears to me, that the question is really concluded by authority * * *
>
> I will assume in favour of the respondent that everything which is mentioned between the words "not responsible" and the word "excepted" is meant to be matter in respect of which there is to be no liability on the part of the shipowner * * *
>
> But it appears to me obvious that what is here referred to as a peril of the sea is, as described, something which happens on the transit, whether land or sea transit, and that of course does not commence until the ship leaves the port. Therefore, if it be the case, as I submit to your Lordships it is, that there is in the early part of the bill of lading an engagement that the ship shall be reasonably fit to perform the service which she undertakes, there is, in my opinion, nothing in the later part of the bill of lading which qualifies that engagement. * * * Consistently with this verdict, it might have been that there was no want of fastening the port-hole when the ship sailed, that the port-hole may have been unfastened afterwards for any particular purpose, and then left insufficiently fastened, and that all this occurred in the course of the voyage through the negligence of one of the sailors; and, if so, probably that would be a matter which would be covered by the exception in the bill of lading as a case of negligence occurring during the transit of the

goods. Or it may be, that if the port-hole (still looking at this verdict alone) was unfastened at the time of the sailing of the ship, the port-hole may have been so situated and the access to the port-hole such as that, at any moment, in prospect of any change of weather, the port-hole could have been immediately fastened; and that the ship at the time of her departure was perfectly free from any charge of not being adequate for the performance of the voyage which she had undertaken.

Lord O'Hagan;—

I shall only say that I entirely concur in the view that a shipowner who accepts goods, which he is to deliver in good order and condition, impliedly contracts to perform the voyage in a ship which is seaworthy.

Lord Selborne;—

It was suggested by Mr. Matthew, in his able argument, that the bill of lading covered risks, by way of exception, some of which might occur during the loading of the cargo on board and the stowing of it in the ship. I cannot agree to that construction. It appears to me to be clear, on the face of the bill of lading, that it represents the goods as already shipped. It is given in duplicate, in the ordinary course, and I also find that it is expressly stated by the pursuers in their condescendence, that the wheat had been loaded on board the ship before, and on the day which is the date of the bill of lading. I, therefore, quite agree that all the perils which are excepted are perils subsequent to the loading of the wheat on board the ship, and that they are capable of and ought to receive a construction not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken * * *

It was assumed by those learned lords, (in the court of session), and I should think by all the lords, that the contract of the shipowner was to provide "a seaworthy ship, tight, staunch and strong, well-manned and equipped for the carriage of the goods," and that if he did not do that, there was nothing, (I should so read the judgments), in the exception in the bill of lading, to relieve him from that liability.

Lord Blackburn;—

I take it my lords to be quite clear both in England and in Scotland that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be

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stipulated which should prevent it, that the ship shall be fit for its purpose. * * *

In the case of *Kopitoff* v. *Wilson*, (1) where I had directed the jury that there was an obligation, I did certainly conceive the law to be that the shipowner in such a case warranted the fitness of the ship when she sailed, and not merely that he had loyally, honestly and *bonâ fide* endeavoured to make her fit. * * *

Now my lords, taking that to be so, it is settled that in a contract where there are excepted clauses, a contract to carry the goods except the perils of the seas, and except breakage and except leakage, it has been decided both in England and Scotland that there still remains a duty on the shipowner not merely to carry the goods, if not prevented by the excepted perils, but also that he and his servants shall use due care and skill about carrying the goods and shall not be negligent. * * *

I think myself that the proper and right way of enunciating it would be, in such a case, to say if, owing to the negligence of the crew, the ship sinks while at sea, although the things perish by a peril of the sea, still inasmuch as it was the negligence of the shipowner and his servants that led to it, they cannot avail themselves of the exception. It matters not whether that would be the right mode of expressing it or not, that is clearly established. They may protect themselves against that, and they do so in many cases, by saying that these perils are to be excepted, whether caused by negligence of the ship's crew or the shipowner's servants or not. When they do so, of course that no longer applies. * * *

So here I think that if this failure to make the ship fit for the voyage, if she really was unfit, did exist, then the loss produced immediately by that, though itself a peril of the sea, which would have been excepted, is nevertheless a thing for which the shipowner is liable, unless by the terms of his contract he has provided against it.

Now my lords, I perfectly agree with what has been said by the noble and learned lords, who have already addressed you on the construction of this contract, that it does not provide at all for this case of an unseaworthy ship producing the mischief. The shipowners might have stipulated if they had pleased (I know no law that would hinder them) we will take the goods on board but we shall not be responsible at all though our ship is ever so unseaworthy; look out for yourselves; if we put them on board a rotten ship that is your lookout; you shall not have any remedy against us if we do. I say they might have so contracted, and perhaps in some cases they may actually so contract. I do not know. Or the shipowner might,

(1) 1 Q. B. D. 377.

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and that would have been more reasonable, have said, I will furnish a seaworthy ship, but I stipulate that although the ship is seaworthy, and although I have furnished it, I shall only be answerable for the vitiation of your policy of insurance, if you have one, in case the ship turns out not to be seaworthy; and I will protect myself against any perils of the seas, though the loss should be produced in consequence of or caused by the unseaworthiness.

In the head note of this case (1) it is stated that:

In every contract for the conveyance of merchandise by sea, there is, in the absence of express provision to the contrary, an implied warranty by the shipowner that the vessel is seaworthy.

In an action to recover damages for the loss of iron armour-plates, which were lost on board the defendants' ship, it appeared that the defendants, by their servants, stowed the ship, and that during rough weather one of the plates broke loose and went through the side of the ship, which in consequence was lost. At the trial the judge told the jury, as a matter of law, that a shipowner warrants the fitness of his ship when she sails, and not merely that he will honestly and *bonâ fide* endeavour to make her fit, and left to them the questions: Was the vessel at the time of the sailing in a state, as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season? Secondly,—If, she was not in a fit state, was the loss that happened caused by that unfitness?—

Held, that the direction was right, and correctly stated the liability of a shipowner, even though he did not hold himself out as a common carrier.

Mr. Justice Field, who gave judgment in this case (1), said, at page 378:—

Three armour plates of great weight, from 18 to 15 tons weight each, were delivered by the plaintiff to the defendants for shipment, and were by them shipped, on the 15th of September in the defendants' own steamship "*Walamo*" under a bill of lading containing many exceptions. The defendants themselves by their own servants stowed the ship. The armour plates were by them placed on the top of a quantity of railway iron and then secured there by wooden shores. There was a conflict of testimony as to whether this was or was not the proper mode of stowing them. It was not disputed that the steamship was in herself a good ship, but it was contended, on behalf of the plaintiff, that the mode of stowing these plates adopted by the

(1) *Kopitoff* v. *Wilson, et al.*, 1 Q. B. D. 377.

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defendants made her unseaworthy on this voyage. On getting out to sea she encountered bad weather, the wind being high and the sea rough, and she rolled heavily. There was conflicting evidence as to the degree of this bad weather, and the cause of this rolling; the plaintiff contending that the wind and sea were no more than at that season were to be expected, and that the rolling was owing to the improper stowage of the vessel; the defendants contending that there was an unusual sea that would have made any ship, however well stowed, roll. After the ship had been out at sea for some hours, one of the armour plates broke loose and went through the side of the ship, which in consequence went down in deep water, and was totally lost with all her cargo on board. The plaintiff's contention was that the breaking loose of the plate was because it was improperly stowed and secured; the defendants', that it was a direct consequence of the roughness of the sea, which was a peril excepted in the bill of lading. These contentions raised questions of fact for the jury. Leave was reserved at the close of the case to enter a non-suit if the exception in the bill of lading protected the defendants under the circumstances.

The case was thus left to the jury. The learned judge told the jury as a matter of law, and not as a question for them, that a shipowner warrants the fitness of his ship when she sails, and not merely that he will honestly and *bonâ fide* endeavour to make her fit, and after explaining to the jury what "reasonably fit" meant with reference to a North Sea voyage, and the other facts in the case, left the following questions to the jury:

Was the vessel at the time of her sailing in a state as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season from Hull to Cronstadt?

Second. If she was not in a fit state, was the loss that happened caused by that unfitness?

These questions were put in writing and handed to the jury, and on that paper the judge put in writing what he had previously stated in his summing up, that they were "to understand (in answering this second question) that though the disaster would not have happened had there not been considerable sea, yet it is to be considered as caused by the unfitness, if they, (the jury) think that the plates would not have got adrift when they did, had the stowage been such as to put the ship in a fit state. The jury answered the first question in the negative, and the second in the affirmative. * * * We hold that in whatever way a contract for the conveyance of merchandise be made, where there is no agreement to the contrary, the shipowner is by the nature of the contract impliedly and necessarily held to war-

rant that the ship is good, and is in a condition to perform the voyage then about to be undertaken or, in ordinary language, is seaworthy, that is, fit to meet and undergo the perils of the sea, and other incidental risks to which she must of necessity be exposed in the course of the voyage * * *

And at page 382,—

Holding as we now do the result is that the merchant by his contract with the shipowner, having become entitled to have a ship to carry his goods, warranted fit for that purpose, and to meet and struggle against the perils of the sea, is, by the contract of assurance, protected against the damage arising from such perils acting upon a seaworthy ship.

In *Tattersall* v. *The National Steamship Company*, (1), the plaintiff shipped certain cattle on board the defendants' ship, for carriage from London to New York, under a bill of lading which provided:—

these animals being in sole charge of shipper's servants, it is hereby expressly agreed that the shipowners or their agents or servants are, as respects these animals, in no way responsible, either for their escape from the steamer, or for accidents, disease, or mortality, *and that, under no circumstances, shall they be held liable for more than five pounds for each of the animals.*

The head-note, after quoting from the bill of lading as above, goes on to say:—

The ship had, on a previous voyage, carried cattle suffering from foot and mouth disease. Some of the cattle shipped under the bill of lading were during the voyage infected with that disease, owing to the negligence of the defendants' servants in not cleansing and disinfecting the ship before receiving the plaintiff's cattle on board and signing the bill of lading, and the plaintiff in consequence suffered damage amounting to more than £5 for each of the said cattle. *Held*, that the provision in the bill of lading, limiting liability to £5 for each of the cattle, did not apply to damage occasioned by the defendants not providing a ship reasonably fit for the purposes of the carriage of the cattle, which they had contracted to carry.

Mr. Justice Day, in giving judgment in this case, said:—

I take it to have been clearly established, if not previously, at any rate, since the case of *Steel* v. *State Line Steamship Co.* (2), that where

(1) 12 Q. B. D. 297. (2) 3 App. Cas. 72.

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there is a contract to carry goods in a ship, there is in the absence of any stipulation to the contrary an implied engagement on the part of the person so undertaking to carry that the ship is reasonably fit for the purpose of such carriage. In this case, it is clear that the ship was not reasonably fit for the carriage of these cattle. There is therefore a breach of the implied engagement by the defendants, and the plaintiff having sustained damage in consequence must be entitled to recover the amount of such damage unless the defendants are protected by any express stipulation. * * *

If the goods had been damaged by any peril in the course of the voyage which might be incurred in a ship, originally fit for the purpose of the carriage of the goods, the case would have been wholly different, but here the goods were not damaged by any such perils, or by any peril which, in my opinion, was contemplated by the parties in framing the bill of lading. They were damaged simply because the defendants' servants neglected their preliminary duty of seeing that the ship was in a proper condition to receive them, and received them into a ship that was not fit to receive them. There is nothing in the bill of lading that I can see to restrict or qualify the liability of the defendants in respect of the breach of this obligation, and, therefore, I think our judgment upon the question submitted us must be for the plaintiff.

A. L. Smith J. said:—

I am of the same opinion. The real question is what is the true meaning of a very special bill of lading relating to the carriage of certain cattle and other animals; and whether under that bill of lading the plaintiff can recover more than £5 damages in respect to each animal. * * *

The terms of the bill of lading which have been alluded to appear to me to deal with the contract so far as it relates to the carriage of the goods upon the voyage; they do not in my opinion relate to anything before the commencement of the voyage * * *

I take the meaning of the whole to be that they are not to be liable for accidents, disease or mortality arising during the voyage, unless occasioned by the negligence of their servants, and that even in respect of accidents, disease or mortality so occasioned, they shall only be liable to the amount of £5. So construed, the stipulation in no way restricts or affects the primary obligation of shipowners to have the ship reasonably fit to receive the goods.

Blackburn J. thinks that

a shipowner warrants to the person who ships goods that the vessel is seaworthy.

Lord Tenterden, in Abbott on Shipping (1), states the law thus:—The first duty is to provide a vessel, tight and staunch, and furnished with all tackle and apparel necessary for the intended voyage. For if the merchant suffer loss or damage by reason of any insufficiency of these particulars at the outset of the voyage, he will be entitled to a recompense. An insufficiency in the furniture of the ship cannot easily be unknown to the master or owners; but in the body of the vessel there may be latent defects unknown to both. The French ordinance directs that if the merchant can prove that the vessel at the time of sailing was incapable of performing the voyage the master shall lose his freight and pay the merchant his damages and interest. Valin in his commentary on this article, cites an observation of Weytsen,—"that the punishment in this case ought not to be thought too severe, because the master, by the nature of the contract of affreightment, is necessarily held to warrant that the ship is good and perfectly in a condition to perform the voyage in question, under the penalty of all expenses, damages and interest." And he himself adds that this is so although before its departure the ship may have been visited according to the practice in France, and reported sufficient; because, on a visit, the exterior parts only of the vessel are surveyed so that secret faults cannot be discovered, "for which by consequence," says he, "the owner or master remains always responsible, and this more justly because he cannot be ignorant of the bad state of the ship; but even if he be ignorant, he must still answer being necessarily bound to furnish a ship good and capable of the voyage" (2).

In *Lyon* v. *Mells* (1) Lord Ellenborough in delivering the judgment of the court says:

(1) Abbott on Shipping (14 ed.) pp. 488, 489.
(2) 5 East 428 at p. 437.

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In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman *implied by law*, that his vessel is tight, and fit for the purpose, or employment for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so. The law presumes a promise to that effect on the part of the carrier without any actual proof and every reason of sound policy and public convenience requires that it should be so. The declaration here states such a promise to have been made by the defendant and it is proved by proving the nature of his employment; or in other words *the law* in such a case without proof *implies* it.

In *Gibson* v. *Small* (1), Baron Parke says:—

The shipowner contracts with every shipper of goods that he will make the ship seaworthy. The shipper of goods has a right to expect a seaworthy ship, and may sue the shipowner if it is not. Hence the usual course being that the assured can and may secure the seaworthiness of the ship, either directly if he is the owner or indirectly if he is the shipper, it is by no means unreasonable, to imply such a contract in a policy on a ship on a voyage, and so the law most clearly has implied it.

It appears from this that this most learned judge thought it clear that the undertaking of the shipowner to the shipper of goods, as to seaworthiness, is co-extensive with the undertaking of the shipper of the goods to his insurer.

In *Stanton* v. *Richardson* (2), and *Richardson* v. *Stanton* (2), the charter-party provided that the ship should load a full and complete cargo of sugar in bags, hemp in compressed bales, or measurement goods. It likewise specified different rates of freight for dry and wet sugar. The usual words as to the vessel's being tight, staunch and strong, were not in the charter-party, but it was provided that the vessel should be a good risk for insurance, before and when receiving cargo, and that the master should provide a survey report declaring

(1) 4 H. L. Cas. 353.

(2) L. R. 9 C. P. 390.

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her to be so. The ship proceeded to her port of loading and having been surveyed was reported to be a first class risk. The cargo of wet sugar was provided for her by the charterers. A great deal of moisture drained from wet sugar, and when the cargo had been nearly all shipped it was found that there was an accumulation in the hold the result of drainage from the sugar, mixing with the ordinary leakage of the ship, which the pumps were unable to deal with, from the nature of the material, and which rendered the ship unseaworthy for the voyage if she proceeded in her then condition. The ship was perfectly seaworthy, except with respect to this particular cargo and the pumps were quite sufficient for all ordinary purposes. The sugar had to be unloaded again, and the charterer then refused to reload it or provide any other cargo. Cross-actions were brought, the one by the shipowner against the charterer for refusing to provide a cargo and the other by the charterer against the shipowner to recover damages by reason of the ship not being fit to carry the cargo provided for her. At the trial the jury found that the cargo of sugar offered was a reasonable cargo to be offered; and the ship was not reasonably fit to carry a reasonable cargo of wet sugar; that the ship could not be made fit within such a time as would not have frustrated the object of the adventure; and that the ship would not without new pumps and with a reasonable cargo of wet sugar on board have been seaworthy:

Held, affirming a decision in the court below, that the shipowner by the charter-party undertook that the ship should be fit for the carriage of a cargo of wet sugar and that the charterer was entitled to succeed in both actions. (1).

The question here is whether the contract entered into between the shipper and the shipowner either

(1) L. R. 9 C. P. 390.

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exempted the shipowners from all responsibility for having furnished an unseaworthy ship, and whether the limitation of time within which an action may be brought took away any right of action which the shipper may have had against the shipowner. I do not think the terms of the contract removed the responsibility which the shipowners incurred in furnishing an unseaworthy ship. So far as that feature of the contractual relations are concerned, I am of opinion that there is nothing in the contract which exempts the shipowners from liability for having furnished an unseaworthy vessel or which limits the right of action on this antecedent obligation to the period of the month. If the question of the unseaworthiness of the ship remains antecedent to and outside the contract between the shipper and the company, then I think it follows that the terms of limitation upon the time within which suit may be brought, though very broad, cannot be held to embrace anything outside of the contract, and as the question of seaworthiness remains untouched by it, the right of action arising from having furnished an unseaworthy ship is not a matter affected by the limitation clause of the contract and that this appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Davis, Marshall & Macneill.*

Solicitors for the respondent: *Tupper, Peters & Gilmour.*

ROBINSON F. BRIGGS (PLAINTIFF).....APPELLANT; 1902

AND

SAMUEL NEWSWANDER AND OTHERS (DEFENDANTS).....RESPONDENTS; *Mar. 10. *May 15.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Contract—Mining Claim—Agreement for Sale—Construction—Enhanced Value.

By agreement in writing signed by both parties B. offered to convey his interest in certain mining claims to N. for a price named with a stipulation that, if the claims proved on development to be valuable and a joint stock company was formed by N. or his associates, N. might allot or cause to be alloted to B. such amount of shares as he should deem meet. By a contemporaneous agreement, N. promised and agreed that a company should immediately be formed and that B. should have a reasonable amount of stock according to its value. No company was formed by N., and B. brought an action for a declaration that he was entitled to an undivided half interest in the claims or that the agreement should be specifically performed.

Held, reversing the judgment of the Supreme Court of British Columbia, that the dual agreement above mentioned was for a transfer at a nominal price in trust to enable N. to capitalize the properties and form a company to work them on such terms as to allotting stock to B. as the parties should mutually agree upon; and that, on breach of said trust, B. was entitled to a reconveyance of his interest in the claims and an account of moneys received or that should have been received from the working thereof in the meantime.

APPEAL from a decision of the Supreme Court of British Columbia affirming the judgment at the trial in favour of the defendants.

The result of the appeal depended on the construction to be placed on two agreements for the transfer

*PRESENT:—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills JJ.

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of mineral claims from Briggs to Newswander. The agreements were executed on the same day and the substantial portions thereof are stated in the above head-note. They are fully set out in the judgment of the court published herewith :—

J. Travers Lewis for the appellant cited *Peacock* v. *Peacock* (1); *Bryant* v. *Flight* (2); *Taylor* v. *Brewer* (3); *The Queen* v. *Doutre* (4); *Davies* v. *Davies* (5); *Re Vince* (6); *Guthing* v. *Lynn* (7); *Leeds* v. *Amherst* (8); *Chattock* v. *Muller* (9); *Hart* v. *Hart* (10); and *Gaskarth* v. *Lowther* (11).

Davis K.C. for the respondents. The agreement is illusory, vague and uncertain. The plaintiff has not chosen to make a definite agreement which can be enforced and he now wishes the court to make one for him. This the court will not do, on the authorities referred to by Mr. Justice Irving in his judgment. It is impossible for the court to say, assuming that the plaintiff is entitled to anything, what he is entitled to. The plaintiff has chosen his own forum and the difficulty arises that the plaintiff along with the defendant Newswander, having fixed upon the tribunal which is to decide what number of shares are to be considered "reasonable," "according to the value thereof," that tribunal to consist of the two parties themselves, there was no provision made for a disagreement. It is expressely provided that the number of shares must be agreed upon "amicably," and as they have not been able to agree amicably upon any given number or shares, the plaintiff has no right of action.

(1) 2 Camp. 45.
(2) 5 M. & W. 114.
(3) 1 M. & S. 290.
(4) 6 Can. S. C. R. 342.
(5) 36 Ch. D. 359.
(6) [1892] 1 Q. B. 587; 2 Q. B. 478.
(7) 2 B. & Ad. 232.
(8) 20 Beav. 239.
(9) 8 Ch. D. 177.
(10) 18 Ch. D. 670.
(11) 12 Ves. 107.

The two agreements taken together shew clearly that the plaintiff really had no legal rights against the defendants but, in consideration of his not worrying them by litigation, the defendants were to give him $500 and, in case they formed a company and issued shares, would give him whatever amount of shares was satisfactory to them. It was intended that Newswander should feel morally bound to give the plaintiff some shares, but the amount of such shares was to be mutually agreed upon by all parties.

The judgment of the court was delivered by:—

SEDGEWICK J.—The plaintiff was the owner of two adjoining mineral claims called the "Two Kids" and "Monarch" located by him on the 17th of July, 1899, and situated in the Ainsworth Mining Division of British Columbia. The defendant Newswander, acting for himself and his co defendants who resided in France, wrongfully entered upon the ground of the plaintiff and staked it, on the 9th of December following, in the name of the defendants, Doras and Darginac, as the "Dublin" and "Cork" mineral claims. The property appearing to be valuable, the defendant Newswander was desirous of acquiring it on behalf of himself and his two colleagues. Negotiations were thereupon entered into which resulted in the contemporaneous execution of the following agreements:

THIS AGREEMENT made the twelfth day of June, one thousand nine hundred, between Robinson P. Briggs, of the City of Kaslo, free miner, of the first part, and Samuel Newswander, of the said City of Kaslo, merchant, of the second part.

Whereas the party of the first part is the owner of the mineral claims hereinafter mentioned and has agreed to sell the same to the party of the second part;

Now this indenture witnesseth that the party of the first part agrees to sell to the party of the second part, and the party of the second part agrees to purchase the mineral claims "Monarch," "Two Kids"

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and "Victor," situate on the south fork of Kaslo Creek, being re-locations of the ground formerly located in the name of "Essex" and "Ben Hur" mineral claims, at and for the price or sum of five hundred dollars ($500.00), payable as follows: One hundred dollars ($100.00) on account of purchase money to be paid on the execution of this agreement and the balance of the said purchase money to be paid within one (1) month from the date hereof.

Should the ground covered by the said mineral claims prove on development to be valuable, and a joint stock company be formed by the party of the second part or his associates, the party of the second part may allot or procure to be allotted to the party of the first part such amount of the shares in the said company as to the party of the second part may seem meet, but it is distinctly understood that the party of the first part shall have no right of action to demand allotment of shares as aforesaid, and it shall be entirely optional on the part of the party of the second part whether or not he allot to the party of the first part any shares therein.

The party of the second part shall be entitled at the time of payment of the balance of said purchase money to conveyance of said mineral claims free from all encumbrance except against the mineral claims "Two Girls" "Cork" and "Dublin."

Time is to be considered of the essence of this agreement.

In witness whereof the parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of J. J. FLEUTOT.

ROBINSON P. BRIGGS. (seal.)
SAM NEWSWANDER. (seal.)

Know all men by these presents that I, Samuel Newswander, of the City of Kaslo, B.C., free miner's license No. B27,068, issued at Kaslo, B.C., May 30, 1900, in consideration of the transfer of the title to me of the full interests in the "Monarch" mineral claim and the "Two Kids" mineral claim by Robinson P. Briggs, of Kaslo, B.C., free miner's license No. B27,208, issued at Kaslo, B.C., May 30, 1900, promise and agree that a corporation shall be immediately and legally formed to do business under the laws of British Columbia to take over the above named mineral claims, and that the said Robinson P. Briggs shall have a reasonable amount of the stock of said corporation according to the value thereof, and it is hereby agreed that no action shall be instituted by the said Briggs to defraud the said Newswander of the title to the said claims, and that the number of shares shall be amicably determined between the parties hereto.

Dated at Kaslo, B.C., June 12th, 1900. Made in duplicate.

ROBINSON P. BRIGGS.

F. CONRUYT

SAM. NEWSWANDER.

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It is not disputed that both agreements are to be read together and that the second agreement, in so far as the question here is concerned, has to be interpreted according to its terms. The defendant Newswander and those associated with him proceeded to exploit and develop the claims which turned out to be very valuable but not even the approximate value, when this action was instituted, was ascertained. The plaintiff, however, swore they are worth $100,000, while the defendants gave most unsatisfactory evidence upon the question. During the defendants' operation of the work they allowed the property located as the "Monarch" and the "Two Kids" to lapse and, having paid the full amount due to the Crown by way of rental, obtained, under the British Columbia Mineral Act, a Crown grant of the property in their own names,—their title, whether under the legal mineral claim acquired by them from the plaintiff or under their own illegal location, being thereby converted into an estate in fee simple. There was never any attempt on the part of the defendant Newswander or any one else to form a corporation for the purpose of taking over the property in question, and no excuse or suggestion has ever been made why that course was not followed except the alleged intention on the part of the defendants to destroy any interest which the plaintiff Briggs might have in the property under the agreement.

Subsequently this action was brought in which the plaintiff claimed a declaration that he was the owner of an undivided one-half interest or share in the "Dublin" and "Cork" mineral claims and entitled to a decree vesting the same in him and for an account of his share of the moneys accruing from the working of the mines by the defendants.

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The defendants denied liability but paid $700 into court and it appeared in the evidence that this $700 together with the $500 originally paid making the sum $1,200 was the amount spoken of during the negotiations above referred to as the sum for which Briggs, the plaintiff, was willing at that time to sell his absolute interest.

The case was tried before Mr. Justice Irving who dismissed the action upon the ground that inasmuch as the agreement did not make provision for the exact proportion or interest which the vendor was to receive, leaving that question to be "amicably determined between the parties hereto," he knew of no standard by which the court could say what was a reasonable amount of shares to be given, and it was ordered that the money paid into court should be returned to the defendants. Upon the appeal Mr. Justice Martin delivered the unanimous judgment of the court, confirming the judgment of the trial judge as follows:—

> It might be that if the construction of the agreement depended solely upon the words "the said B. shall have a reasonable amount of stock, etc." that a conclusion favourable to the plaintiff could be arrived at. But the manner in which the number of shares is to be allotted is provided by the agreement which declares that it "shall be amicably determined between the parties hereto." The difficulty arises from the fact that no such determination can be come to, and under such circumstances, the parties having selected their own forum, it is difficult to see upon what ground the court can interfere. No authority has been cited which would justify this court substituting itself for that "amicable" tribunal of interested parties which the agreement empowers to determine the vexed point, nor is there any legal machinery, which can be resorted to, to compel the parties to act in concert. The cases cited by plaintiff's counsel do not go to the length necessary to support the contention advanced and no valid reason appears for departing from the view taken by the learned trial judge.

I am of opinion that there is manifest error in this disposition of the case. The courts below seem to

have entirely overlooked the principles relating to express and resulting trusts that are applicable here. The true construction of the dual agreement of the 12th June, 1900, is, that it was a transfer by the plaintiff, Briggs, to the defendant, Newswander, of the properties in question for the nominal consideration of $500 as earnest money, in trust, expressly for the purpose of enabling Newswander to capitalize such properties and to create and finance a company to take over and work them on such terms as to stock allotment to the vendor as might thereafter be determined between the parties interested, which parties would necessarily then include the prospective company so to be created.

The breach complained of by Briggs is the defendant Newswander's refusal and failure to incorporate any company for the purpose of implementing the express trust which he had undertaken, and as a breach, on the threshold, of the fundamental trust which formed the master-motive of the transaction.

The first effect of that breach of trust was that a resulting trust in favour of the Plaintiff, Briggs, was at once created, a trust further emphasized and the breach of the express trust further aggravated by the fact that the defendants have since tortiously converted the property to their own use by Crown-granting the identical areas in their own names as the "Cork" and "Dublin" claims and repudiating any further responsibility to the plaintiff, Briggs.

In strict law, under these circumstances, the plaintiff Briggs is entitled, upon payment back of the $500 received by him, to a re-conveyance of the areas in question, the transfer describing them not as the "Monarch" and "Two Kids" but as the "Cork" and "Dublin" claims, *eo nomine*.

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If there was such vagueness and uncertainty in the trust instruments as the court below found there was in that case, under the law as I understand it, the result would be, not that the defendants could retain the property of which they had the legal estate, but that there was a resulting trust to the plaintiff. In other words, the very grounds upon which the court gave judgment for the defendants were, as a matter of law, the grounds upon which they should have given judgment for the plaintiff. I need not refer to cases in which these elementary principles of resulting trust are illustrated. The rule is stated in Lewin on Trusts (10 ed.) at page 155:—

> The general rule is, that wherever, upon the conveyance, devise, or bequest, it appears that the grantee, devisee or legatee was intended to take the legal estate merely, the equitable interest, or so much of it as is left undisposed of, will result, if arising out of the settlor's realty, to himself or his heir, and if out of personal estate, to himself or his executor.

And in H. A. Smith's Principles of Equity, he states:—

> Where a trust is evidently intended to be created the person in whose hands the legal estate is transferred cannot hold it beneficially (p. 36). Thus where a bequest is made to a person "upon trust," and no trust is declared (i) or the trusts declared are too vague to be executed (k), or are void for unlawness (l), or fail by lapse (m) the trustee can have no pretence for claiming the beneficial ownership, the whole property being clearly impressed with a trust. In such cases, therefore, the trust will result to the settlor or his representatives, the heirs as to realty, the next of kin as to personality and the trustee cannot defeat the resulting trust by parol evidence in his favour (n).

I may, however, refer to the case of *Chattock* v. *Muller* (1), in which case the defendant purchased an estate, having agreed with the plaintiff that if he made the purchase he would cede part thereof to the plaintiff. In an action for specific performance of the agreement, the court directed a reference to chambers

(1) 8 Ch. D. 177.

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to ascertain what portion the plaintiff was entitled to and decreed that the defendant should convey such portion to the plaintiff. During the argument of that case, Malins V.C., said:—

It may be that as the plaintiff has been lulled into false security by the defendant's conduct, the proper relief would be to give the plaintiff the whole estate.

And in delivering the judgment of the Court, he said:—

But it was strongly argued by Mr. Glasse and Mr. Kakewich, for the defendant, that the plaintiff cannot have a decree because there was no certainty as to what part of the estate the plaintiff was to have, or as to the price to be paid for it. In a case like this, where the defendant has acquired the estate or part of it by a fraud on the plaintiff, I think that the court would be bound, if possible, to overcome all technical difficulties in order to defeat the unfair course of dealing of the defendant, and I should not, in my opinion, be going too far if I compelled the defendant to give the whole estate to the plaintiff at the price given for it, rather than that he should succeed in retaining it on account of any uncertainty as to the part which the plaintiff is entitled to have. But I think the memorandum in the handwriting of the defendant, which was given to the plaintiff at the interview of the 20th of June, relieves the court in this case from any difficulty.

In the case of *The Duke of Leeds* v. *The Earl of Amherst* (1) Sir John Romilly, advances the following proposition:—

I take it that the general wisdom of mankind has acquiesced in this:—That the author of a mischief is not the party who is to complain of the result of it, but that he who has done it must submit to have the effects of it recoil upon himself. This, I say, is a proposition which is supported by the Holy Scriptures, by the authority of profane writers, by the Roman Civil Law, by subsequent writers upon civil law, by the common law of this country, and by the decisions in our own courts of equity.

See also *Booth* v. *Turle* (2); and *Re Duke of Marlborough* (3).

(1) 20 Beav. 239.
(2) L. R. 16 Eq. 182.
(3) [1894] 2 Ch. 133.

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The offer to pay $700 as satisfaction of the plaintiff's claim seems grossly inadequate. The plaintiff, Briggs, was possibly willing when the agreement was made to sell out on that basis but the defendant was not. He constituted himself the trustee and agent of Briggs to develop the property and the plaintiff is entitled to any enhanced value which the subsequent development and outlay gave to it.

There is some question as to the proportion of interest which the court should declare the plaintiff entitled to. As I have said, according to the rigorous rules and demands of a court of equity, in dealing with breaches of trust such as this, the result might be that the whole property should revert to the vendor, he returning the purchase money and they being allowed for repairs but not for improvements.

An abuse of trust, said Lord Ellenborough, in *Taylor* v. *Plumer* (1), can confer no rights on the party abusing it, nor on those who claim in privity with him.

Lewin on Trusts (10 ed.) at page 1093 :—

If the trust estate has been tortiously disposed of by the trustee the *cestui que trust* may attach and follow the property that has been substituted in the place of the trust estate, so long as the metamorphosis can be traced.

In cases of actual fraud the court refuses any allowance for improvements but usually allows for repairs.

If, (said the Lord Chancellor in *Kenney* v. *Browne* (2),) a man has acquired an estate by rank and abominable fraud, and shall afterwards expend his money in improving the estate, is he therefore to retain it in his hands against the lawful proprietor? If such a rule should prevail it will certainly fully justify a proposition which I once heard stated at the Bar of the Court of Chancery, that the common equity of this country was, to improve the right owner out of the possession of his estate.

According to my first conception of this case, if the defendant Newswander had as a fact formed a company,

(1) 3 M. & S. 562 at p. 574. (2) 3 Ridg. P. C. 462 at p. 518.

as agreed, and if the mining areas had then been taken over by such company, the plaintiff would have been entitled in that event to, at least, one half of the company's shares, fully paid up, for the agreement of the 12th of June, fairly construed, embodied also a partnership agreement whereby Briggs supplied the property and the defendant Newswander, on his part, agreed to furnish the funds necessary to work it, by organizing a company to finance or capitalize the undertaking and, in the absence of a definite agreement as to proportionate interest, the partners must stand on an equal footing.

In the present case there were two parties to the agreement, Briggs and Newswander, and the latter did not purport to contract as an agent for his co-defendants in this action. Upon consultation, however, with my brother judges I have been convinced that giving him a moiety of the property would not be equitable. The pleadings as well as the evidence disclose that the agreement was in fact made between Briggs on the one part, and the three defendants on the other, and that will justify us in assuming that the four contracting parties are each entitled to an equal share.

Now the "Partnership Act" of British Columbia, R.S.B.C. (1897), ch. 150, sec. 25, enacts as follows:—

> The interest of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules:—
>
> (1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

That creates a statutory rule for the determination of the respective interest of the parties in the present case. But that provision in the Act is a mere statement of what has always been the English law.

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Sedgewick J.

In *McIlquham* v. *Taylor* (1), the agreement in question was as follows:—

> The said (defendant) H. E. Taylor, will within twelve calendar months from the date hereof pay the sum of £1,000 to or hand over to or otherwise transfer into the names of the said (plaintiffs) James McIllquham and James Mitchell one thousand pounds worth of fully paid up shares in a company to be formed by the said H. E. Taylor, within the said twelve months as aforesaid, for working the said mines and premises, the capital of such company not to exceed £12,000.

In the judgment of the trial court, Stirling, J., at page 58, says:—

> I think that the shares which the defendant undertook to transfer were to be shares in a company in which the shareholders all stood on a footing of equality. If the case were one of partnership it would come within the Partnership Act, 1890, which provides in section 2, sub-section 1, in accordance with the law as it was before the Act, that, subject to any agreement express or implied between the partners, all the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm. Therefore partners, in the absence of express stipulation, stand on equal footing. In the same way, upon an agreement for a partnership, if the shares are not defined, the partners must come in on equal terms.

The result is that the plaintiff is entitled to maintain the present action and to have judgment declaring him entitled to a one-quarter interest in the "Dublin" and "Cork" mineral claims referred to in the pleadings and to a proper conveyance of the same, also to have an account taken of moneys received or entitled to be received by the defendants from the operation of such mineral claims, deducting therefrom all moneys rightfully expended by them, the plaintiff to be charged with the original purchase money received by him, and that one-quarter of the sum found due upon taking of such account shall be paid by the defendants to the plaintiff, the whole payment to be a charge upon the interest of the defendants in the mineral claims in

(1) [1895] 1 Ch. 53.

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question, all parties to have leave to apply as occasion may require to the court below or a judge thereof for such further directions and relief as may seem right.

The plaintiff will be entitled to his costs of the trial and of the appeal to the full court in British Columbia as well as to the costs of the reference hereby ordered and of this appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Taylor & Hanington.*

Solicitors for the respondents: *McAnn & Mackay.*

F. J. CLEARY AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

L. J. BOSCOWITZ (DEFENDANT) ..... RESPONDENT.

1902

*Mar 11,
*May 15.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mining law—Location—Certificate of work—Evidence to impugn.

A certificate of work done on a mining claim in British Columbia is conclusive evidence that the holder has paid his rent and can only be impugned by the Crown. *Coplen* v. *Callahan* (30 Can. S.C.R. 555) and *Collom* v. *Manley* (32 Can. S. C. R. 371) followed.

C. believing that the statutory work had not been done on mining claims, and that they were, therefore, vacant, located and recorded them under new names as his own and brought an action claiming an adverse right thereto.

Held, affirmlng the judgment of the Supreme Court of British Columbia (8 B. C. Rep. 225) that evidence to impugn the certificate of work given to the prior locators was rightly rejected at the trial.

PRESENT:—Sir Henry Strong, C.J. and Sedgewick, Girouard, Davies and Mills, J J.

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

The action was dismissed by the trial judge because it was admitted that the plaintiffs could only succeed by shewing that the defendant's certificate of work was issued without the full amount of work required by the statute having been performed or by impeaching the certificate on some other ground, and the learned judge was of opinion that evidence to that effect could not be received, the Attorney-General not being a party to the action. This ruling was affirmed by the full court and whether or not it was right was the only question to be decided on the plaintiffs' appeal to this court.

J. A. Russell for the appellants. The appellants adopted the proceedings provided by sect. 37 of the "Mineral Act" for asserting their adverse right and contend that section 28 does not override sections 36 and 37. Section 37 provides the only remedy open to an adverse claimant; *Hand* v. *Warren* (2): *Gelinas* v. *Clark* (3).

Section 28 has no bearing on "adverse proceedings" taken under sections 36 and 37. It has to do only with disputes between the party obtaining a certificate of work and the government in matters of irregularities affected by fraud, to protect the free-miner against his own admissions or irregularities in the same way that section 53 of the Act protects him from the omissions or irregularities of the government or its officials. This view of section 28 is confirmed in *Coplen* v. *Callahan* (4), per Gwynne J. at page 557.

The appellants also contend that work, as well as the certificate of work is necessary in order to keep alive the title to any mineral claim. Here the irregularity happened at the dates of the certificates of work, not

(1) 8 B. C. Rep. 225.
(2) 7 B. C. Rep. 42.
(3) 8 B. C. Rep. 42.
(4) 30 Can. S. C. R. 555.

previously thereto. This section is imperative that work on the claim itself shall be done. It is not sufficient that the Mining Recorder shall be made to believe by a false or insufficient affidavit that work has been done where, as a matter of fact, no work has been done. The certificate of work granted and recorded under such circumstances is merely evidence that the affidavit mentioned in this section has been produced to the Mining Recorder. He is not given any option to accept or to reject the affidavit. The section requires that the free-miner shall satisfy the Mining Recorder, by an affidavit of himself or his agent, that such work has been done. The Mining Recorder cannot require corroborative evidence or otherwise question the affidavit produced. He must accept it, true or false. It is not intended that the mere paper certificate shall take the place of actual work on the claim itself; work done and certificate recorded are essential to a proper compliance with section 24. Failure to do work on the claim itself goes to the root of the free-miner's title. Section 28 deals only with irregularities and does not preclude the appellants from challenging a vital essential of respondent's title or anything which makes his title void, not merely voidable. If respondent's title is a nullity because he did not do the work required to make his title, then section 28 does not deal with nor affect his position. *Coplen* v. *Callahan* (1). See also *Manley* v. *Collom* (2), per Drake J. at page 162.

Further, inasmuch as the respondent failed to give affirmative evidence of his title to the ground in question judgment should not have been given in his favour. See section 11 of the Mineral Amendment Act, 1898; also *Schomberg* v. *Holden* (3), and *Dunlop* v. *Hanley* (4).

(1) 30 Can. S. C. R. 555.
(2) 8 B. C. Rep. 153.
(3) 6 B. C. Rep. 419.
(4) 7 B. C. Rep. 2.

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The plaintiffs proved at the trial that they had complied with all the requirements of title, viz: (1) free-miners' licenses; (2) a proper location; (3) recording claims; (4) doing and recording necessary work within the year.

Partlo v. *Todd* (1), and *Johnson* v. *Kirk* (2), are analogous cases.

Davis K.C., for the respondent. It is not contended that section 28 will validate or give life to a mineral claim which, by reason of its location or otherwise, was illegal and void *ab initio*, but that, given a good and valid mineral claim originally, the title to such mineral claim is conclusively assumed to be perfect up to and including the date of the record of the last certificate of work preceding the time when the dispute in question arose, which in this case, would be the date of the location of the subsequent mineral claims, that is, the "Regina," "Royal" and "Royal Extension." The section certainly cures everything in the shape of an irregularity, and the *bonâ fide* omission to do a full hundred dollars worth of work, through mistake or otherwise, would be nothing more than an irregularity. On the other hand, if no work was done or an insufficient amount, deliberately and *malâ fide*, that would amount to fraud and, under the section, it would certainly be necessary for the Attorney-General to be made a party to the suit. The British Columbia authorities on the subject are mentioned in the judgment of Mr. Justice Martin. The same question to a certain extent, arose, but was not settled, in the case of *Coplen* v. *Callahan* (3).

The judgment of the court was delivered by:

SEDGEWICK J.—The mineral claims "Empress," "Victoria" and "Queen" were located and recorded

(1) 17 Can. S. C. R. 196. (2) 30 Can. S. C. R. 344.
(3) 30 Can. S. C. R. 555.

by the defendant, in September, 1898. The plaintiffs, in the year 1900, located and recorded, over the same ground, the alleged mineral claims "Royal," "Royal Extension" and "Regina." At the time this action was brought, all the claims had obtained certificates of work, but the certificates in respect to the latter three were later in point of date than the others. On the 2nd of August, 1900, the defendant applied for a certificate of improvements in respect of the three claims he owned, under section 36 of the Mineral Act as amended by chapter 33 of the Acts of 1898, secs. 7 and 8.

The (plaintiffs) appellants, claiming an adverse right and to be in possession of the ground or claims referred to in this application, commenced this action in the Supreme Court of British Columbia, under the provisions of said section 37, as amended by section 9 of of the "Minerals Acts Amendment Act, 1898," to determine the question of the right of possession to said claims, and otherwise enforce their adverse right.

The (plaintiffs) appellants, pleaded in their statement of claim that the locations made by them were on vacant and unoccupied land of the Crown.

The (defendant) respondent, in his statement of defence denied this fact and set up that he had obtained and recorded two certificates of work, each, on the "Empress," "Victoria" and "Queen" mineral claims, dated respectively, the 26th of September, 1899, and the 24th of July, 1900.

In reply, the appellants pleaded that these certificates of work were wrongfully and fraudulently obtained, for the reason that the work required by section 24 of said Mineral Act, as a condition precedent to such certificates of work being obtained, had not been done on the claims.

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At the trial of the action, the learned Chief Justice refused to hear any evidence impeaching the defendant's certificates of work or shewing that they had been issued without the full or any amount of work being done. It was stated by plaintiffs' counsel at the trial that the only question raised was as to the sufficiency of the work on which the certificates were obtained, it being impliedly admitted that, at the time of the location by the defendant, the "Empress," "Victoria" and "Queen" were valid existing mineral claims. The Attorney-General was not a party to the action, and the Chief Justice dismissed it with costs.

On appeal to the Supreme Court of British Columbia, the judgment of the learned Chief Justice was affirmed and the plaintiffs' appeal dismissed with costs. The appeal to this court is from that judgment.

The decision on this appeal depends upon the construction to be placed upon section 28 of the Mineral Act, which is as follows:

> Upon any dispute as to the title to any mineral claim, no irregularity happening previous to the date of the record of the last certificate of work shall affect the title thereto, and it shall be assumed that, up to that date, the title to such claim was perfect, except upon suit by the Attorney-General based upon fraud.

In *Coplen* v. *Callahan* (1) we dealt with this section and, in the case of *Collom* v. *Manley* (2), argued in the February term of this court, we endeavoured to place a more definite construction upon it. If we are right, then this appeal must fail, the late learned Chief Justice being right in refusing to receive evidence tending to shew that the certificates of work held by the defendant did not truly represent the facts but were fraudulently procured and void.

This case, it seems to me, affords an interesting illustration of what the legislature was aiming at

(1) 30 Can. S. C. R. 555. (2) 32 Can. S. C. R. 371.

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when they passed it. In the present case, on the day when the plaintiffs made their attempt to "jump" (the word used in the courts below), the claims, the defendant was their duly located and recorded owner, holding the same as the tenant of the Crown By the statute, the rental payable by him to the Crown was the annual payment of $100 for five years, or the annual doing of work on the ground for five years. Upon the full payment of $500. or the doing of $500 worth of work, he becomes entitled to a certificate of improvements, which, in its turn, entitled him to a patent converting his estate for years into an estate in fee simple, as absolute a title as the law could give him. During this period the plaintiffs, having no interest in the property, imagined that the tenant Boscowitz, had not paid his rent to his landlord, and, coming to the conclusion that the claims had thereby become vacant, located and recorded them under new names as their own. One of the objects (I can imagine many others), which the legislature here had in view, was to prevent any legal effect being given to a transaction of that character. A certificate of work once given by the Crown's officer was made conclusive evidence to the world that the tenant had paid his rent; it was made irrefutable and indisputable except upon attack by the Crown itself. So that, as it was admitted in the present case that, at the time mentioned, the respondent had a valid title and had not abandoned it, the paper title held by the appellants and all locations and payments and work made or done by them were absolute nullities forming no basis for the adverse claim set up.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Russell & Russell.*

Solicitors for the respondent: *Davis, Marshall & Macneill.*

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*May 16.

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

AND

VIRGINIE BOISSEAU ÈS QUALITÉ, ET AL. (PLAINTIFFS)..... } RESPONDENTS.

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

Negligence—Findings of jury—Operation of railway—Lights on train—Evidence.

A conductor in defendant's employ while engaged, in the performance of the duty for which he was engaged at the Windsor Station of the Canadian Pacific Railway in Montreal, was killed by a train which was being moved backwards in the station-yard. There was no light on the rear end of the last car of the train nor was there any person stationed there to give warning of the movement of the train.

Held, that by omitting to have a light on the rear end of the train the railway company failed in its duty and this constituted *primâ facie* evidence of negligence.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, which maintained the plaintiffs' action with costs.

At the trial the jury found, in addition to the facts stated in the head-note, that the place where the accident occurred was dangerous, that it was lighted at the time (7 p.m. on 1st December, 1899), and the 16th, 17th and 18th questions, with the jury's answers thereto, were as follows:

16. "Could the deceased have avoided the said accident by proper precaution and care?"—Ans. "Yes, he might, if he took proper precautions.—Unanimous."

*PRESENT:—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills JJ.

17. "Could the defendants have avoided the said accident by the exercise of proper precaution and care?"—Ans. "Yes.—Unanimous."

18. "Is the accident due wholly or mostly to the fault of the deceased or the defendants?"—Ans. "Yes, the defendants mostly.—Unanimous."

At the trial defendants admitted that no employee or light had been placed at the rear end of the last car to warn people of the proximity and movements of the train, the contention, as to these alleged requirements, being that there was no obligation either by statute or at common law, to place a man or light on the last of the cars in question at a place such as that where the accident happened, and that it was impracticable and not customary to do so.

The principal grounds relied upon by the appellants in the present appeal were:—Mis-direction by the judge at the trial in instructing the jury that by the law the defendants were bound to have a man on the rear end of the rear car of the train whilst moving reversely at the time and place of the accident; also in not charging the jury that there were two ways open for the deceased to have passed, one of which did not expose him to any risk, and that he was negligent in not taking that way; also, in charging the jury that the witnesses agreed that it would have been prudent to have had a man at the back of the car, the statement not being borne out by the evidence; and likewise, because the amount awarded was excessive in view of the fact that the jury found that the deceased might have avoided the accident and, even though the accident was principally due to the fault of the defendants, as it might have been avoided by the deceased had he taken proper precautions all the damages should not be borne by the defendants, but, damages having been assessed, a deduction should have been

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made proportionate to the fault of the deceased, and judgment should not have been entered up against the defendants in any greater sum than one half the amount so found.

T. Chase Casgrain K.C. and *Frederick Meredith K.C.* for the appellants.

Beaudin K.C. and *Mignault K.C.* appeared for the respondents but were not called upon for any argument.

The judgment of the Court was delivered by:

THE CHIEF JUSTICE (oral).—This appeal fails. The question of negligence was very properly left to the jury. There was *primâ facie* negligence on the part of the company in omitting to have a light on the rear end of the train and in this it failed in its duty. It is true that there has been a finding which might lead to the inference that there was contributory negligence on the part of the deceased, but the jury have also found that there was neglect of duty on the part of the company, and according to the law of the Province of Quebec the plaintiff is entitled to recover, the question of contributory negligence in that province merely affecting the assessment of damages, which are mitigated in such cases.

I adopt in its entirety the opinion expressed in the court below by Chief Justice Lacoste and am of opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

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

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

SARAH GRANT, ADMINISTRATRIX OF THE ESTATE OF DOUGALD GRANT (PLAINTIFF) ..... } APPELLANT;

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*May 7, 9.
*May 27.

AND

THE ACADIA COAL COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Working of mines—Statutory mining regulations—R. S. N. S. (5 ser.) c. 8—Fault of fellow-workmen.

The defendant company employed competent officials for the superintendence of their mine, and required that the statutory regulations should be observed. A labourer was sent to work in an unused balance which had not been fenced or inspected and an explosion of gas occurred from the effects of which he died. In an action for damages by his widow,

Held, reversing the judgment appealed from, Taschereau and Sedgewick JJ. dissenting, that as the company had failed to maintain the mine in a condition suitable for carrying on their works with reasonable safety, they were liable for the injuries sustained by the employee, although the explosion may have been attributable to neglect of duty by fellow-workmen.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc*, affirming the judgment at the trial by which the plaintiff's action was dismissed with costs.

The facts of the case are stated in the judgments reported.

Mellish for the appellant.

Newcombe K.C. and *Drysdale K.C.* for the respondents.

*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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TASCHEREAU J. (dissenting.)—The appellant is the widow of one Dougald Grant and this action was brought by her, as administratrix, on her own behalf as well as on behalf of her daughter, to recover compensation for injuries which caused the death of the said Dougald Grant, under chapter 116, Revised Statutes of Nova Scotia, fifth series, which is substantially a copy of "Lord Campbell's Act."

Dougald Grant was an employee of the defendant company, being a labourer at the defendant company's mine at Thorburn, in the County of Pictou. On the 13th of November, 1899, the said Dougald Grant was set to work in a portion of the said coal mine known as "No. 4 Balance," and, whilst at work in the said balance, an explosion occurred from gas. As a result of the said explosion, he was severely injured and, ultimately died from the burns then received.

In this action, the defendant company is charged with negligence in connection with the accumulation of gas in the said balance. Paragraphs four and five of the statement of claim charge the defendant company's officers with sending the said Grant into No. 4 balance without first examining the balance and assuring themselves that it was free from gas. Paragraph six sets out a regulation of the "Mines Act," whereby it is provided that a place in a mine not in actual course of working and extension shall be fenced off, and then charges the defendant company with neglect to fence off the said No. 4 balance, alleging that the same was not in actual course of extension, and alleges that the same was not in actual course of extension, and alleges an assumption of inspection both by the deceased and defendant company's officers, and charges that the neglect to fence off the said balance was negligence which caused the injuries. Paragraph

seven charges the defendant company with negligence in having an incompetent manager.

The defendant company denied all the allegations contained in the statement of claim, and pleaded that the negligence, if any, which caused the death of the said Grant, was that of a fellow-servant or fellow-servants in the common employ of the defendant company with the said Grant and, at the time, working with the said Grant.

The action came on for trial at Pictou before Chief Justice McDonald, with a jury, on the fifteenth of June, 1900, and, at the close of the plaintiff's case, the learned Chief Justice withdrew the case from the jury and directed judgment to be entered for the defendant company, on the ground that it appeared, to the satisfaction of the court, that the company operating the mine had appointed competent and careful men to act for them in connection with the management, and that the accident, or circumstances under which it took place, was attributable to the carelessness or inattention of fellow-workmen or servants.

From this judgment the plaintiff, appellant, appealed to the Supreme Court of Nova Scotia, but her appeal was dismissed.

The appellant has failed to convince me that there is error in the judgment of the Supreme Court of Nova Scotia she now appeals from.

The cause of the accident was clearly want of inspection of the place where the deceased was sent on the occasion in question. Such inspection was required by rule three, of the Nova Scotia Regulations of Mines, which reads as follows:

In every mine worked for coal or any stratified deposit, in which inflammable gas has not been found within the preceding twelve months, then, once in every twenty-four hours, a competent person or persons, who shall be appointed for the purpose, shall, within five hours before time for commencing work in any part of the mine,

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Taschereau J.

inspect that part of the mine and the roadways leading thereto, and shall make a true report of the condition thereof so far as ventilation is concerned; and a workman shall not go to work in such part until the same and the roadways leading thereto are stated to be safe.

Now, it seems to me clear, that it is simply because he was carelessly sent into a balance by one of the officials of the company, without an inspection having previously taken place, that Dougald Grant was injured. And, that being so, the negligence he suffered from was the negligence of a fellow-servant upon which this appellant has no action. The contention that there was a breach of the mining regulations, in that the defendant company's officers neglected to fence off balances that were not in actual course of working and extension, and that the fact of such neglect was proof of a defective system in operating the defendant company's mine, is well answered by the fact that the breach of the regulations as to fencing the balances not in course of actual extension did not cause or contribute to the accident, and cannot be said to be the proximate cause of the accident, nor can the accident be said to be the proximate, necessary or natural result of non-fencing. The fact of not fencing was not sufficient to bring about the result, and the fencing would not have been sufficient to hinder it.

It may well be contended that it was not the official who sent the deceased into the mine, but the inspector or examiner, or perhaps the underground manager, whose negligence caused the accident But whichever of them it was due to is immaterial, as they were all fellow-servants of deceased. They were, upon the evidence, competent men, and no negligence against the company itself is proved.

A verdict for the appellant could not have been sustained. I would dismiss the appeal with costs.

SEDGEWICK J. (dissenting).—The plaintiff is the administratix of one Dougald Grant and brings this action to recover damages by reason of the death of her husband who was killed by a gas explosion in the defendant's mine at Thorburn, Pictou County, N.S. Upon the trial before the Chief Justice of Nova Scotia, the case was withdrawn from the jury upon the ground that the plaintiff had failed to establish a case of negligence against the company, as distinguished from negligence by its servants, and gave judgment accordingly.

Upon appeal. this judgment was affirmed by Weatherbe, Ritchie, Townshend and Meagher JJ., Graham J. dissenting.

Coal mines in Nova Scotia are governed and worked under "The Mines Regulations Chapter" (Revised Statutes, 5th ser., cap. 8) and by section 25, sub-sec. 4, the following provision or rule is made:

> All entrances to any place in a mine * * * not in actual course of working and extension, shall be properly fenced across the whole width of such entrance so as to prevent persons inadvertently entering the same.

And by sub-sec. 31, it is provided that

> in the event of any contravention or non-compliance with any of the said general rules in the case of any mine by any person whomsoever being proved, the owner, agent and manager shall each be guilty of an offence against this chapter, unless he prove that he had taken all reasonable means by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine to prevent such contravention or non-compliance.

The explosion which occasioned the accident occurred in a place in the mine called a "balance," which balance was not in actual course of working or extension at the time and had not been worked for six months before, during which time it had not been fenced. As the place was not in actual course of working, the examiner, one of the company's em-

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ployees and an official with specified statutory duties, did not inspect it on the morning of the accident, as it was his duty to do and as he did in the case of the "working places" in the mine, to see that it was free from gas. Consequently, the deceased was sent to work in the place without any inspection having been made, the overman who gave the order assuming that the place had been inspected for the reason that it was unfenced. There was gas in the balance. Upon his entering, his lighted lamp ignited the gas and the fatal explosion occurred.

The mine, as I have said, was worked under the provisions of the Mines Act. So far as the directorate of the company was concerned, everything was done that they could do. They employed competent officers duly certified by the statutory authority as to their fitness and knowledge. These officers had been supplied with the regulations and were aware of their contents and purported to work the mine under them.

So far as I can see, the only negligence proved was that of the underground officials in not fencing the balance and its consequent non-inspection. This was undoubtedly negligence, but the negligence of a fellow-servant of the deceased not that of the company. Except upon the ground about to be alluded to, there was no actual personal negligence of the master, and that must be established in order to place a liability upon him.

The judgment, in my view, must be affirmed for two reasons.

There is no evidence that the accident was occasioned by reason of the negligent act of non-fencing. The evidence shewed that, even if the place in question had been fenced, the deceased would have entered, obeying the order of the overman, and the accident would still have happened. Whether or not the gate

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was opened or closed, it is manifest that that had nothing to do with what occurred; the immediate direct cause of the accident—its only cause—was his burning lamp and the presence of gas.

Nor was there any defect of system here. The law is that a negligent system may make the employer liable, as stated by Lord Halsbury in *Smith* v. *Baker & Sons* (1), at page 339, but the alleged default on the part of the company's underground servants in the matter of fencing, even if that had been the cause of the accident, was not a defect in system, but the negligent carrying on, in a matter of detail, of a proper system. It is not necessary here to discuss what knowledge or conduct on the part of the company itself, in a matter of this kind, would make it liable. It is enough to say that no such knowledge or conduct has been proved or can be imputed here.

I have cited the clause making a breach of any of the statutory regulations an offence merely for the purpose of suggesting that an act or omission, lawful at common law, is not necessarily evidence of negligence in a civil action, even although prohibited by statute and made subject to penal consequences.

See *The Montreal Rolling Mills Co.* v. *Corcoran* (2), in this court, so far as the Province of Quebec is concerned, and the judgment of Lord Chelmsford in the House of Lords (3), as to the general law.

The appeal should be dismissed with costs.

GIROUARD J.—I entirely concur in the judgment of my brother Davies.

DAVIES J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia (Mr. Justice Graham, dissenting), confirming the ruling of the learned Chief

(1) [1891] A. C. 325.
(2) 26 Can. S. C. R. 595.
(3) *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326 at p. 335.

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Justice, who tried the cause, withdrawing it from the jury at the conclusion of the plaintiff's evidence on the ground that it was proved to his satisfaction that the defendants had employed competent men to act for them in the management and that the accident was attributable to the negligence of the deceased's fellow-servants.

The facts of the case may be stated very shortly. The deceased workman was employed as an ordinary labourer in defendants' mine and, on the morning of the accident, the 13th day of November, 1899, was ordered by the defendants' "overman" to go to work in No. 4, balance. He did so and was almost immediately after killed by an explosion of gas which had accumulated there.

The officials of the mine, so far as its general working was concerned, consisted of the general manager, the underground manager, the overman and the inspector. The mine was subject to the Nova Scotia statute for the Regulation of Mines, ch. 8, Rev. Stats. N.S. (5th Ser.), and the general system prescribed by the statute for the working of the mines was contained in the "general rules" enacted by section 25 and which were directed "to be observed so far as is reasonably practicable in every mine."

The first rule provided generally for ventilation as follows:

(1) An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless noxious gases to such an extent that *the working places* of the shafts, levels, stables, winzes, sumps and workings of such mine, and the travelling roads to and from such working places, shall be in a fit state for working and passing therein.

This, I take it, was nothing more than a statutory declaration of the common law duty of the mine-owner. He is bound to see that his works are suitable for the operations he carries on at them being carried on with reasonable safety.

The second and third rules prescribe generally the times and manner in which the mines should be inspected and the fourth rule relates to the precautions with regard to places not in actual course of working. It reads:

(4) All entrances to any place in a mine worked for coal or any stratified deposit not in actual course of working and extension shall be properly fenced across the whole width of such entrance, so as to prevent persons inadvertently entering the same.

The place where Grant was killed was admittedly one of those required by the rule to be fenced and was not fenced. Neither had it been inspected to ascertain whether it contained noxious gases and I cannot doubt that it came within rule one and should have had an adequate amount of ventilation produced in it so as to render harmless noxious gases and to be in a fit state for working in. As the result shewed, no such adequate ventilation was provided for.

The system adopted by the defendant company can only be gathered from the evidence of their two officers, who were examined on the part of the plaintiff, but this evidence, in the absence of any explanation or denial, we are bound to accept. The inspector, McKay, says he worked under the Act and the instructions he had received from the general manager on his appointment, twelve years previously. These instructions had not been altered by the present or the intervening managers. McKay says:

He (Turnbull) gave me *the regulations to go by as far as the working places were concerned and, when I had time, I was to go to places that were idle, when I got a chance, and have an eye on the places that were idle and see that no roof fell on the stock or on the roadway.*

He further goes on to state that, for some months, he had not inspected the place or cutting where the accident occurred for gas because he did not

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regard it as a working place within his instructions and the Mines Regulations Act. In his examination he states explicitly that he does not report to the shaftmen or the labourers, "that he has nothing to do with them," but simply reports to and inspects for the pickmen and coal-cutters, and gives as his reasons for not inspecting No. 4 balance,

> I did not consider it to be a working place and, besides, I had instructions from the first manager that I worked under.

Whatever might have been the duties of the inspector, if he had simply been appointed to carry out the regulations, it seems clear that, under his instructions, his duties, so far as inspecting for gas was concerned, were limited to the inspection of such places as were in actual working. This place where Grant was killed was not, therefore, either fenced off, as provided for by the regulations, or inspected, as, it seems to me, they also provide for. The system under which, for twelve years, the mine had been carried on did not provide for these reasonable precautions for safety. Mr. Justice Weatherbe intimated in his judgment, (p. 34), that the evidence showed there were "other inspectors besides McKay for *unused* places," and that they may all have had their instructions as McKay had and that he was not in a position to say there was a defect in the inspection system from the evidence of the directions of the general manager Turnbull to only one of his servants. And, if the facts were as the learned judge assumed and stated, I should be inclined to agree with him. But I have searched in vain for any evidence whatever of other inspectors than McKay and I certainly gathered from the argument at bar that there were none.

The overman, McDonald, who was the only other official examined, says that he ordered Grant to go to

work in this balance or cutting, after asking the manager whether the place would be all right, who replied "that there would be nothing in there." He further says that he, himself, thought the place had been treated as a working place and examined by McKay right along, and he explained why he thought so.

> Because it contained stock and was not fenced, and I understood from the manager that it was safe ;

and he further says, that

> if the place had been fenced, he would have had it examined to see that it was safe

before commencing work. This witness went on to say that, immediately after the death of Grant, this No. 4 balance had been fenced, but that another explosion of gas subsequently took place in it and that, in his opinion, the cause was

> that the brattice across the main level had been knocked down and that caused the collection of gas in No. 4.

And he explains that he came to that conclusion because when the brattice was replaced it at once cleared the "balance." As the balance had not been examined or inspected for days before the accident, it was, of course, impossible to say whether or not the same cause, the brattice being down, had produced the result. But it is a reasonable inference which might fairly be drawn by the jury from the evidence.

As to the law on this subject, I agree with the judgment of Mr. Justice Graham who dissented from the majority. I cannot doubt that, while the master is not liable for the negligence of his officers, he is

> bound to see that his works are suitable for the operations he carries on at them being carried on with reasonable safety,

and this is a duty that no officer's negligence can relieve him of.

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The observations of the learned law lords who decided the case of *Smith* v. *Baker & Sons* (1) are directly in point. The Lord Chancellor, on page 339, says:

I think the cases cited at your Lordship's bar of *Sword* v. *Cameron* (2), and *Bartonshill Coal Co.* v. *McGuire* (3), established conclusively the point for which they were cited, that a negligent system or a negligent mode of using perfectly sound machinery, may make the employer liable, quite apart from any of the provisions of the "Employers' Liability Act." In *Sword* v. *Cameron* (2), it could hardly be doubted that the quarryman who was injured by the explosion of the blast in the quarry was perfectly aware of the risk, but, nevertheless, he was held entitled to recover, notwithstanding that knowledge.

And Lord Watson, at page 353, says:

It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this House, by Lord Cranworth, and other noble and learned Lords, that it is needless to quote authorities in support of it. But, as I understand the law, it was also held by this House, long before the passing of the Employers' Liability Act (4), that a master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery, than for injuries caused by a defect in the machinery itself. In *Sword* v. *Cameron* (2), the first Division of the Court of Sessions found a master liable in damages to a quarryman in his employment who was injured by the firing of a blast before he had time to reach a place of safety of shelter although it was proved that the shot was fired in accordance with the usual and inveterate practice of the quarry. That case was cited in *Bartonshill Coal Co.* v. *Reid* (5), in support of the proposition that the doctrine of collaborateur was unknown to the law of Scotland; but Lord Cranworth pointed out that the decision did not turn upon the negligence of the fellow-workman who fired the shot, and expressly stated that it was justifiable, on the ground that "the injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosions."

The Lord Chancellor (Chelmsford) expressed the same view in *Bartonshill Coal Co.* v. *McGuire* (3). The judgment of Lord Wensleydale in *Weems* v. *Mathieson*, (6) clearly shows that the noble and learned Lord

(1) L. R. [1891] A. C. 325.
(2) 1 Ct. Sess. Cas. (2 ser.) 493.
(3) 3 Macq. 300.
(4) 43 & 44 Vict. ch. 42 (Imp.)
(5) 3 Macq. 266.
(6) 4 Macq. 215.

was also of opinion that the master is responsible in point of law, not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used.

And Lord Herschell, page 362, says:

It is quite clear that the contract between employer and employed involves, on the part of the former, the duty of taking reasonable care to *provide proper appliances and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk.* Whatever the dangers of the employment which the employed takes, amongst them is certainly not to be numbered the risk of the employer's negligence and the creation or enhancement of danger thereby engendered. If then, the employer thus fails in his duty towards the employed, I do not think that because he does not straightway refuse to continue his services it is true to say that he is willing his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim "*volenti non fit injuria*" becomes applicable.

Now, the learned Chief Justice McDonald, in withdrawing this case from the jury, did so on two grounds which I cannot assent to without qualification; first, that, where a company appoints competent men to act for it and the accident is attributable to the negligence of fellow-workmen, the injured party cannot recover. Such a general proposition is only true when and after it is shewn that the company has provided a proper place for the men to work and carry on its operations so as not to subject the workmen to unnecessary risk. A negligent system or a negligent mode of using perfectly sound machinery might, as the Lord Chancellor says, make the employer liable and I altogether challenge the application of the maxim "*volenti non fit injuria*" to the facts of this case.

One of the learned judges in the court below asks;—What is the question which should have been submitted to the jury? It does not seem difficult to frame such a question. The jury might be asked;—

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Whether or not the system under which the company carried on its operations subjected the deceased workman to unnecessary risks, and, if so, in what respect did it do so? Whether or not the system provided for proper inspections and examinations or fencing off of the balance No. 4, where Grant was put to work, and, whether, as a fact, it had been examined and inspected before the accident? In this case, as I read the evidence, I think there was quite sufficient to justify the jury in finding the injury to Grant to have been the result of a defective system which did not adequately provide for the workman's protection inasmuch as, in direct violation of the statute, it seems to have left this balance or cutting entirely unprovided with a protective fence and failed to have any examination of the balance or cutting made, before allowing men to work there, so as to see whether the current was flowing through, and, lastly, had for many years confined the inspection for dangerous gas to those "working places in actual operation" and to the entire neglect of other places in which men were occasionally put to work, but which were not in actual working operation, as in the "balance" where this accident happened. The company may, of course, be able to explain away completely the evidence already given. I, of course, decide upon the reasonable and fair inference which a jury might draw from the uncontradicted and unexplained evidence given for the plaintiff.

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

MILLS J.—I think in this case that the appeal should be allowed with costs and a new trial should be given. It is not enough that the company should have given proper directions to its servants, but it is responsible

for their performance It is its duty to see that those directions are carried out. *Philadelphia and Reading Railroad Co.* v. *Derby* (1).

The master who puts a servant in a place of great responsibility and commits to him the management of his business, or intrusts him with the discharge of important duties in which the lives of other servants are involved, cannot escape from the discharge of those duties which the law imposes upon himself by simply entrusting their performance to another. The law imposes, in this case, certain duties upon the company for the better security of its servants. It requires the performance at its hands and it makes the company responsible if there is neglect. It is in the public interest that this should be so.

In the case of *Warburton* v. *The Great Western Railway Company* (2) where the plaintiff, while engaged in his usual employment, was injured by the negligence of the defendants' engine driver, in shunting a train without signal, the judgment of the court was delivered by Kelly C.B., who says:—

> We are of opinion that inasmuch as the injury sustained by the plaintiff was occasioned by the servant of the defendant, not in the course of a common employment or of operation under the same master, but by negligence in the discharge of his ordinary duty to the defendant alone, this case is distinguishable from all which have been decided in relation to the above doctrine of exemption and that therefore, the action is maintainable.

To exempt a company from all responsibility in a case of this kind would tend to defeat the legislation had, to give greater security to life, in carrying on mining operations. It is its duty to see that the provisions of the law are faithfully complied with. It is not a duty in a common employment, but an antecedent duty, the performance of which the law requires

(1) 14 How. (U.S.) 468. (2) L. R. 2 Ex. 30.

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at the hands of the company, which, in this case, was not discharged.

Appeal allowed with costs.

Solicitor for the appellant: *H. Mellish.*

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

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*May 9.

*May 27.

MARY D. S. CORNWALL.....Appellant;

AND

THE HALIFAX BANKING COMPANY.....Respondents.

IN RE, ESTATE OF IRA CORNWALL, DECEASED.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Insurance—Application—Beneficiary not named in policy—Right to proceeds—Accident policy—Act for benefit of wives and children.

Where through error and unknown to the insured, the beneficiary mentioned in the application for insurance is not named in the policy he is, nevertheless, entitled to the benefit of the insurance.

Judgment appealed from reversed, Davies and Mills JJ. dissenting.

Per Sedgewick J. The New Brunswick Act (58 Vict. ch. 25) for securing to wives and children the benefit of life insurance applies to accident insurance as well as to straight life insurance.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the decree of the Probate Court which declared that the proceeds of a policy on the life of the late Ira Cornwall belonged to his estate and not to his widow.

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*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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The facts of the case are fully set out in the opinions of the judges on this appeal.

C. J. Coster for the appellant.

J. R. Armstrong, K.C., for the respondents.

TASCHEREAU J.—This is an appeal from a judgment of the Supreme Court of New Brunswick affirming a decree of the judge of probate of St. John by which, upon the hearing of passing accounts in the insolvent estate of the late Ira Cornwall, the appellant, his widow, on the application of the respondent, creditor of the estate, was ordered to account for a sum of one thousand dollars which she has received from an insurance company upon a policy for two thousand dollars on her deceased husband's life. She claims that she was the beneficiary under that policy. The creditors, on the other hand, claim that the amount of the insurance passed into the estate of her late husband.

The substantial facts of the case are not complicated.

On the twenty-sixth day of February, 1896, the late Ira Cornwall applied in writing for an accident insurance, the sum to be insured two thousand dollars, policy to be payable in case of death by accident under the provisions thereof to present appellant. The company, however, issued their policy payable on its face to the personal representatives of the said Ira Cornwall.

Hugh Scott, the chief agent for Canada of the insurance company, stated as follows in his evidence:—

Q. Why did you not endorse on the policy that it was payable to Mary D. S. Cornwall, wife of the deceased, as expressed in application?

Ans. It is not the practice of this association to do so, and it never has done so under our management in Canada.

Under such an application and our policy we would pay the beneficiary only named in the application.

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After receiving the policy from the company, the said Ira Cornwall, believing that it was payable to his wife as he had ordered it to be, handed it to her and told her that it was payable to her. She did not look at it, but kept it in her possession as her own until after his death, after which it was found that it was through error on its face payable to his personal representatives.

On the 26th July, 1897, while the said policy was in force, the said Ira Cornwall was found drowned, in the River St. John, under circumstances which induced the company to believe that there had been a breach of the condition in the policy against suicide.

The appellant then applied to the company for payment of the amount of the policy to her as beneficiary.

The company thereupon set up merely the defence of suicide and refused to pay the amount of the insurance. Under the New Brunswick law, an action could not be brought in the name of the beneficiary. Administration had, therefore, to be taken out on Ira Cornwall's estate to obtain a nominal plaintiff and, upon action by the appellant as such administratix for the two thousand dollars covered by the policy, the insurance company compromised her claim and paid her the one thousand dollars now in controversy.

The judge of probate determined that as, in law, the policy on its face was not payable to the appellant, he could not recognise the equitable or beneficiary right she claims and, therefore, ordered her to account for that sum to the estate. With deference, I think that this determination, though affirmed by the Supreme Court of the province, is erroneous.

As I view the case, it seems to me to be a very simple one. First, it cannot but be conceded that principles of equity govern the administration of estates in probate courts in New Brunswick in the same way, in effect, as

they would if the estate was being administered in equity. *Harrison* v. *Morehouse* (1). Now, it seems to me incontrovertible, upon the evidence on record, from the facts found and the fair inferences therefrom, that the deceased believed that the policy he received from the company was payable in the case of death to the appellant, as he had directed in his application, and agreed to receive the policy exclusively upon that belief. Then, the company themselves admit that by their real contract the appellant was, in case of death, to be the sole beneficiary of the insurance. That the policy is not in terms payable to her is, therefore, clearly a mutual mistake. And that, under these circumstances, a court of equity would not refuse a reformation of the policy so as to make it payable to appellant as both parties to it intended it to be, seems to me plain.

That, in my opinion, concludes the case. The learned counsel for the respondents invoked the acquired rights of the creditors, and argued that as, at the death of Ira Cornwall, these one thousand dollars had passed to his estate, the appellant was now precluded from asserting any equitable rights in the matter she might have had during his life. But that is a *petitio principii*. It is assumed that she was not *ab initio* the benificiary of this insurance. Now, that is the very question in issue. And by determining, as we do, that she was, at the date of the policy, the sole beneficiary thereunder, it follows that, at the death of her husband, the amount of the policy did not pass into his estate.

The respondents' attempt to imply a waiver or an estoppel against the appellant from certain allegations she made in her petition for letters of administration entirely fails. It would be most unfair to declare her

(1) 4 N. B. Rep. 584.

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precluded from now asserting her just rights merely because she made a mistake of law in such a document which, as to the respondents, was *res inter alios acta.*

The appeal is allowed with costs; a decree to be entered that the $1,000 in question formed no part of Ira Cornwall's estate. Costs in all the courts will be against the respondents.

SEDGEWICK J.—I concur in the judgment of my brother Taschereau, but I think it desirable to make a few observations relating to a point upon which he is silent.

As he has shewn, the policy in question is one which a court of equity would, under the circumstances, rectify upon the ground of mutual mistake, the assured thinking that he was to receive a policy payable to his wife and the company thinking that they were giving him a policy payable to his wife.

Assume then that the policy in question is a policy in which the widow is named as the beneficiary; what rights does the widow possess under it? It is clear that, at law and apart from the statute, she could not sue upon it because there is no privity between her and the company. But the company has contracted with the assured that it, upon his death, will pay the widow. The contract is clearly fulfilled and the company's liability has ceased if it specifically performs its contract, namely, pays the insurance money to the widow. Upon such payment, in the absence of special circumstances or arrangements to the contrary, the transaction is forever closed.

I have been unable to find a single case in England or elsewhere where, under such circumstances, moneys so paid were ever declared to be estate funds payable to the executors or administrators of the assured. It is only by virtue of the technical rule as to privity of

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contract that the insurance moneys could ever come into their hands and, coming into their hands, it comes there ear-marked, and then, subject to the rights of the beneficiary named in the policy and forming no part of the general estate.

Against this proposition has been cited the celebrated case of *Cleaver* v. *Mutual Reserve Fund Life Association* (1), where one Maybrick insured his life for the benefit of his wife, Mrs. Maybrick, who afterwards murdered him. In that case the insurance company endeavoured to escape liability upon the ground that inasmuch as the beneficiary, Mrs. Maybrick, had murdered her husband, it was not liable. The court, however, held that while, on grounds of public policy, Mrs. Maybrick could not recover the money, yet the insurance company was, nevertheless, liable to the estate of which the insurance moneys in that event would form part.

It is evident in that case that, had Mrs. Maybrick been an innocent woman, she would have been both at law and in equity entitled to the money. The insurance company had contracted to pay her, and they would have paid her except for her conduct. It is true that Lord Esher in his judgment states that at common law in a case like the present the money would, in the event of non-payment by the insurance company to the beneficiary, become the estate property, but that statement was not necessary to determine the case, and appears to have been inadvertently made, because Fry L. J. states that the effect of the transaction was, in his opinion, to create a contract by the defendants with James Maybrick that the defendants would, in the event which has occurred, pay Florence Maybrick the £2,000 insured. *It would be broken by non-payment* to her, and he never suggests that in the event of payment to her the estate could recover it back.

(1) [1892] 1 Q. B. 147.

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But if there were any doubt about this, I think the question is settled by ch. 25 of 58 Vict., "An Act to secure to wives and children the benefit of life insurance." It is the enactment here of the same law which prevails in England and in most of the provinces of Canada. It expressly gives the beneficiary, if a wife or child of the deceased, a beneficial interest in the insurance moneys. The only difficulty suggested is that the policy here is not a life insurance policy, but an accident insurance policy, and section 3 of the Act, providing that its provisions shall apply

to every lawful contract of insurance in writing now in force or hereafter effected, which is based on the expectation of human life,

does not apply.

I cannot see why the contract here is not based upon the expectation of human life. The contract, so far as this question is concerned, is that, should the assured die by accident within a year from its execution, the company will pay the amount insured. It expects him to live. It takes the chance and runs the risk of an accident bringing him to an untimely end, so that, in my view, the statute clearly applies.

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

DAVIES J. (dissenting).—For the reasons given by Mr. Justice Barker in the Supreme Court of New Brunswick, speaking for the majority of that court, and to which I feel I can add little, if anything, useful, I am of opinion that this appeal should be dismissed with costs.

To my mind the reasoning of Mr. Justice Barker is conclusive. There was admittedly no mutual mistake in the issue of the policy by the company in the form it did and making the amount insured payable in case of death by accident to the executors of the assured.

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And I thoroughly concur with Mr. Justice Barker that, the company having paid the sum of $1,000 as a compromise to the administratrix of the estate in an action brought by her to recover the money on the policy, the evidence of Mr. Scott as to the general practice of the insurance company in paying the beneficiary only, in cases where an application for insurance named a beneficiary and the policy issues payable instead to the insured's executors, is of no importance in the present case,—even if it should have been admitted at all.

There having been no mutual mistake there can of course be no reformation. Even if the policy was reformed as now contended for, unless the New Brunswick Statute "Securing to wives and children the benefit of life insurance" was held applicable to an "accident" policy, the reformation of the policy would not avail the appellant.

I quite agree with Mr. Justice Barker that, outside of the statute and in the absence of any independent act of the assured declaring a trust respecting the moneys payable under the policy for the benefit of his wife or assigning them to or for her benefit, the proceeds of the policy would go to the estate. But as the proper construction of this statute, and its application to such a policy as the one in question, was not argued before us and, in the view I take of this appeal, it is not necessary to decide this question, I express no opinion upon it.

MILLS J. (dissenting).—I am of the same opinion as my brother Davies.

Appeal allowed with costs.

Solicitor for the appellant: *C. J. Coster.*

Solicitor for the respondents: *J. R. Armstrong.*

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*May 26, 27.

BERTRAND J. CLERGUE AND THE LAKE SUPERIOR POWER COMPANY (PLAINTIFFS)..... } APPELLANTS

AND

ELIZABETH MURRAY AND DAVID MURRAY (DEFENDANTS). } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Vendor and purchaser—Principal and agent—Sale of land—Authority to agent—Price of sale.

M., owner of an undivided three-quarter interest in land at Sault Ste. Marie, telegraphed to her solicitor at that place "Sell if possible, writing particulars; will give you good commission." C. agreed to purchase it for $600 and the solicitor telegraphed M. "Will you sell three-quarter interest sixty-seven acre parcel, Korah, for six hundred, half cash, balance year? Wire stating commission." M. replied "Will accept offer suggested. Am writing particulars; await my letter." The same day she wrote the solicitor, "Telegram received. I will accept $600, $300 cash and $300 with interest at one year. This payment I may say must be a marked cheque at par for $300, minus your commission $15, and balance $300 secured." The property was incumbered to the extent of over $300 and the solicitor deducted this amount from the purchase money and sent M. the balance which she refused to accept. He also took a conveyance to himself from the former owner paying off the mortgage held by the latter. In an action against M. for specific performance of the contract to sell;

Held, affirming the judgment of the Court of Appeal, that the only authority the solicitor had from M. was to sell her interest for $585 net and the attempted sale for a less sum was of no effect.

Held further, that the conveyance to the solicitor by the former owner was for M.'s benefit alone.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the defendants.

* PRESENT:—Sir Henry Strong C. J. and Taschereau, Sedgewick, Davies and Mills JJ.

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

Ritchie, *K.C.*, and *Marsh*, *K.C.*, for the appellants. The solicitor was authorized to sell the fee simple of Mrs. Murray's interest and not merely the equity. *Ireland* v. *Livingston* (1).

If Mrs. Murray intended to sell subject to incumbrances she should have specially instructed the solicitor to that effect. *Torrance* v. *Bolton* (2); *Phillips* v. *Caldcleugh* (3); Armour on Titles, (2 ed.) p. 141. And see also *Cato* v. *Thompson* (4); *Gamble* v. *Gummerson* (5); *Cameron* v. *Carter* (6); Armour on Titles, (2 ed.) pp. 136-7.

Aylesworth, *K.C.*, for the respondents. The solicitor appears to have acted more in the interest of the purchaser than in that of his client. That, in itself, is a ground for refusing specific performance. *Hesse* v. *Briant* (7).

THE CHIEF JUSTICE (oral).—It is impossible that there can be any disturbance of the decree made at the trial and affirmed by the Court of Appeal. We agree with every thing said in both courts, though the two judgments did not proceed on precisely the same grounds.

Speaking for myself and without entering into any discussion of the evidence which was fully dealt with by Meredith C.J., at the trial, and Mr. Justice Lister, in appeal, I am of opinion that Simpson had no authority to enter into any contract for sale of the land for a less sum than five hundred and eighty-five dollars net, and I agree with Chief Justice Meredith that any-

(1) L. R. 5 H. L. 395.
(2) L.R. 14 Eq 124; 8 Ch. App. 118.
(3) L.R. 4 Q.B. 159.
(4) 9 Q.B.D. 616.
(5) 9 Gr. 193.
(6) 9 O.R. 426.
(7) 6 DeG. M. & G. 623.

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thing done by him, if he did do anything, looking to the receipt of a less sum was entirely without authority. On that ground alone I would dismiss the appeal.

In the second place, I am of opinion that, in point of fact, no contract was entered into (I do not advert to the distinction between written and parol contracts). There was none by Simpson for a sale for five hundred and eighty-five dollars net, in other words, no agreement at all in point of fact for a sale at that sum.

As to part performance, I do not think the argument on that head calls for any answer. There is nothing in it.

Having regard to the decision in *Hesse* v. *Briant* (1), referred to by counsel for the respondent, I do not see how it would be possible, were we in other respects in the appellants' favour, to order specific performance in this case. Here was an agent with authority to sell for a certain price, and whose duty it was to get a higher price if he could, (and it must be remembered that he was a solicitor, whose duty towards his client was higher than that of a mere agent), and he was all the time acting as solicitor of the purchaser for whom he had made it his duty and his interest to do his best without regard to the interests of the respondent, who was in ignorance of the fact that Simpson was acting for the appellant. On that ground too, I would dismiss the appeal.

Whatever effect it may have on other litigation, which we are told is pending, I think it right to add that any conveyance made to Simpson was for the benefit of Mrs. Murray and as a trustee for her.

The appeal is dismissed with costs.

TASCHEREAU and SEDGEWICK JJ. concurred in the judgment dismissing the appeal with costs.

(1) 6 DeG. M. & G. 623.

DAVIES J.--In this case the alleged contract, of which it is sought to enforce specific performance, is to be gathered from the telegrams and correspondence to and from one Simpson, alleged to be an agent of the plaintiffs and the defendants, Mr and Mrs. Murray, in the latter part of January, and the beginning of February, 1899. I am clearly of the opinion that the defendants' interpretation of the offer made by them in this correspondence was the correct one and that Mrs. Murray was entitled under it to receive five hundred and eighty-five dollars net for her interest in the property which she was offering to sell. From the dates above mentioned until the sixth of October, when Bradshaw, the solicitor in Winnipeg, on behalf of Mrs. Murray, wrote to Simpson the letter of that date, the offer may be said to have been open. Simpson put an entirely different construction upon this offer to sell and claimed that, under it, Mrs. Murray was only entitled to receive two hundred and seventy-five dollars and thirty-two cents, instead of the five hundred and eighty-five dollars claimed by her. The minds of the negotiating parties, therefore, never were *ad idem*.

I had doubts at first whether or not the letter of the sixth of October really amounted to a withdrawal of the offer of sale. But, on giving careful consideration to the correspondence, I have no doubt that it did, and that it was intended to end, and did end, the negotiations.

The subsequent willingness of Simpson to accede to Mrs. Murray's offer, it having been withdrawn, could not, of course, create any new contract.

On these grounds I concur in the dismissal of the appeal.

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

Appeal dismissed with costs.

Solicitors for the appellants: *Simpson & Rowland.*

Solicitors for the respondents: *Scott & Scott.*

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*May 27.

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

AND

EDMUND R. MILLER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence — Railway — Collision — Duty of engineman—Rules—Contributory negligence.

By rule 232 of the Grand Trunk Railway Company, "conductors and enginemen will be held responsible for the violation of any of the rules governing their trains, and they must take every precaution for the protection of their trains even if not provided for by the rules." By rule 52, enginemen must obey the conductor's orders as to starting their trains unless such orders involve violation of the rules or endanger the train's safety, and rule 65 forbids them to leave the engine except in case of necessity. Another rule provides that a train must not pass from double to single track until it is ascertained that all trains due which have the right of way have arrived or left. M. was engineman on a special train which was about to pass from a double to a single track and when the time for starting arrived, he asked the conductor if it was all right to go, knowing that the regular train passed over the single track about that time. He received from the conductor the usual signal to start and did so. After proceeding about two miles his train collided with the regular train and he was injured. In an action against the company for damages in consequence of such injury:

Held, affirming the judgment of the Court of Appeal, that M. was not obliged, before starting, to examine the register and ascertain for himself if the regular train had passed, that duty being imposed by the rules on the conductor alone, that he was bound to obey the conductor's order to start the train, having no reason to question its propriety, and he was, therefore, not guilty of contributory negligence in starting as he did.

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*PRESENT;—Sir Henry Strong C.J. and Taschereau, Sedgewick, Davies and Mills JJ.

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GRAND TRUNK RWAY. CO. v. MILLER.

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

The only question raised on the appeal was whether or not the plaintiff, Miller, was guilty of contributory negligence in starting the train, the engine of which was in his charge and which was passing from a double to a single track, on receiving the signal from the conductor, without first ascertaining for himself that the single track was clear. The ground on which the company contended that it was his duty either to make specific inquiries of the conductor as to the whereabouts of train No. 86, which should pass about that time, or to examine the register for himself, was that rule 232 made him equally responsible with the conductor for violation of any of the rules and imposed upon the both the duty of taking every precaution for the safety of their trains. The rules affecting the cases are set out or summarized in the above headnote.

Walter Cassels, *K.C.*, and *Rose*, for the appellants, referred to *Baster* v. *London & County Printing Works* (1) and *Bunker* v. *Midland Railway Co.* (2).

Clark, *K.C.*, and *Campbell*, for the respondent, were not called upon.

THE CHIEF JUSTICE (oral). This appeal must be dismissed. The judgment of Mr. Justice Osler, in the Court of Appeal, contains this passage:

It appears to me that unless we can hold that the plaintiff was to blame for not asking the conductor specially as to the first part of the train No. 86, the evidence fails to connect him with the negligence which caused the accident. The rules do not require him to examine the train register. On the contrary, they require him not to leave his engine except in case of necessity, and, as the obligation to examine

(1) [1899] 1 Q. B. 901. (2) 31 W. R. 231.

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The Chief Justice.

the register is expressly thrown upon the conductor, saying nothing of the engineer, it must be inferred that, where there is a conductor, there is no necessity for the engineer to leave his engine in order to do so.

Then, by rule 52, he is bound to obey the orders of the conductor as to starting the train, unless they endanger the safety of the train or require violation of rules.

I agree with my brother Street in thinking that the exception depends upon the knowledge or reasonable belief of the engineer of the danger or impropriety of the conductor's order. I see nothing in the rules which makes it imperative upon him to leave his engine in order to verify its accuracy.

We entirely concur in these observations and adopt them as the reasons for our judgment on this appeal.

The opinions of the other judges, in the Court of Appeal, were in much the same sense.

The appeal is dismissed with costs.

TASCHEREAU J. concurred.

SEDGEWICK J.—I concur. I think there was no evidence of negligence in this case on the part of the engineer.

DAVIES and MILLS JJ. also concurred in dismissing the appeal.

Appeal dismissed with costs.

Solicitor for the appellants: *John Bell.*

Solicitors for the respondent: *McPherson, Clark, Campbell & Jarvis.*

THE TOWN OF AURORA.....APPELLANT; 1902

AND *May 22,
*June 9.

THE VILLAGE OF MARKHAM.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—60 & 61 *V. c.* 34—*Quashing by-law—Appeal de plano—Special leave.*

The appeals to the Supreme Court from judgments of the Court of Appeal for Ontario are exclusively governed by the provisions of 60 & 61 Vict. ch. 34 and no appeal lies as of right unless given by that Act.

The Supreme Court will not entertain an application for special leave to appeal under the above Act after a similar application has been made to the Court of Appeal and leave has been refused.

MOTION for special leave to appeal from a judgment of the Court of Appeal for Ontario (1) quashing a by-law of the Town of Aurora.

The by-law in question provided for a bonus to persons proposing to establish an industry in the town and was assented to by the ratepayers. As the persons entitled to the bonus were, when it was passed, carrying on the same industry in the Village of Markham, that corporation moved the High Court of Justice for an order to quash it which motion was refused but, on appeal, the by-law was quashed by the Court of Appeal and the Town of Aurora sought to appeal from the judgment quashing it to the Supreme Court of Canada.

Aylesworth K.C. for the motion.

Raney contra.

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*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, Davies and Mills JJ.

(1) 3 Ont. L. R. 609.

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THE CHIEF JUSTICE —The municipal council of the Town of Aurora passed a by-law granting a bonus to persons who proposed to establish a certain industry in that municipality. The by-law, having passed the council, was duly assented to by a majority of the ratepayers of the municipality according to the tenor of the Municipal Act. It appeared that, at the time of the passing of the by-law, the same persons had already established and were carrying on the same industry, which they proposed to establish in Aurora, in the Village of Markham. The High Court of Justice refused to quash the by-law in question, whereupon an appeal was taken to the Court of Appeal which court allowed the appeal and directed the by-law to be quashed.

The Town of Aurora now moves for leave to appeal to this court.

Upon the argument of the motion it was suggested that leave to appeal was not requisite inasmuch as it was open to the applicants to appeal *de plano*. We are of opinion that, as regards the Province of Ontario, there can be no appeal in the case of an application to quash a municipal by-law without leave so to do having been previously granted either by the Court of Appeal or by this court.

Under the Act originally constituting this court it was by section 24 authorized to entertain appeals

> in any case in which a by-law of a municipal corporation has been quashed by a rule or order of court.

By this Act no leave to appeal was required.

Subsequently, by statute 60 and 61 Vict. c. 34, Parliament enacted that no appeal should lie to the Supreme Court of Canada from any judgment of the Court of Appeal of Ontario except in certain enumerated cases amongst which proceedings to quash by-

laws were not included. It then proceeded to provide that there might be an appeal

in other cases where the special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last mentioned court is granted.

In the face of this provision it is manifest that the unqualified jurisdiction to entertain appeals in this class of cases conferred by the original act is restricted and is by it limited to those in which leave to appeal is first obtained either from the Court of Appeal or from this court.

It appears that in the case before us the Court of Appeal upon a motion made for the purpose has formally refused leave to appeal.

It is therefore now to be considered whether this court, which undoubtedly has jurisdiction to entertain this application, will or will not grant the leave already refused by the Court of Appeal.

I am of opinion that we ought not to sanction an appeal in a case such as the present. First, for the reason that leave has already been refused by the provincial court. Were we to do so we should be substantially but indirectly reviewing the discretion of the Court of Appeal in a matter in which no appeal is given, for it has been held by high authority in England that a decision granting or refusing leave to appeal is not itself the proper subject of an appeal. Parties have the election of making the application to either court and indeed, according to the words of the Act, to both alternatively, but it does not seem reasonable that having elected to make application to one court they should in case of failure be at liberty to resort to the other. Therefore upon this, treating it as a ground for refusing leave and not as an objection to the jurisdiction of this court, I think we ought to refuse this application.

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The Chief Justice.

Further, the ground on which the Court of Appeal quashed the by-law is so clear and plain that, taking into consideration the probability or improbability of error being established in the judgment of the court below, (a matter always considered by the Privy Council on an application for leave to appeal,) it appears that the judgment cannot be otherwise than right. The sole question was as to whether a certain enactment of the municipal law controlling the granting of bonuses to persons or corporations who had already established the same industry in another place, was applicable, and if so whether it made any difference that the parties previously to applying for the bonus had determined to remove from their present site.

The enactment referred to is in these words (1):

No by-laws shall be passed by a municipality for granting a bonus to secure the removal of an industry already established in this province.

Surely it cannot be doubted that the intention of parties applying for a bonus of this kind to remove their establishment from its present seat ought not to be considered as making this provision inapplicable. This is the construction the Court of Appeal have placed upon the statute and it appears to me that any appeal against its decision could not possibly succeed.

The motion is refused with costs.

TASCHEREAU J.—When special leave has been asked of the Court of Appeal for Ontario and refused or granted the case is concluded. It is clearly concluded when granted. I do not see why it is not concluded if refused. If refused by this court in first instance, it could hardly be contended that the Court of Appeal for Ontario could subsequently grant leave. Yet that

(1) 63 V. c. 33 s. 9 (e) [Ont.].

would be the consequence if we should decide that a party having elected to ask leave from one of the two courts would, after being refused, have the right to apply to the other court.

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Taschereau J.

SEDGEWICK, DAVIES and MILLS JJ. concurred in the judgment dismissing the motion with costs.

Motion dismissed with costs.

Solicitor for the appellant: *T. H. Lennox.*

Solicitors for the respondent: *Mills, Raney, Anderson & Hales.*

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*May 13.

*June 9.

THE ROYAL ELECTRIC COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

MALVINA HÉVÉ (PLAINTIFF).....RESPONDENT.

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

Negligence—Operations of a dangerous nature—Supplying electric light—Insulation of electric wires.

The defendants are a company engaged in supplying electric light to consumers in the City of Montreal under special charter for that purpose. They placed a secondary wire, by which electric light was supplied to G.'s premises, in close proximity to a guy-wire used to brace primary wires of another electric company which, although ordinarily a dead wire, might become dangerously charged with electricity in wet weather. The defendants' secondary wire was allowed to remain in a defective condition for several months immediately preceding the time when the injury complained of was sustained, and it was at that time insufficiently insulated at a point in close proximity to the guy-wire. While attempting to turn on the light of an incandescent electric lamp on his premises, on a wet and stormy day, G. was struck with insensibility and died almost immediately. In an action to recover damages against the company for negligently causing the injury :

Held, affirming the judgment appealed from, that the defendants were liable for actionable negligence as they had failed to exercise the high degree of skill, care and foresight required of persons engaging in operations of a dangerous nature.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, by which the plaintiff's action was maintained with costs.

*PRESENT :—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

The action was brought by the plaintiff, as well personally as in her capacity of tutrix to her minor children, to recover damages against the company for negligence which caused the death of her husband, the father of the minor children.

The case is fully stated in the judgment of His Lordship Sir Louis H. Davies now reported.

Atwater K.C. and *Campbell K.C.* for the appellants. There was no evidence on which it could reasonably be found that the deceased came to his death by an electric shock. On the contrary, it is shewn that the usual characteristic of death by electricity was absent.

The company, under their charter, are entitled to use electric wires in the City of Montreal for the purpose of supplying electric light. They merely used this franchise and do not incur any unusual obligation in exercising their rights.

There is no evidence, either direct or by presumptions to be drawn from the facts established, to shew that the deceased came to his death through any fault on the part of the company. On the contrary, it appears that fuse wires were placed at the point where the supply-wire passed into deceased's premises and at various other parts of the building which would have had the effect of preventing the entrance of a current sufficient to cause death.

We refer to *The Canadian Pacific Railway Co.* v. *Roy* (1); *Port-Glasgow & Newark Sailcloth Co.* v. *Caledonian Railway Co.* (2); *The Canada Paint Co.* v. *Trainor* (3), and to the remarks of His Lordship Mr. Justice Strong, as to onus of proof, in *Evans* v. *Skelton* (4) at page 649, where the established jurisprudence is succinctly stated.

(1) [1902] A. C. 220.
(2) 20 Ct. Sess. Cas. (4 Ser.)35.
(3) 28 Can. S. C. R. 352.
(4) 16 Can. S. C. R. 637.

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Brodeur K.C. and *Bissonnet K.C.* for the respondent. It is immaterial how the deadly current entered the defendants' wires. It is enough to shew that they neglected to use proper care and foresight in placing and insulating these wires so as to secure safety to consumers at all seasons and in all conditions of weather liable to occur in our climate.

The company's charter does not relieve them from the obligation to make use of the highest degree of skill, care and foresight in the dangerous operations of the business in which they have engaged.

We rely upon the findings of negligence by the trial judge, which have been affirmed in the court below, and we refer to the following cases in support of the principles upon which the judgment under appeal is rested, viz., *McAdam* v. *Central Railway and Electric Co.* (1); *McLaughlin* v. *Louisville Electric Light Co.* (2); *Haynes* v. *Raleigh Gas Co.* (3); *Ennis* v. *Gray* (4); *Giraudi* v. *Electrical Improvement Co. of San José* (5); *Denver Consolidated Electric Co.* v. *Simpson* (6); *Alton Railway and Illumimating Co.* v. *Foulds* (7); *The Citizens Light and Power Co.* v. *Lepitre* (8); *Yates* v. *Southwestern Brush Elec. Lt. & Power Co.* (9); *The George Matthews Co.* v. *Bouchard* (10); *Compagnie l'Urbaine-Incendie* v. *Jarriant* (11); Thompson on Negligence (2 ed.) Nos. 796, 895; Keasby on Electric Wires, pp. 260, 305; Groswell on Electricity, p. 205.

TASCHEREAU J.—The judgment of the Court of King's Bench appealed from was one confirming the judgment of the Superior Court whereby a sum of

(1) 67 Conn. 445.
(2) 6 Am. Elec. Cas. 255.
(3) 114 N. C. Rep. 203.
(4) 87 Hun. 355.
(5) 107 Cal. 120.
(6) 21 Col. 371.
(7) 81 Ill. App. 322.
(8) 29 Can. S. C. R. 1.
(9) 40 La. Ann. 467.
(10) 28 Can. S. C. R. 580.
(11) Pand. Fr. 86, 2, 34.

$5,000 had been awarded to the respondent for damages resulting to her from the death of her husband, killed in his own house on the 20th January, 1900, by an electric shock from an incandescent lamp connected with the wires of the appellant company under a special contract with them for lighting the said house with electricity.

I am unhesitatingly of opinion that the judgment appealed from is perfectly right. The company's contentions are untenable, and I would have thought it sufficient to dismiss them purely and simply upon the findings of fact of the provincial courts, as we often do upon such frivolous appeals, if it were not that the company at the argument seemed to have taken it for granted that the ruling of the Privy Council in the case of *Canadian Pacific Railway Co.* v. *Roy* (1)ppli a es to this case, and that, consequently, Arts. 1053 and 1054 of the Civil Code are superseded by their charter as they were held to be by the railway charter in question in that case, so that, as they would contend, they are not responsible for the damages they may cause in the exercise of their powers under a special contract in the absence of proof by the plaintiff of negligence on their part, as railway companies are under that and analogous decisions. (See *Jackson* v. *The Grand Trunk Railway Co.* (2); also compare *East Freemantle Corporation* v. *Annois* (3).

Now, speaking for myself, I do not wish to be taken as acceding to that proposition. I would not feel justified however to say more here, and to determine this important point in the present case for obvious reasons. First, it has been but lightly alluded to at the argument. Then, it is unnecessary to decide it, as the

(1) [1902] A. C. 220.
(2) 32 Can. S. C. R. 245.
(3) [1902] A. C. 213.

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Taschereau J.

judgment is amply supported by the findings of fact at the trial, affirmed by the Court of King's Bench. Moreover, we have not even been referred to the charter of the company at the argument. It is simply mentioned, incidentally as it were, in one of the factums, without a word of comment.

Under the circumstances, I content myself with referring to the cases of *Metropolitan Asylum District* v. *Hill* (1); *Canadian Pacific Railway Co.* v. *Parke* (2), and *Hopkin* v. *Hamilton Electric Light & Cataract Power Co.* (3) which I cited in *Gareau* v. *The Montreal Street Railway Co.* (4). Also to Keasby on Electric Wires, pp. 259 to 305; *Alton Railway and Illuminating Co.* v. *Foulds* (5); *Ennis* v. *Gray* (6); *Haynes* v. *Raleigh Gas Co.* (7); *Snyder* v. *Wheeling Electrical Co.* (8); Joyce on Electric Law, secs. 606 *et seq.*

The company cannot contend under the evidence that the accident in question was caused by *vis major*, or was an inevitable accident. *The Schwan* (9). Neither was it caused by the fault of the deceased or by his negligence. Then, contributory negligence is not a defence in the Province of Quebec as it is under the English law. It must therefore necessarily have been caused by them. They cannot have taken the high degree of care that the law demands from a company trading in so dangerous an element as electricity. If, as they would surmise, the deadly current resulted from the momentary contact of their secondary wires with a guy-wire of the Lachine Company, they are responsible. The fact that the Lachine Company may have been joint tort-feasors would not relieve the appellants from their liablity towards the

(1) 6 App. Cas. 193.
(2) [1899] A. C. 535.
(3) 2 Ont. L. R. 240.
(4) 31 Can. S. C. R. 463.
(5) 81 Ill. App. 322.
(6) 87 Hun. 355.
(7) 114 N. C. Rep. 203.
(8) 43 W. Va. 661.
(9) [1892] P. D. 419.

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respondent. That dead wire had been there for two years, to their knowledge, and their allowing it to remain in a dangerous proximity to their own lines was an act of gross, I would say, criminal carelessness on their part. For future reference, though an expression of my own views on the subject would be *obiter*, I think it expedient to reproduce here the concluding remarks of Mr. Justice Hall, in the Court of King's Bench:

But in my opinion, it is a matter of indifference, legally speaking, where this current originated. The appellants should be held responsible for it under any circumstances. They deal in a commodity of recognized dangerous character, the control of which is a matter of technical knowledge and experience, and entirely uncomprehended by the general public. When a company like the appellants, organized under the name of an electric company, hold themselves out to the public as dealers in and suppliers of that commodity, for gain, and make contracts with private individuals for furnishing light or power, over a system constructed and controlled by themselves, they are bound to deliver it in a form, and under conditions of safety for the person and property for whose use the company charge and receive compensation, and they are also bound, in the discharge of their part of the contract, to a supervision and diligence proportionate to the peculiar character and danger of the commodity in which they deal.

In the case under consideration the electric company not only had stipulated, but had exercised the right of supervision of their system within the premises of the deceased. As to that portion of the system outside of his premises no one but their own employees had even the right of examination or interference. If their transformer was defective, or could become dangerous from the moisture of an ordinary rain storm, it was their business to have discovered and removed the cause of danger. If their system of wiring came within an inch of the wire of another company even if on a dead wire, common prudence would have suggested their interference, either by a protest against the other company, or by the removal of their own wires, while it is in evidence that the proximity of the two systems had existed for months prior to the accident. The fact that guy-wires become, from accident, live wires of the most dangerous character is one unfortunately of too frequent occurence to be overlooked or ignored in the exercise of the constant supervision which an electric system exacts, and which the public has the right to enforce.

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The implied contract between the appellants and deceased was that they should supply his premises with a safe electrical current for lighting purposes by the lamps which they furnished. They failed in this respect, and in the use of their lamp he received a current of electricity by which he was instantaneously killed. The presumption is that it came over the same system and from the same source as that by which his ordinary supply was delivered to him by appellants. The burden of proof is upon them to show the contrary. This they have failed to do, and the judgment holding them responsible for the accident should be confirmed.

SEDGEWICK J. concurred.

GIROUARD, J.:—I am of opinion that the appeal should be dismissed with costs for the reasons given in the Court below.

DAVIES J.—The defendant company is one which supplies electric light to its customers in the City of Montreal. The action is brought by the widow of her deceased husband in her own name and as tutrix to her two minor children to recover damages because of her husband's death. The deceased Girouard was one of the defendants' customers, and his death was charged as being due to an electric shock received by him on the 20th January, 1900, in his dwelling house.

The electric current was brought by the defendants, from Chambly into their works in the City of Montreal where it was passed through transformers so as to reduce the current down to about 2400 volts and then carried by primary wires to different parts of the city. Before being passed into the different houses or factories of the defendants' customers, it was again passed through transformers, attached to poles in the vicinity of the customers, and thus further reduced down to a voltage, varying from 54 to 100 volts, at which the current was supposed to be innocuous. After being thus reduced, it was then carried from the

last transformer into the customers houses through what are called secondary wires.

In the case of Girouard's house these secondary wires were carried from the pole to which the transformer was affixed across the street and into the house. The day when the accident happened was by common consent, admitted to have been very wet and stormy. At the back of the bar kept by the deceased there was a water-closet lighted with the electric light supplied by defendants. The plaintiff had gone there and, while attempting to turn on the light, had received an electric shock which caused her to cry out and call her husband, the deceased. He went into the closet and was heard immediately to cry out and, on the plaintiff and others running to his assistance, he was found speechless leaning against the wall with his right hand on the electric lamp or button. He expired almost immediately.

A doubt was attempted to be raised by the defendants as to whether death was really caused by an electric shock, and was not attributable to natural causes. The only medical expert examined was Dr. Wyatt Johnston, who was called in immediately the accident occurred, and who made an autopsy upon the body. He found a burn on the thumb of the right hand, which had come in contact with the electric lamp, but the autopsy did not reveal any natural cause of death, while, on the other hand, the generally characteristic sign of an electric current having passed through the body, viz., that the blood did not clot, was wanting. The blood in this case did clot but, in the doctor's opinion, all natural causes of death being eliminated, death was due to electricity. No other evidence was offered on this question and the courts below have both held, and I think rightly, that the man's death was due to an electric shock.

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The defendants contend, I think rightly, that the law does not constitute them insurers of the lives of their customers and their families and that, to hold them liable in cases of death or injury arising from electric shocks, there must be some proof adduced of negligence on their part or that of their employees

I fully agree with the law as stated by Mr. Justice Hall that the defendants, while dealing in and disposing of a commodity of so recognised a dangerous character as electricity, are

> bound to a supervision and a diligence proportionate to the peculiar character and danger of the commodity in which they deal.

I cannot concur with him in thinking that they can be held responsible for the effects of the electric current "under any circumstances." This would be placing their liability too high and be constituting them insurers. They are bound to carry on their business with all possible skill, care and foresight, and are bound, in doing so, to anticipate and take into consideration such conditions of weather as may be reasonably expected in our climate. The law in requiring from them the highest care and skill and the exercise of constant vigilance in their business and operations does nothing more than, having regard to the extremely dangerous character of the article or substance they supply, is necessary for the proper protection of those with whom they deal. But on the other hand, before they can be held liable, there must be shewn to have been the absence of some one of these necessary precautions, or of the required skill and vigilance; in other words, some negligence to which the accident can be reasonably attributed must be found.

Now, in the case before us, it appears to me that this proof is abundantly present. The duty and care required of the electric company is equally required with respect to the secondary wires passing from the

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transformer to the houses as it is with regard to the primary wires leading up to and into the transformer. The secondary wires, in the case at bar, had been up for some years, and do not appear to have been subjected to any periodical inspection. One of them as stated by Mr. Thornton, an electrical engineer and the superintendent of the line department of the defendants, was found by him, on examination immediately after the accident, to have been so badly burned or frayed in one spot, just underneath the transformer and within an inch of it, that

> the insulation material was entirely off it and you could see the conductor underneath.

He explains that it might have been gradually frayed owing to the wires swaying in the wind. But whatever the reason, the fact was indisputable. He further says, that

> the secondary wire feeding Girouard's house, which is insulated with D. B. insulating cotton covering, when the moisture gets there on a wet day that insulation does not amount to anything.

Now insulation which does not amount to anything on a wet day is practically no insulation at all, and the company cannot complain if, when an accident happens which cannot be accounted for in any other way than through the want of proper insulation of these secondary wires, they are held responsible.

The negligence of the defendants may be said to consist in their having carried the electric current into Girouard's house through wires which had through time become most defective, and with having permitted these badly insulated wires to remain in dangerous proximity to a guy-wire which, though ordinarily dead, was quite liable in wet weather to become a live wire.

Two theories were suggested, either one of which might under the circumstances have been the cause

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of the accident. One, which was adopted by the trial court, was that owing to the wet the electricity had escaped from the primary wire alongside the transformer, had passed down the wet side of the transformer and entered the secondary wire at the burnt or frayed spot immediately beneath it and so passed through the secondary wire into the house causing Girouard's death. The other, that a guy-wire, belonging to the Lachine company and which supported one of that company's posts and ran just underneath these secondary wires of the defendant company and within an inch and a half of them, had also, owing to the rain and wet, become a live wire, charged with electricity and, from the swaying of the wires in the wind, had come in contact with defendants' secondary wires and so communicated its charge of electricity to the latter. This was the theory suggested in their defence by the defendants in case it was held that Girouard's death was due at all to electricity, and was supported by the evidence of their chief inspector. They evidently believed that if the deadly current could be traced to the guy-wire belonging to the Lachine company that their liability for Girouard's death would be disproved. But it is plain that the defendants should not have permitted another wire, such as this guy-wire of the Lachine company, to remain as it did for so many months within one and a half inches of contact with their secondary wires, unless indeed the latter were so well insulated that no danger could happen from the proximity of the wires.

So far however from these secondary wires of the defendants having been thoroughly and properly insulated, they were in the condition described by Inspector Thornton that

> when the moisture gets on the insulating cotton covering on a wet day the insulation does not amount to anything.

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In addition to that they they were left with the burn or abrasion near to the transformer so deep that, as the inspector says, he could see the "conductor underneath." And under this condition of things, if an abnormal charge of electricity came to the secondary wires whether over and along the transformer, as suggested by the Abbé Choquette and adopted by the Court of first instance, or by reason of the secondary wire coming in contact with the guy-wire, after it became a live one, (the theory of the defendants themselves,) in either case it could only be transmitted through those secondary wires into the house of the deceased as a consequence of the negligence of the defendant company. Such negligence was plain and consisted in leaving these secondary wires (*a*) without any proper or effective insulation while in close proximity with a guy-wire which might according to the evidence at any moment in very wet weather become a live wire; and (*b*) with a burn or abrasion on the insulating material around the wire so deep or worn that the conductor inside was quite visible to the naked eye.

Accepting the evidence tendered by the defendants themselves, it is clear that if and when the outside covering of this wire became wet, instead of being a non-conductor, it became really a conductor for any abnormal charge of electricity which might reach it from any source and, with the burn or abrasion so deep or worn as to show the conducting wire beneath, sure to carry any such charge into Girouard's house.

In the view I take of the law and the facts, it makes no difference which theory is adopted. In either case the defendants are clearly liable and that on grounds of the defendants' fault and imprudence and the absence of that care, skill and foresight which constitutes negligence and which the law exacts from those

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controlling and disposing of such a dangerous agent as electricity.

The appeal should therefore be dismissed.

MILLS J. concurred.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Bissonnet & Geoffrion.*

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*May 19.
*June 9.

JOHN HYDE, LIQUIDATOR TO THE VICTORIA-MONTREAL FIRE INSURANCE COMPANY (DEFENDANT)..... } APPELLANT;

AND

GEORGE LEFAIVRE AND LÉONCE TASCHEREAU, JOINT CURATORS OF THE ESTATE OF GEO. BROWN, (PLAINTIFFS)..... } RESPONDENTS;

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

Fire insurance — Condition of policy—Proof of loss—Waiver—Acts of officials.

An insurance company cannot be presumed to have waived a condition precedent to action on a policy on account of unauthorised acts of its officers.

Judgment appealed from reversed, Girouard J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Quebec, and maintaining the action with costs.

*PRESENT :—Taschereau, Sedgewick, Girouard, Davies and Mills J.J.

The questions arising on this appeal are stated in the judgment of the majority of the court delivered by His Lordship Mr. Justice Taschereau.

T. Chase Casgrain, K.C., for the appellant, cited *Nixon* v. *Queen Insurance Co.* (1); *Hiddle* v. *National Fire & Marine Insurance Co. of New Zealand* (2); *Atlas Assurance Co.* v. *Brownell* (3); *Commercial Union Assurance Co.* v. *Margeson* (4); *Employers' Liability Assurance Corporation* v. *Taylor* (5); *Western Assurance Co.* v. *Doull* (6); *Logan* v. *Commercial Union Insurance Co.* (7).

Robitaille K.C. and *F. X. Drouin K.C.* for the respondents. The general manager, the director and the liquidator were all important officers and could issue policies and waive conditions. We refer to May on Insurance, Vol. I., No. 126, Vol. II., No. 143; *Ruggles* v. *American Central Insurance Co. of St. Louis* (8); *Stickley* v. *Mobile Insurance Co.* (9); Story on Agency, p. 502; *Quebec Bank* v. *Bryant, Powis & Bryant* (10); *Agricultural Insurance Co. of Watertown* v. *Ansley* (11).

The insurer had communications with the insured after the expiration of the time limited in the condition and carried on negotiations towards an amicable settlement of the claim and authorized him to dispose of the damaged goods and, consequently, cannot take advantage of the non-observance of formalities. A waiver results from the negotiations or transactions after knowledge of the forfeiture by which the insurer recognized the continued validity of the claim and acted thereon. The insurer and the insured proceeded amicably to an estimate of the loss, without observance

(1) 23 Can. S. C. R. 26.
(2) [1896] A. C. 372.
(3) 29 Can. S. C. R. 537.
(4) 29 Can. S. C. R. 601.
(5) 29 Can. S. C. R. 104.
(6) 12 Can. S. C. R. 446.
(7) 13 Can. S. C. R. 270.
(8) 114 N. Y. 415.
(9) 16 S. E. Repr. 280.
(10) 17 Q. L. R. 98.
(11) 15 Q. L. R. 256.

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of forms and consequently they have waived all formalities. See *DeMontigny* v. *Agricultural Insurance Co. of Watertown* (1); *Provincial Insurance Co. of Canada* v. *Leduc* (2) The company was bound by the admission of the existence of the claim in its printed circular issued upon liquidation. See *Fowler* v. *Metropolitan Life Insurance Co.* (3); *Southern Mutual Life Insurance Co.* v. *Montague.*

The judgment of the majority of the court was delivered by

TASCHEREAU J.—The action was brought by the respondents for four thousand dollars upon a policy of fire insurance. It was dismissed in the Superior Court, (Caron J.) but maintained by the Court of Appeal.

The appellant claims that the respondents failed to comply with the condition of the policy as to proof of loss antecedent to action. The respondents reply: first, that they conformed to the requirements of the policy; secondly, that if they failed to do so in any particular, the insurance company have waived all the objections they might otherwise have relied upon. The following are the material parts of the policy relating to the controversy:

19. If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and within fourteen days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by the said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss thereon, all incumbrances thereon, all other insurance whether

(1) 2 Dor. Q. B. 27.
(2) L. R. 6 P. C. 224.
(3) 41 Hun. 357.
(4) 84 Ky. 653.

valid or not, covering any of said property, and a copy of all the descriptions and schedules in all policies.

22. This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for, and the loss shall not become payable until sixty days after notice, ascertainment, estimate and satisfactory proof of the loss herein required, have been received by this company, including an award by appraisers when appraisal has been required.

25. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity, until after full compliance by the insured with all the foregoing requirements, and every action or proceeding against the company for the recovery of any claim under or by virtue of this policy shall be absolutely barred unless commenced within twelve months next after the loss or damage occurs.

27. This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or attached hereto, and no officer, agent or representative of this company shall be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be in writing, signed by the managers of the company.

Did the insured furnish to the company, within fourteen days after the fire, the proof of loss required by the policy, is the first point to be considered.

The insured has himself amply demonstrated that he did not do so by the very document which he has produced in the case purporting to fulfil the condition in question, and this point must clearly be determined against him. His claim, as sent to the company, does not contain any inventory or description of the goods destroyed; the value and cost of the goods is not given; no mention is made of the goods which, as it is in evidence, escaped from the fire, nor of their value before or after the fire, though the books and invoices of the insured had been saved; and the company did not, within the fourteen days, extend in writing, the time given by the policy for furnishing proof.

The insured's contention that though he did not furnish it to the appellant, yet he furnished it to two

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other companies which had also insured these goods, cannot be taken seriously. Did he or did he not furnish it to the appellant? He did not, and that concludes this part of the case. Whether or not he furnished it to the other companies cannot affect the rights that the appellant had to it.

The Court of Appeal, upon that point, seem to have been against the respondents, as the Superior Court had been, but determined the case in their favour upon the ground that the company had waived its right to insist upon these conditions of the policy. With deference, I cannot adopt that view of the case. The fact upon which the respondents first base this plea is that the adjusters sent by the two other companies interested reported verbally to the appellant what they had done in the matter for their own companies. I cannot see in this any evidence of waiver on the part of the company simply because they continued to remain inactive in the matter. Waiver cannot be implied from mere silence.

The second fact relied upon by the respondents on this part of the case is that one Audet, a director of the company, and one Lavery, a member of the liquidator's committee, had recognised the claim and promised to pay it. There is nothing in this contention, in the total absence of proof that these gentlemen were in any way regularly authorised to admit the claim so as to bind the company.

The third ground relied upon by the respondents as to waiver by the company is a circular to the creditors dated 7th January, 1901, sent by Grant, the manager, in which it may be contended that he admitted the respondent's claim. But Grant, heard as a witness, swears that he acted without authority from the Board of Directors in sending this circular. Moreover, when he says in it that the respondent's claim is admitted, he distinctly states that it is the liquidators who authorised him in the matter. Now those liquidators

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had no power to bind the company and the insured must be assumed to have been aware of it. They were mere volunteers without any legal authority whatever. They themselves could not bind the company, and what they could not do, they could not authorise the manager to do. Then it is proved negatively that the Board of Directors never admitted the claim. The permission given by Grant to Brown, upon his request on the same or next day, to open his store and sell stock cannot be deemed a waiver by the company. A refusal to grant him that permission might, perhaps, rationally have been invoked as an admission that the relations between the company and the insured, upon the policy, had not come to an end. But at that time, the insured's right of action was gone and it would require stronger evidence than I am able to find in the record to satisfy me that a new right of action had been created by the manager's conduct in allowing the store to be opened, a thing which the company had no right to prevent, with which it then had nothing to do. The respondents would ask us to imply a waiver from this permission given to the insured. That cannot be done. The company cannot have been presumed to have renounced their rights upon such slight evidence.

I would allow the appeal and restore the judgment of the Superior Court.

GIROUARD J. (dissenting).—I am of opinion that the appeal should be dismissed with costs for the reasons given in the court below.

Appeal allowed with costs.

Solicitors for the appellant: *Casgrain, Lavery, Rivard & Chauveau.*

Solicitors for the respondents: *Robitaille & Roy.*

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*June 11.

FREDERIC LEE RICE..... APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—60 & 61 *V. c.* 34—*Criminal case.*

The Act of the Dominion Parliament respecting appeals from the Court of Appeal for Ontario to the Supreme Court (60 & 61 Vict. ch. 34) applies only to civil cases. Criminal appeals are still regulated by the provisions of the Criminal Code.

MOTION for special leave to appeal from the judgment of the Court of Appeal for Ontario affirming the conviction of the appellant for murder.

As the judges of the Court of Appeal were unanimous in affirming the conviction there could be no appeal to the Supreme Court under the provisions of the Criminal Code. Counsel for the prisoner claimed, however, that 60 & 61 Vict. ch. 34 overruled the code, so far as appeals from the Court of Appeal were concerned, and that the Supreme Court of Canada could grant special leave under the latter statute.

Robinette K.C. for the motion.

Cartwright K.C., Deputy-Attorney-General for Ontario, and *Guthrie K.C.* contra.

The judgment of the court was delivered by:

THE CHIEF JUSTICE (oral).—In the case of *The Union Colliery Co.* v. *The Queen* (1), it was held that under

* PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, Davies and Mills JJ.

(1) 31 S. C. R. 81.

section 750 of the Criminal Code an appeal will lie from the judgment of the Court of Appeal on a reserved case provided there was a dissenting judgment. The question therefore is whether the plain provisions of the Code, which require a dissent in the Court of Appeal to give jurisdiction to this court, are no longer in force so that an appeal may now be entertained where there is no dissent. The only possible ground on which this can be rested is subsection (*e*) of 60 & 61 Vict. c. 34, sec. 1, passed in 1897, in which it was enacted that the provisions of a statute, itself *ultra vires*, previously passed by the Ontario Legislature, should be confirmed. The Act in its preamble states that its object is to confirm or to re-enact the inefficacious Ontario Act referred to. We have a right therefore to turn to the latter Act. When we do so we find that, on its face, it is confined to civil cases and does not attempt to interfere with criminal appeals It was *ultra vires* because the Ontario Legislature had no jurisdiction to pass an Act regulating appeals to this court but, if it had professed to deal with criminal cases, it would have been *ultra vires* on that ground also.

It is therefore plain beyond all doubt that the subsection referred to, which authorises this court as well as the Court of Appeal to grant leave to appeal in certain cases, does not in any way apply to criminal cases.

We have therefore section 743 of the Criminal Code which gives an appeal from the judgment on a reserved case standing uninterfered with by any subsequent Dominion legislation.

Then, how can we grant this application ? Not only is there no jurisdiction conferred upon us in criminal cases, where the court appealed from is unanimous, but we are expressly prohibited from interfering under

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such conditions. It is therefore plain that it is not within the competence of this court to entertain an appeal by the prisoner.

The motion must be refused.

Motion refused.

Solicitor for the appellant: *T. C. Robinette.*

Solicitor for the respondent: *Hugh Guthrie.*

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

AND

ARCHIBALD STEWART (SUPPLIANT)..... } RESPONDENT.

1901
*Nov. 4, 5, 6.
1902
**Mar. 11.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Public work—Breach of contract—Appropriation of plant—Damages—Interest.

The judgment appealed from (7 Ex. C.R. 55) was affirmed, Taschereau J. dissenting.

APPEAL and Cross-Appeal from the judgment of the Exchequer Court of Canada (1), awarding damages to the suppliant on his petition of right.

The case is stated by the Exchequer Court Judge in his reasons for the judgment appealed from and in the dissenting judgment of His Lordship Mr. Justice Taschereau, now published.

S. H. Blake K.C. and *Lawlor* for the appellant (*Kerr* with them).

C. Robinson K.C. and *Glyn Osler* for the respondent (*Hogg K.C.* with them).

The CHIEF JUSTICE and their Lordships Justices SEDGEWICK and GIROUARD were of opinion that the judgment of the Exchequer Court should be affirmed and that both the appeal and the cross-appeal should be dismissed, but no written notes of reasons for the judgment of the majority of the court were delivered.

*PRESENT :—Sir Henry Strong C.J. and Taschereau, Sedgewick and Girouard JJ.

(His Lordship, Mr. Justice Gwynne was present during the hearing but died before judgment was rendered.)

(1) 7 Ex. C.R. 55.

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TASCHEREAU J. (dissenting.)—The respondent alleges by his petition of right that, on the 24th of September, 1892, a contract was entered into between him and Her Majesty for the construction of sections 1 and 2 of the Soulanges Canal and the completion thereof on or before the 31st of October, 1894, for the prices and under the conditions mentioned in the said contract.

The approximate value of the work so contracted for was over $800,000.

The petitioner further alleges that he was greatly delayed in the fulfilment of his part of the said contract by acts of the Minister of Railways and Canals and of his officers, which he details at some length, in paragraphs 3, 4, 5, 6 and 7 of his petition, and that "for the reasons aforesaid and not otherwise (as he alleges in paragraph 8 thereof) your petitioner was unable to complete the said contract works at the time mentioned in said contract which he otherwise would have done." The petitioner then alleges that on the 9th of November, 1897, whilst the said contract was still subsisting and he was proceeding thereunder, Her Majesty took forcible possession of the said works and of all the plant belonging to him of the value of $90,000, and, by thus preventing him from completing his contract, deprived him of the profits he would otherwise have made thereupon amounting to $150,000, which sum he claims as damages from the Crown for breach of the said contract, in addition to $90,000 for the value of his plant as aforesaid.

On the part of Her Majesty, the respondent's claim was met by a plea denying generally that it was through any neglect or fault of Her officers that the respondent had not completed his contract, but exclusively through the respondent's own fault, as well in not providing the proper organisation necessary

for such an undertaking, and the sufficient plant, machinery, engineers and workmen therefor, as from his financial embarrassments and want of sufficient funds; that the breach of contract was not on Her part but on the part of the respondent; that up to the end of the year 1895 the total amount of work done on the ground amounted to only $157,142.35; to only $186,500 at the end of 1896; and in 1897 when the Crown took possession, to only $285,616; that

from time to time the proper officer in that behalf remonstrated with the suppliant and urged him to furnish better and more plant, and more workmen, and to proceed more quickly with the undertaking. This proceeded until the suppliant had been given three years in addition to the original twenty-five months that he was to have for the completion of the work, and, as there was no prospect or promise or apparent intention of finishing the said work, it became necessary for the Crown to undertake it, which after repeated notices to the suppliant given duly under the contract, the Crown was obliged to do. At the time that Her Majesty so undertook to complete the work, the suppliant had made no preparations to hasten the completion of or to complete the same, and it was only when it was found that the work would not be completed for many years to come that Her Majesty was driven to adopt the course which she took and which is above set forth.

As to the respondent's claim for the value of the plant forcibly taken possession of by the Crown, the plea was that

Her Majesty did not take forcible possession of the works, plant and material, but, as she was entitled to under the contract, the plant and material was taken for the purpose of completing the work. Such plant and material were taken under the express terms of the said contract, and have been used in completing the same, and, the purposes for which such plant and material were so taken having been accomplished, the same are at the disposal of the suppliant and can be by him had on payment of the amount which may be found due by him to Her Majesty on the taking of the accounts between Her Majesty and the suppliant. Her Majesty's Attorney General submits that, under the terms of the contract, the only claim of the suppliant in this respect is for a return of such part of the plant and material as may be unused when the contract is completed.

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With this plea, a counter-claim was filed on the part of the Crown for:

1st. Balance due on the cash account between the parties up to November 1897	$	101,223 39
2nd. Excess of cost incurred in finishing the contract		83,942 00
3rd. Interest		26,558 29
4th. Additional salaries		6,779 36
5th. The amount paid for re-cutting stone.		14,443 37
6th. Paid for the use of the quarry		20,000 00
	$	252,946 41

The Exchequer Court determined that the respondent's claim for damages for breach of contract was well founded, and gave judgment against the Crown for $28,415.79, which amount was arrived at as follows:—

Loss of profits that would have been made had the respondent been allowed to finish the work	$	87,000 00	
The value of his plant taken by the Crown		45,410 14	
The drawback retained by the Crown for the money earned for work done up to the time the contract was taken from him		16,638 75	
			$ 149,048 89

As against this amount the Crown was found entitled to the following credits:

Amount advanced to the respondent on the Potsdam

sandstone excavated on the work	$ 57,000 00	
Amount advanced on certain backing stone.....	48,500 00	
Amount paid to Hugh Ryan & Co., by the Crown on the respondent's order and account.....	7,500 00	
Amount paid Ryan & Co...	7,577 00	
An admitted over-payment..	56 10	
		$ 120,633 10
		$ 28,415 79

From that judgment an appeal and a cross-appeal have been taken.

The facts upon which the Crown's appeal as presented to us must be disposed of, as I view the case, are not very numerous. I lay aside all the dealings between the parties and their complaints and cross-complaints anterior to 1897. They are, in my opinion, quite immaterial and can have no influence on the result of the appeal. It is merely what passed between the parties in 1897 that has to be considered for the determination of the controversy as it now stands.

The first incident of that year appears to be a letter from the Chief Engineer to the respondent, dated the 20th March, which reads as follows:

OTTAWA, 20th March, 1897.

DEAR SIR,—As we are now approaching the season when the resumption of active work under your contract upon the Soulanges Canal may be looked for, I am instructed by the minister to say that he cannot permit the work upon the canal to be further delayed. The intention of the government is to push forward the completion of the undertaking as rapidly as possible; and I am to further notify you that if the *Chief Engineer* has any reason to fear that your contract will not be fully executed by the 31st October, 1898, the work will he

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taken off your hands, and the conditions of the existing contract as to penalties rigidly enforced.

Yours, &c.
C. SCHREIBER,
Deputy Minister & Chief Engineer.

That letter remained unanswered, and the respondent did not remonstrate that the time so given to him was too short. On the contrary, the Minister, Mr. Blair, being asked:

Did he at any conversation with you in 1897 make any statement as to the time (October, 1898) being too short for him to do the work?

Answers:

Not that I can recall.

And later, being asked:

In any of your discussions with Mr. Stewart was there any talk of extending the time for completing his contract to any later date than 1898?

The Minister answers:

No, Sir, I did not have any.

On the 17th May, the Chief Engineer wrote to the respondent as follows:

OTTAWA, 17th May, 1897.

MY DEAR SIR,—I hereby give you notice that unless you at once proceed to prosecute the work of canal construction on sections 1 and 2 of the Soulanges Canal vigourously, it will be my duty to take action under the contract to ensure the delay in diligently continuing to prosecute the work to my satisfaction being put an end to.

Yours truly,
COLLINGWOOD SCHREIBER.

On the 22nd May, the following Order in Council was passed:

On a memorandum dated 27th April, 1897, from the Minister of Railways and Canals, representing that application has been made by Mr. A. Stewart, contractor for sections 1 and 2 of the Soulanges Canal, for payment from the amount of his ten per cent drawback of the sum of $10,000.

The minister states that in a report dated the 10th February, 1897, of the Chief Engineer of the Department of Railways and Canals, it is shewn that there remains to be executed under these contracts, exclusive of the value of materials paid for, work to the value of about $355,000 (the total estimated value of the contract work having been $818,310) as security for which the Government hold the ten per cent drawback, $21,300, and a deposit security mortgage for $40,900, a total of $62,200. Deducting from this the amount of $48,-500, being an advance made on backing stone (which the contractor has to repay under his agreement in connection with the change from a four lock to a three lock system) the amount of security left in the hands of the Government would be $13,700.

The minister further states that the Chief Engineer observes that delay in the prosecution of the work last season has been caused by no fault of the contractor, but is owing to his not been allowed by the Superintending Engineer to use certain stone, of which the Chief Engineer had approved.

The minister, under the circumstances of the case, recommends that authority be given for payment to Mr. Stewart of the sum of $10,000 from the drawback in hand.

The committee submit the above from your Excellency's approval.

Owing to objections made by the Auditor General, these $10,000 were not then paid to the respondent. But he continued to press the minister for the advance, and finally got it upon his undertaking to complete his contract by the 31st October, 1898, as he had previously been requested to do by the Chief Engineer on the 20th March preceding. Mr. Blair, the minister, in his evidence says:

Mr. Stewart was very anxious to get this drawback as he was to get the other amount, and told me himself when I pointed out to him as I did that he was not getting along, he was delaying, he was humbugging, it would be years before the work would be completed in the peddling way he was prosecuting it—he told me that his main trouble was that he was hard up financially, he needed these amounts, and particularly when the payment for the $10,000 came up. He had got the other amount I think earlier. He gave me his own personal assurance that he would be able to do the work and would do the work in the time named if this payment was made to him. It would be re-instating him with the bank, and he would be able to get what additional plant he required to complete his organisation and

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get right on and he would do it in the time we named, I think the 31st October—the last October at all events, 1898. He gave me a positive assurance upon that.

Acting upon these assurances Mr. Blair felt justified to report to council on the 26th June, 1897, that

the minister is assured in the most positive manner by the contractor that with this assistance he will be able to continue the work, and will have no difficulty in fully performing his contract by the close of the year 1898. From independent enquiries the minister is led to believe it to be probable that the contractor may be enabled to do this if the present application is acceded to.

And Mr. Dobell, another minister of the Crown, also swears that in May, 1897, the respondent, upon his pressing to get the said drawback,

most distinctly told me that he would complete his work within two years, if he got that advance made him,

and that upon this assurance, he recommended the respondent's application to council. Being asked:

Now, did he at all complain of the date or the reasonableness of the time fixed by the minister for the completion.

Mr. Dobell answered:

Not in the least.

On the 2nd of June, the Chief Engineer sent the following notice to the respondent:

To Archibald Stewart, of the City of Ottawa, Province of Ontario, Contractor:

Take notice, that as you have made default and delay in diligently continuing to execute or advance to my satisfaction the works contracted to be performed by you under your contract with Her Majesty, Queen Victoria, represented by the Minister of Railways and Canals of Canada, dated the twenty-fourth day of September, 1892, whereby you contracted to execute and provide the several works and materials required in and for the formation of sections numbers one and two, Cascades entrance of the Soulanges Canal, you are hereby notified to put an end to such default or delay.

You are also notified that if such default or delay shall continue for six days after the giving of this notice, Her Majesty may proceed

under the powers conferred upon Her by clause No. 14 of the said contract.

Dated at Ottawa, this second day of June, 1897.

COLLINGWOOD SCHREIBER,
Chief Engineer of Railways and Canals.

No action, it appears, was taken on this notice. On the 28th June, Mr. Munro, the engineer on the works, reported that the work done by the respondent that season up to date was so small that he could not, as requested by the Chief Engineer, send a statement of the quantity of each class of work executed daily.

On the 3rd of July he reported that it was impossible for him to conjecture when, under existing circumstances, the work contracted for by the respondent would be completed, and that to complete the masonry alone by October, 1898, would require the building of about as many yards in one day as had been laid up to date that season.

On the 23rd September Mr. Munro reported that it was quite evident that the progress made by the respondent did not hold out the slightest hope of the work being finished in 1898. On the 25th September he reported that

> unless a wholly different management of affairs be established on the respondent's contract, it was impossible to conjecture when the work would be completed, and that he could not see how it was possible for him to complete his contract in 1898.

On the 29th September, the Assistant Engineer reported to Mr. Munro that the condition of affairs on respondent's contract necessitated some special action.

On the 4th of October, Mr. Munro reported that there were but a few masons on respondent's works and apparently no organisation fit for carrying on such work, which was falling into such a confusion that it was impossible to make any conjecture as to when these sections might be finished.

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On the 14th of October, the following notice was served on the respondent:

To Archibald Stewart, of the City of Ottawa, Province of Ontario, Contractor:

Take notice that as you have made default and delay in diligently continuing to execute or advance to my satisfaction the works contracted to be performed by you under your contract with Her Majesty Queen Victoria, represented by the Minister of Railways and Canals, dated the 24th day of September, 1892, whereby you contracted to execute and provide the several works and materials required in and for the formation of sections Numbers One and Two Cascades Entrance of the Soulanges Canal, you are hereby notified to put an end to such default or delay.

You are also notified that if such default or delay shall continue for six days after the giving of this notice, Her Majesty may proceed under the powers conferred upon Her by Clause No. 14 of the said contract.

Dated at Ottawa, this thirteenth day of October, 1897.

(Sgd.) C. SCHREIBER.

On the 30th of October, the Chief Engineer reported to the minister, as the result of his personal inspection, that he found no improvement in the progress made by the respondent and that at the rate he was going on the masonry and concrete work would not be completed before 1900 and the earth work not before 1903. The evidence fully supports that report, upon which, on the 5th of November the following notice was served upon the respondent:

To Archibald Stewart, of the City of Ottawa, Province of Ontario, Contractor:

Whereas you have made and are making default and delay in diligently continuing to execute and advance to the satisfaction of the engineer, the works contracted to be performed by you under your contract with Her Majesty Queen Victoria, represented by the Minister of Railways and Canals of Canada, dated the 24th day of September, 1892, whereby you contracted to execute and provide the several works and materials required in and for the formation of Sections One and Two Cascades Entrance of the Soulanges Canal, and that such default and delay has continued for more than six days after notice has been given by the engineer to you, requiring you to put an end to such default and delay and such default and delay still continue:

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Now take notice that Her Majesty, represented by me, the Minister of Railways and Canals of Canada, does hereby, under the provisions of the fourteenth clause of your aforesaid contract terminate the said contract from this date, and take the work out of your hands and will employ such means as She may see fit to complete the work;

And further take notice that you shall have no claim for any further payment in respect of the works performed, and that you will nevertheless remain liable and be held responsible for all loss and damage suffered or which may be suffered by Her Majesty by reason of the non-completion by you of the said work, or by reason of your breaches of the said contract.

Dated at Ottawa, the fourth day of November, 1897.

(Sgd.) AND. G. BLAIR,
Minister of Railways and Canals,
On behalf of Her Majesty.

The respondent filed a protest in answer to this notice, and notified the minister that he would hold the Government liable for damages if they interfered with his work, but the Government took possession of the works a few days afterwards, and put an end to the contract.

In his subsequent annual report to Parliament, filed in the case, the Chief Engineer says:—

The season of 1897 arrived when it was expected the contractor would go energetically to work, to complete his contract by the 31st October, 1898, as called for by a notice sent him in March last by me. However, little progress was made with the work, and in June, I served him with a notice that if he did not proceed with greater vigour within six days, the work would be taken out of his hands; the minister, however, not desiring to act in any way harshly, deferred further action in the matter; still the contractor, though with apparent sincerity promising from time to time to increase his force and plant to enable him to carry the work to completion within the required time, for some unexplained reason made no improvement. Not a stick of timber was laid in the crib approach piers, nor was a yard of excavation done until about the middle of October last, when the steam shovel was started, but from want of rolling stock and rails, was not properly served; it therefore excavated only about 250 to 300 cubic yards a day instead of at least 1,000 cubic yards. On the 14th October, I served him with another notice, and on the 6th of November instant, an Order in Council was passed taking the works out of

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his hands. At this time, the favourable working season was about closing. It is due to the contractor that I should mention that the lock work, which was very nearly all built by him, is strong, substantial and of excellent quality, satisfactory both as to the workmanship and material, the walls being of massive masonry of large sound stone, and well mixed concrete, such as no fault can be found with. The only complaint has been as to the slow progress made, which was such that, if continued, it would take several seasons to complete the work.

In his evidence, the Chief Engineer, who all along seems to have acted with the utmost fairness and impartiality towards the respondent, says that his contract was cancelled in 1897 because the respondent was not making sufficient progress to complete it within a good many years

The fourteenth clause of the contract under which the minister took the works out of the respondent's hands as aforesaid, reads as follows:

14. In case the contractor shall make default or delay in diligently continuing to execute or advance the works to the satisfaction of the engineer and such default or delay shall continue for six days after notice in writing shall have been given by the engineer to the contractor requiring him to put an end to such default or delay, or in case the contractor shall become insolvent or make an assignment for the benefit of creditors, or neglect either personally or by a skilful and competent agent to superintend the works, then in any such cases Her Majesty may take the work out of the contractor's hands and employ such means as she may see fit to complete the work, and in such cases the contractor shall have no claim for any further payment in respect of the works performed, but shall nevertheless remain liable for all loss and damage which may be suffered by Her Majesty by reason of the non-completion by the contractor of the works.

It is not possible for the respondent to contend upon the evidence, that he diligently continued to execute or advance the works to the satisfaction of the engineer after the notice of the 13th of October, requiring him so to do, or that he had at any time in 1897 attempted to get on so as to complete within a reasonable time. He failed to pay any attention what-

ever to it, and when later on the minister himself visited the locality, he found the works in a condition of absolute inertia and was satisfied that if he allowed them to remain any longer in the respondent's hands, the whole policy of the Government, as he testified, would have been paralysed and defeated, and the canal would not have been finished within anything like the time it was then determined it should be finished in. The respondent contends, however, that the 14th clause of his contract was not in force in October, 1897, and that the Government could not then take away the contract from him as they have done. That contention is, to my mind, untenable. The contract of 1892 was in full force. It was clearly under it that the respondent had gone on with the works. He himself alleges, in his petition of right, that it was a valid and subsisting contract in November, 1897. Then clearly, to claim damages, as he does, for a breach in November, 1897, of a contract made in 1892, is an admission that, in November, 1897, that contract was still in force. Now, if the contract was then in force, extended as to time by mutual consent, how clause fourteen thereof can be singled out of it, I fail to understand. If the contract survived, it must have survived subject to the powers of the engineer.

If, for instance, the respondent had become insolvent in 1896 or 1897, the Government, if his contention were well founded, would not have had the power conferred upon them in that event by that same clause to go on with the works themselves. The clause is a penal one certainly, and one that left the respondent at the mercy of the Crown to a certain extent. But whether unreasonable or not that is what he has agreed to. And it is not a more unreasonable one during the extended time than it was during the time at first agreed upon. If his contention prevailed,

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it is the Crown that would have been at his mercy for having been lenient to him in not forfeiting his contract in 1894. He would contend that up to the 31st October, 1898, he had the right to fold his arms and stop the work entirely.

There is another penal clause in his contract which would also have been inoperative, he would contend, after the time at first fixed for the completion of the works. I mean the seventeenth under which, in the event of any assignment of his contract without the consent of the Crown, the Crown could forfeit it. What was to his advantage in the contract would alone have remained, but anything empowering the Government to ensure a satisfactory completion of his contract would have been wiped out. I cannot accede to these propositions. The parties must be taken to have intended all along that the engineer should continue to control the works and be vested with the same powers The case of *Walker* v. *The London & North Western Rway. Co.* (1), upon which the respondent chiefly relies, does not seem to be in point. Here, by clause sixteen of the contract, it is agreed that the contractor

> shall not have or make any claim or demand, or bring any action or suit or petition against Her Majesty for any damage which he may sustain by reason of any delay in the progress of the work arising from the acts of any of Her Majesty's agents, and it is agreed that in the event of any such delay the contractor shall have such further time for the completion of the works as may be fixed in that behalf by the minister for the time being.

In the *Walker Case*, there was no such clause. I would think it incontrovertible that clause fourteen would apply to any time fixed under this said clause sixteen by the minister subsequent to the time originally agreed upon. And if that be so, I cannot see upon what ground that same clause fourteen could be

(1) 1 C. P. D. 518.

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held not to apply to any time during which the contract was continued by consent subsequently to the term originally fixed.

In *Walker's Case*, it was with reference to the time agreed upon in first instance that the court held that the rate of progress could exclusively be determined, *no new agreement as to time having been made.* But here, it is to the rate of progress with reference to the time fixed by the new agreement of 1897 that the engineer certified under the said clause fourteen of this contract.

Under that clause sixteen, I may as well here remark, the respondent's contentions as to the delays caused to him in 1897 by the change in the recesses for the gates of the locks, and the delay in the plans for the weirs are untenable. He never asked for an extension of time on account of those delays. The minister consequently was never called upon to fix any. And he cannot contend that by the sole fact of his not asking for any such extension, this clause became inoperative and he thereby became entitled to make any claim as to such delay, independently of the minister's authority in the matter, as expressly vested in him exclusively.

The case of *Wood* v. *The Rural Sanitary Authority of Tendring*, (1), also cited by the respondent has no application. The *ratio decidendi* there was that a new contract had been entered into, *without a fixed time for its completion*, and the old one repudiated, a state of things which cannot be contended for in the present case. A similar contention was put forward in the *Berlinquet Case*, (2), but did not prevail. Then here, both parties in their pleadings, as I have already remarked, admit that the contract of 1892 was in force

(1) 3 Times L.R. 272.

(2) 13 Can. S.C.R. 26.

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up to the time that the Government put an end to it in November, 1897.

In *McDonnell* v. *Canada Southern Rway. Co.* (1), it was held that a forfeiture clause of this nature continued to apply after the day fixed for the completion of the contract, the parties, as here, having continued the work according to the contract and as if the contract still governed. There, by the contract the question of reasonableness of time had not been left to the engineer, but here, no such question can arise.

> In many cases, said Wilson, J., a certain number of days is specified in the contract. That is not so here. And we are, therefore, of opinion, that the question of reasonableness of time has not been left to be, and cannot be, determined conclusively by the engineer.

Here, the contract specifies the number of days after which, upon notice, the work might be taken out of the contractor's hands. And the question of the reasonableness of that delay does not arise.

The case of *Roberts* v. *The Bury Improvement Commissioners* (2), in which a great difference of opinion in the Court of Common Pleas and in the Exchequer Chamber, cannot but be noticed, is distinguishable. There was no stipulation in the contract there under consideration, as there is in clause 16 of the contract now under consideration I have previously referred to, that

> the contractor shall not have or make any claim or demand * * * for any damage which he may sustain by reason of any delay in the progress of the work, arising from the acts of any of Her Majesty's agents.

Here, there is no question of delay or negligence on the part of the Crown or of its officers after the notice to the respondent of the 13th of October. In fact, in 1897, but the trivial delay of a few days at the begin-

(1) 33 U.C.Q.B. 313.

(2) L.R. 4 C.P. 755; L.R. 5 C.P. 310.

ning of the season is relied upon by the respondent. That these short delays in May and June can be held as an excuse for leaving the works in a state of stagnation during the rest of the season is to my mind an untenable contention.

In *Berlinquet* v. *The Queen* (1), the contractor had agreed to complete the works on the 1st July, 1871. He, however, did not do so, but went on by consent with his undertaking till May, 1873, when the Government took possession of the works under clause 6 of the contract (page 91), which enabled it to be done after seven days' notice to the contractor. Mr. Justice Fournier took the view that after the expiration of the time fixed by the contract, the Government had lost their right to so put an end to the contract, and cited the case of *Walker* v. *The London & North Western Rway. Co* (2), in support of his opinion, but the majority of the Court clearly did not adopt that view.

Another contention of the respondent as to the notice to him of the 13th of October, is that it was insufficient in that it did not point out to him in what respect the engineer was dissatisfied, and what he required to be done; citing *Smith* v. *Gordon* (3). There is nothing that I can see in this contention. In the *Smith* v. *Gordon* case, it was merely three special items that the architect had ordered. Here it is default and delay in diligently continuing to execute or advance the works to his satisfaction that the engineer charged the respondent with in the very words of the contract, and nothing more specific than that was required.

The proposition, on the part of the respondent, that under ordinary circumstances, the law implies a contract to allow a reasonable time to a contractor when the term originally fixed has been indefinitely extended,

(1) 13 Can. S. C. R. 26. (2) 1 C. P. D. 518.
(3) 30 U.C.C.P. 553.

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cannot perhaps be controverted. But that rule cannot under any circumstances have any application here, for it is specially provided by clause 34 of this contract that

> no implied contract of any kind whatever, by or on behalf of Her Majesty, shall arise or be implied from anything in this contract contained, or from any position or situation of the parties *at any time*, it being clearly understood and agreed that the express contracts, covenants and agreements herein contained and made by Her Majesty, are and shall be the only contracts, covenants and agreements upon which any rights against Her are to be founded.

Now that part of this contract is as binding as the rest of it. Where the parties have agreed that no implied contract will rule their dealings, the court cannot see any.

Then here, by the new agreement entered into between him and the minister in June, 1897, by which, upon the cash payment of $10,000, he bound himself to terminate his contract on the 31st of October, 1898, as requested by the Crown, the respondent is precluded from raising the question of the reasonableness of the time given to him. And this more specially differentiates this case from all those cited by the respondent, were any of them binding upon us. He has agreed to that time, and however unreasonable it might afterwards appear to have been, he must be bound by it. It was far more unreasonable for him to agree in 1892 that he would do all the work within two years. Yet, he could not contend that, at any time during these two years, the Crown had not the power, under clause fourteen, to terminate the contract.

The respondent's contention that this agreement of June, 1897, with the minister is not proved, cannot prevail. The minister's evidence, corroborated as it is by Mr. Dobell, and by the report to council of the 26th of June, leaves in my mind no room for doubt upon

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this fact. Mr. Edwards' evidence is invoked by the respondent as supporting his contention. But, as I read it, it cannot preponderate over the direct and positive testimony of the two ministers. The occasion Mr. Edwards speaks of must be another one than that referred to by them. Then he, and the respondent, at most deny and do not remember, whilst the other two affirm. And under these circumstances, the rule laid down in *Lane* v. *Jackson* (1), has its application. The Master of the Rolls, Sir John Romilly, there said:

> I have frequently stated that where the positive fact of a particular conversation is said to have taken place between two persons of equal credibility, and one states positively that it took place, and the other as positively denies it, I believe that the words were said, and that the person who denies their having been said has forgotten the circumstances. By this means, I give full credit to both parties.

That is a most rational rule. See also *Wright* v. *Rankin* (2); *Stitt* v. *Huidekopers* (3); *Lefeunteum* v. *Beaudoin* (4). In the civil law, it was said upon the same principle, *magis creditur duobus testibus affirmantibus quam mille negantibus.* Then no attempt has been made to discredit these two witnesses, and none was possible. They are men of the highest standing in the community, they gave their evidence, as I read it, in as fair and impartial a manner as could rightly be expected from men of their character, they are absolutely disinterested witnesses, this particular fact they depose to was a reasonable and most probable one under the circumstances, for there is ample evidence that then the extension to October, 1898, was considered to be a sufficient one; and not to give full credit to their statements in all particulars would seem to me an arbitrary act that nothing on the record would justify. Then there is the corroborative fact, uncontroverted and incontrovertible, that it was

(1) 20 Beav. 535.
(2) 18 Gr. 625.
(3) 17 Wall. 384.
(4) 28 Can. S. C. R. 89.

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upon the minister reporting that the respondent had so agreed to complete his contract in 1898, and the certificate of the Chief Engineer, that the Treasury Board who had repeatedly refused to sanction the payment to the respondent of the draw-back in question, at last yielded and allowed it to be paid, though it was not due. The respondent would virtually contend that it was upon a false representation that the minister succeeded to obtain this favour for him. Now, leaving aside all the various other considerations that suggest themselves against the reasonableness of such a contention, is it credible that the minister, in the respondent's sole interest, would have rendered himself guilty of obtaining this money upon false representations to his colleagues, or would have taken the responsibility of asserting a fact of which he was not perfectly sure?

That agreement by the respondent to complete his contract in October, 1898, being established, his claim against the Crown falls to the ground. Assuming that his contract, so far as the time of its completion was concerned, was up to that agreement a contract to complete it in a reasonable time, after that agreement, clause fourteen unquestionably continued in force, and the respondent is out of Court. That agreement of May 1897 constituted a mutual waiver of all anterior grievances. The respondent himself committed a breach of his contract, so renewed as to time, by putting himself, in October, 1897, in the impossibility to complete it as agreed upon in October, 1898. The reasonableness of time was no more in question. And it is the law that no one can sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately

be recoverable back as damages arising from his own breach of contract.

I have considered the case as if it turned altogether upon clause fourteen of the contract—and its being in force in 1897. But, assuming that this clause was not then in force, assuming even that it never had been in this contract, assuming that the contract was in May, 1897, to complete in a reasonable time, the respondent could not, in my opinion, succeed in his claim for damages against the appellant.

I would think it clear that, upon the respondent allowing, as he has done, the whole working season of 1897, to pass without making or attempting to make any reasonable progress, the Crown had the right at the end of the season to cancel the contract. The respondent had then committed a breach of his contract by putting himself in the impossibility to finish within a reasonable time. And it is preposterous, it seems to me, for him to contend, as he does, that the Crown had to wait till that reasonable time was over before they could turn him out. October, 1898, had been agreed by him, in May, 1897, to be then a reasonable time. And when, in October, 1897, he had put himself, as I take it incontrovertibly upon the evidence, in a position not to be able to finish in October, 1898, the Crown had the right to put an end to the contract.

No one has questioned his integrity, and it stands unimpeached. But, in taking this contract, he overestimated his capacity, or underestimated the cost and magnitude of his job, and perhaps relied too much on eventualities.

His claim for damages must be dismissed.

As to his claim for the value of the plant and material taken possession of by the Crown, it must also be dismissed.

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By the 12th clause of the contract it was provided that all machinery and other plant, materials and things provided by the contractor should, from the time of their being provided, become, and until the final completion of the work should be, the property of Her Majesty for the purposes of the said works; that the same should on no account be taken away or used or disposed of, except for the purposes of the works, without the consent in writing of the engineer; and that Her Majesty should not be answerable for any loss or damage whatsoever which might happen to such machinery or other plant, material or things; provided always that upon completion of the works, and upon payment by the contractor of all such moneys, if any, as should be due from him to Her Majesty, such of the machinery and other plant, material and things as should not have been used and converted in the works, and should remain undisposed of, should upon demand be delivered up to the contractor.

By the 14th clause of the contract it was provided that

> where the contract was taken out of the contractor's hands, under the circumstances therein stated, all materials and things whatsoever, and all horses, machinery and other plant, provided by the contractor for the purposes of the works should remain and be considered the property of Her Majesty for the purpose and according to the conditions contained in the 12th clause of the contract.

Under these clauses it is evident that no action as taken can be maintained against the Crown for the value of the said plant.

I would allow the appeal with costs, dismiss the petition of right with costs, and dismiss the cross-appeal with costs.

I take it that, upon this result of the appeal, the counter-claim of the Crown need not be adjudicated

upon according to what was intimated by counsel at the argument.

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Appeal and Cross-Appeal Dismissed.

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

Solicitor for the respondent: *Wm Wyld.*

CHALLONER v. THE TOWNSHIP OF LOBO AND GEORGE OLIVER.

1901

*Nov. 7, 8,

1902

*Mar. 12.

Drainage—Qualification of petitioner—"Last Revised Assessment Roll"—R. S. O. (1897) ch. 226—Costs of non-appealing party.

Judgment appealed from (1 Ont. L. R. 156, 292) affirmed.

APPEAL from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of the trial court (2), and dismissing the plaintiff's action with costs.

The action was to restrain the corporation and their contractor from constructing a drain under authority of a by-law and, in the trial court, Meredith C. J. decided in favour of the plaintiff (2). On appeal by the corporation to the Court of Appeal for Ontario, this judgment was reversed (1), that court holding that the "last revised assessment roll" governing the status of petitioners in proceedings under the Drainage Act, was the roll in force at the time the petition was adopted by the municipal council and referred to the engineer for inquiry and report, and not the roll in force at the time that the by-law was finally passed.

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* PRESENT:—Taschereau, Sedgewick, Girouard and Davies JJ.

[Mr. Justice Gwynne was present at the hearing but died before judgment was delivered.]

(1) 1 Ont. L. R. 156, 292. (2) 32 O. R. 247.

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CHALLONER v. TOWNSHIP OF LOBO.

The contractor (Oliver) had been made a party to the appeal in the Court of Appeal for Ontario (1) and appeared at the hearing but did not himself appeal. On motion, subsequently made, the Court of Appeal for Ontario held (2), that the effect of allowing the appeal of the corporation with costs did not give the contractor any costs on such appeal.

The present appeal was by the plaintiff (Challoner), both defendants being made respondents.

Aylesworth K.C. for the appellant.

Shepley K.C. and *Macbeth* for the respondent, the Township of Lobo.

Burbidge for the respondent, Oliver.

After hearing counsel for the parties, the court reserved judgment and, on a subsequent day, dismissed the appeal with costs against the appellant in the issue before the Supreme Court of Canada with the corporation but without costs to the respondent Oliver.

The following reasons for judgment were delivered.

TASCHEREAU J.—This is an appeal from the judgments reported at pages 156 and 292 of the first volume of the Ontario Law Reports. The majority of the court are against the appellant. If the result had depended on my conclusions, I would have been inclined to adopt the view of the case taken by Meredith C.J. at the trial as reported (3). However, a dissent would not help the appellant.

The appeal is dismissed with costs against the appellant on the issue before this court with the Township of Lobo, but without costs in this court to the respondent Oliver.

(1) 1 Ont. L. R. 156. (2) 1 Ont. L. R. 292.
(3) 32 O. R. 247.

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SEDGEWICK, GIROUARD and DAVIES JJ. were of opinion that the appeal should be dismissed for the reasons given by Mr. Justice Osler in the Court of Appeal for Ontario.

Appeal dismissed with costs to respondent, the Township of Lobo, but without costs to respondent Oliver.

Solicitors for the appellant: *Meredith & Fisher.*

Solicitors for the Township of Lobo, respondent: *Macbeth & Macpherson.*

Solicitors for the respondent, Oliver: *Stuart, Ross & Bucke.*

THE DOMINION COAL COMPANY v. THE S. S. "LAKE ONTARIO.

1902

*May 9.

Admiralty law—Collision—Ship at anchor—Anchor light—Lookout—Weight of evidence — Credibility — Findings of trial judge — Negligence.

Judgment appealed from (7 Ex. C. R. 403) affirmed.

APPEAL from the judgment of Macdonald C.J. in the Nova Scotia Admiralty District of the Exchequer Court of Canada (1) dismissing the action *in rem* of the appellants with costs.

The steamship "Lake Ontario" was proceeding in charge of a pilot to her dock in the Harbour of Halifax, N.S., on a blustery night in the month of January, 1900, the weather being intermittently clear and cloudy, and came in collision with and sank the appellants' coal

* PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

(1) 7 Ex. C. R. 403.

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DOMINION COAL CO. v. S.S. LAKE ONTARIO.

barge "A. L. Taylor" lying at anchor on the northern side of George's Island.

The steamship had signalled, by guns and whistles, for a medical officer when approaching the quarantine grounds shortly before the collision occurred and the evidence of her officers and several of her seamen shewed that her officers and crew were alert and anxiously working the ship through anchored vessels in the darkness and in blustery weather; that they came suddenly upon the "Taylor" and that no lights were seen upon her by any of them.

On the other hand, the caretaker of the barge, who was not on deck at the time, swore that a proper anchor light was burning on the barge and his statement as to the light was corroborated by a captain of a fishing schooner lying close by and several boatmen and labourers on the wharves

The trial court judge accepted the evidence for the defence as correct and found that the collision and subsequent loss were wholly attributable to the negligence of the "Taylor" in failing to have a proper anchor light and to keep a sharp lookout. The action was accordingly dismissed with costs and the plaintiffs appealed to the Supreme Court of Canada.

After hearing counsel for the parties, the court pronounced judgment dismissing the appeal with costs as it appeared that the case was clearly one depending solely upon the appreciation of the evidence by the trial judge and that there was evidence on behalf of the defence which, if believed, would entitle the defendant to succeed.

Appeal dismissed with costs.

Mellish for the appellants.

Newcombe K.C. and *Drysdale K.C.* for the respondent.

S.S. "PAWNEE" v. ROBERTS.

1902

*May 10, 13.

Admiralty law—Collision—Undue speed—Ship in default—Rule 16—Navigation during fog.

Judgment appealed from (7 Ex. C.R. 390), varied, Girouard J. dissenting.

APPEAL from the judgment against the steamship "Pawnee" in the New Brunswick Admiralty District of the Exchequer Court of Canada (McLeod J.) (1), deciding that she was wholly to blame for a collision which occured between her and the schooner "Roland" during a thick fog near the entrance of the Harbour of St. John, N.B., on the 17th of July, 1901, by which the schooner and her cargo were lost, and awarding damages and costs to the respondent, owner of the schooner.

The learned trial judge held that it was the duty of the steamer, upon hearing fog signals sounded by the schooner, to have stopped her engines as far as possible and to navigate with caution until the danger of collision was over; that the steamship had neglected these precautions and was, therefore, wholly to blame for the collision, and he assessed the damages against the "Pawnee" as follows, viz.: $4,000 for the value of the schooner; $90 for her freight, and, after deduction of the value of a few items, $550 for personal effects.

After hearing counsel for the parties, the court reserved judgment and, on a subsequent day, allowed the appeal in part, the value of the schooner being reduced to $2,500, thereby reducing the verdict by $1,500. Mr. Justice Girouard J. dissented. No costs were allowed on the appeal.

Appeal allowed in part without costs.

C. J. Coster for the appellant.

McLean K.C. for the respondent.

* PRESENT;—Taschereau, Sedgewick, Girouard, Davies and Mills J J.

(1) 7 Ex. C. R. 390.

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*Feb. 27, 28.

*June 9.

JAMES K. WARD (DEFENDANT).....APPELLANT;

AND

THE TOWNSHIP OF GRENVILLE (PLAINTIFF).....RESPONDENT.

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

Negligence—Vis major—Driving timber—Servitude—Watercourses—Floatable rivers—Statutory duty—53 V. c. 37 (Que.)—Riparian rights.

The Rouge River, in the Province of Quebec, is floatable but not navigable, and is used by lumbermen for bringing down sawlogs to booms in which the logs are collected at the mouth of the river and distributed among the owners. The plaintiff constructed a municipal bridge across the river near its mouth where the collecting booms are situated. The defendant and a number of other lumbermen engaged in driving their logs, mixed together, down the river, did not place men at the bridge to protect it during the drive and took no precautions to prevent the formation of jams of their logs at the piers of a railway bridge which crosses the river a short distance below the municipal bridge, nor did they break up a jam of logs which formed there, but they abandoned the drive before the logs had been safely boomed at the river mouth. The River Rouge is subject to sudden freshets during heavy rains, and, on the occurrence of one of these freshets, the waters were penned back by the jam and a quantity of the logs were swept up stream with such force that the superstructure of the municipal bridge was carried away. In an action by the municipality to recover damages from the lumbermen, jointly and severally,

Held, affirming the judgment appealed from, the Chief Justice and Sedgewick J. dissenting, that, irrespectively of any duty imposed by statute, the proprietors of the logs were liable for actionable negligence on account of the careless manner in which the driving of the logs was carried on, and were jointly and severally responsible in damages for the injuries so caused.

*PRESENT:—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills JJ.

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Held, further, that the right of lumbermen to float timber down rivers and streams is not a paramount right but an easement which must be enjoyed with such care, skill and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian proprietors and public corporations entitled to bridge or otherwise make use of such watercourses.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Terrebonne, by which the appellant and several other defendants were jointly and severally adjudged and condemned to pay to the plaintiff $4,250 for damages with interest and costs.

The case is stated in the judgments now reported.

Atwater K.C. and *Campbell K.C.* for the appellant. This is not a suit for a penalty under the statute, and consequently, the presence or absence of men to guard the bridge is immaterial, except in so far as it can be shewn that their presence would have been a useful precaution. With regard to the charge that no efforts were made to remove the jam, the appellant claims that he had brought down his logs as far as they could be brought and to the place at which the boom company generally received them; that they were there stopped by an accumulation of other logs which extended down to the boom; that the boom company used all reasonable measures to avoid the jam, and that, even if they did not, he was powerless to interfere with them. The appellant also claims that the municipal bridge was itself an obstruction in the river.

The statute, 53 Vict. ch 37 (Que.) is tacked on as a rider to Art. 2972 R. S. Q., and is in the same category and under the same title as the regulations relating to factories. This court has held in *Tooke* v. *Bergeron* (1), and *The Montreal Rolling Mills Co.* v. *Corcoran* (2), that such provisons are intended to operate only as

(1) 27 Can. S. C. R. 567. (2) 26 Can. S. C. R. 595.

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police regulations and the statutory duties thereby imposed do not affect any civil responsibility as between parties who may be affected thereby.

The article in question is totally inapplicable to the present case. The statute refers to precautions being taken by the owner of timber driven or floated down streams and not to cases, such as the present, where damage has been caused by a jam of the logs below a bridge and by the sudden rising of the waters of the river causing the timber to back up. On the facts of this case it would be impossible to secure a conviction or penalty under the statute. The evidence shows that the jam commenced at the boom and continued right up the river past the different bridges so that the logs were not in course of descent but were resting against the boom.

It cannot be assumed that the right of lumbermen to use the river for floating timber is subsidiary to the rights of the boom company to obstruct the river by its boom, or of the railway company and the municipality to obstruct the river by the piers or abutments of their respective bridges. This use of the river as a highway for logs is the paramount use of the log-owners. The public are entitled to all the advantages which a river in its natural state can afford for public purposes, and there is no difference in that respect whether the river is or is not navigable or floatable. See *McBean* v. *Carlisle* (1), and *Boissonnault* v. *Oliva* (2). Rivers which are floatable, although only so for loose logs, must be free and open and unobstructed for the public. There was no obligation on the lumbermen, because of the presence either of the bridges or the boom, to stop the logs by means of a supplementary boom or other arrangement further up the river; nor was there any right or

(1) 19 L. C. Jur. 276. (2) Stewart K. B. 564.

obligation on the lumbermen to pass the logs through the boom company's boom, and the loss of the bridge is imputable either to *force majeure* or to the negligence of some person or company other than the lumbermen

The appellant's right to use the river for floating logs has not been affected either by the statute or by the boom company's charter, and the municipal bridge is at the risk of the municipality if and so far as it interferes with the floatability of the river, and if the risk to the bridge was increased by the accumulation of logs and by the obstruction caused by the extension of its abutments into the river, that is a risk which was assumed by the municipality in so constructing its bridge. If there was negligence in not removing the logs it was negligence of the boom company in whose control the logs were and not of the appellant who had no further power to move them and, indeed, they could not have been physically moved except by commencing from below and working up and by easing the mass through the boom company's booms.

The jam which caused the backing up of the logs was due to the construction of the booms at the mouth of the river by the boom company which, in erecting such booms, acted within express statutory authority and no act whatever of negligence is proved on the part of the appellant which would render him liable for the damages.

Lafleur K.C. and *DeLaronde* for the respondent. If the jam of logs resting against the piers of the railway bridge had been broken at the commencement of its formation, or *en temps opportun* the accident involving the destruction of the municipal bridge would have been avoided. A very obvious precaution on the part of the defendants, and one prescribed by law, had been neglected, that of retaining a sufficient number

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of men at or near the bridge to guard against possible accident, 53 Vict. ch. 37 (Que.). At a critical moment the defendants' men were discharged and the bridge abandoned to its fate without any effort, even at that late date, and notwithstanding the eminent peril in which the bridge was left. All the defendants were engaged in floating their logs and timber in common down the river towards the boom; they were cognizant of the fact that a much larger quantity than usual of logs and timber was being taken down, still, no warning or intimation of that fact was given to the men in charge of the boom to enable them to provide and prepare for such an emergency. No effort commensurate with the impending danger to the municipal bridge; no effort of any kind was attempted at any time by the defendants to lessen or mitigate the gravity of the situation, wholly engendered by their culpable negligence in not providing a sufficient and competent force of men to cope with such a probable contingency as that which involved the loss and brought about the collapse of the bridge.

What aggravated the condition of things at this time, and materially contributed to the perplexity of the situation was that this jam, having been allowed to increase for weeks without being broken up, soon formed a dam across the river with the natural result that the water was lowered at the foot of the jam where the logs grounded, and rose to an abnormal height at its head, till it was level with the municipal bridge, although this bridge was built ten feet above high water. There was nothing abnormal in the condition of the Rouge River during this drive or descent of the timber. The river had risen a couple of feet as the result of rains, but the rise of twelve feet or more, at and some distance above the municipal bridge was wholly caused by the jam.

There were other means, easy and feasible, to which the defendants could have resorted to prevent the accident such as by stretching safety booms across the river higher up than the bridge, and by having a force of men to precede the drive ready to cope with and break any jam which might form. All precautions were neglected.

The right to construct a boom at the mouth of the Rouge River, conferred upon the Rouge Boom Company, and the existence of such a boom did not exonerate the defendants from the obligation of conducting their business with a due regard to the rights of others, and to conform to the duties imposed upon them by law, and the necessities and conditions of their business. The broad principle determining the question of responsibility reposes on Arts. 1053 and 1054 C. C. We also refer to 20 Laurent, *nn.* 402 *et seq.* and 639; 1 Sourdat, *nn.* 13, 14. *King* v. *Ouellet* (1), and Angell on Watercourses, sec. 556.

The CHIEF JUSTICE and His Lordship Mr. Justice SEDGEWICK dissented from the judgment of the majority of the court dismissing the appeal.

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

GIROUARD J.—By the action, the Township of Grenville, situated in the County of Argenteuil, in the Province of Quebec, is endeavouring to recover jointly and severally from the appellant and a number of other lumbermen the sum of $4,262, as damages for the destruction, on the 26th June, 1898, through their fault, imprudence and negligence, of an iron bridge erected by the respondent across a floatable river *à bûches perdues*, known as the Rouge River.

(1) 14 R. L. 331.

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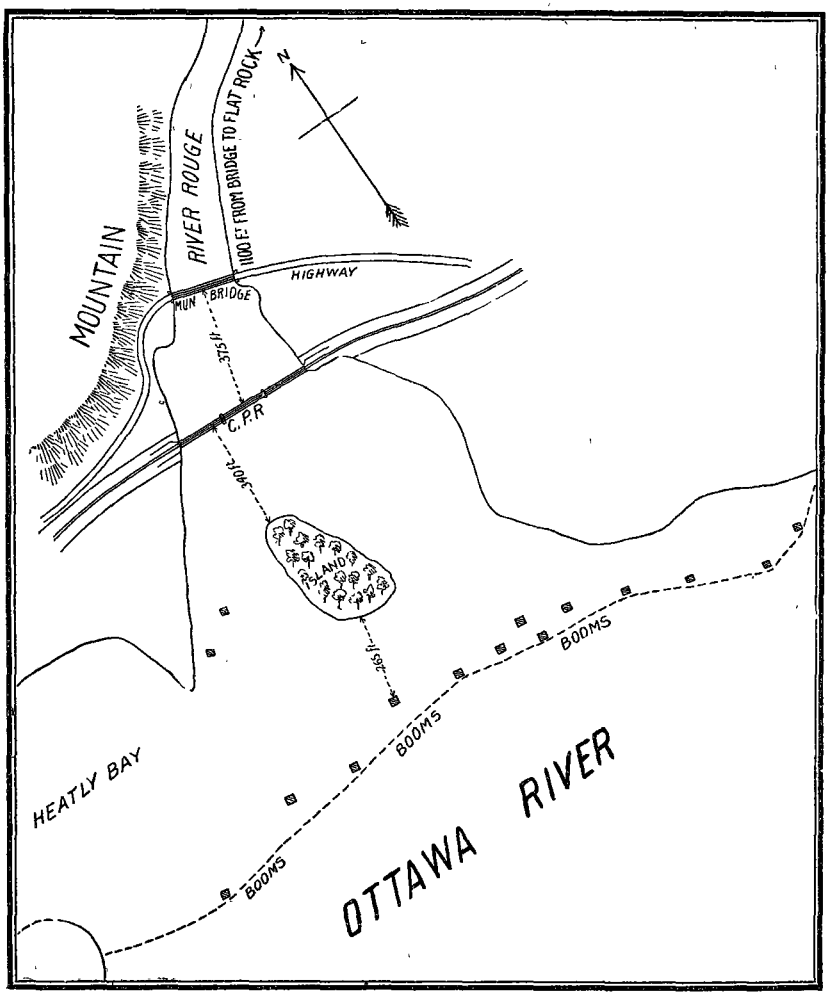
The following plan filed in the case in an enlarged form, shows exactly the situation of the premises:



The booms shown on the plan, as being situated at the mouth of the Rouge River, are the property of a

corporation known as The Rouge Boom Company, incorporated by the Parliament of Canada in 1874, by 37 Vict. ch. 111, which declares them also subject to the provisions of the Consolidated Statues of Canada, 1859, ch. 68, in so far as they are not inconsistent. This chapter 68 was left out of the consolidation of the Revised Statutes of Canada, 1886, as being perhaps out of the jurisdiction of the Parliament of Canada. (Vol. 2, schedule A. p. 2). It is to be found in the Revised Statutes of Ontario, 1887, ch. 160 and 1897, ch. 194, and also in the Revised Statutes of Quebec, 1888, art. 4,985 and following. The parties have agreed however that both the booms and the municipal bridge were lawfully erected under competent authority, and therefore no question arises as to the constitutionality of the Act of incorporation of the Boom Company or the illegality of the construction of these works.

The trial court (Taschereau J.) found that there was negligence on the part of the lumbermen and they were condemned to pay jointly and severally the sum of $4,250, with interest and costs. The judgment rests upon the following *considérant :*

Considérant que les défenses ne mettent pas en question les droits de la demanderesse à la propriété du pont à raison duquel la litige est engagé, et qu'il ressort de la preuve que la demanderesse est en possession du dit pont à titre de propriétaire depuis plusieurs années, que l'enquête fait voir que les travées et le tablier métallique du dit pont ont été soulevés, enlevés et emportés, le 26 juin 1898, par la masse des bois et billots qui, en descendant par la Rivière Rouge, avait précédemment formé un amoncellement ou encombrement et une digue (*jam*) ayant sa base aux piliers du pont du Pacifique (à 375 pieds en aval du pont de la demanderesse) et s'étendant en amont jusqu'à un endroit connu sous le nom de "Flat-Rock", a une distance d'environ 1100 pieds du pont de la demanderesse, laquelle digue, étant subitement brisée et remuée par suite d'une crue soudaine de la rivière causée par des pluies récentes, entraine le dit pont de la demanderesse par le choc irrésistible de sa descente ; qu'il

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appert aussi de l'enquête que la demanderesse a déboursé la somme de $4,250, pour la reconstruction du dit pont et la réparation de ses culées et autres accessoires ; qu'il est prouvé que chacun des défendeurs avait des bois et billots dans la masse composant la dite digue, laquelle s'était augmentée graduellement par la descente continuelle de bois et billots jusqu'au moment de l'accident ; qu'il est aussi prouvé que les défendeurs connaissaient l'imminence du péril, mais qu'ils n'avaient pas placé au dit pont un nombre suffisant d'hommes, ni pris d'autres précautions nécessitées pour empêcher les dommages, ainsi qu'il leur était prescrit par l'acte provincial, 53 Vic., ch. 37, qui punit d'une pénalité et rend responsable des dommages tout propriétaire de billots et bois marchands qui en opère ou fait opérer la descente sur une rivière flottable de cette province sans telles précautions ; que l'accident n'est pas du à la force majeure, mais à la négligence des défendeurs qui n'ont pas empêché la formation de cette digue, ni pris les mesures propres à la briser en temps utile, alors qu'une crue soudaine mais ordinaire des eaux de la Rivière Rouge, due à des pluies récentes, pourrait d'un moment à l'autre, comme la chose est arrivée, emporter cette digue en brisant tout sur sont passage.

This judgment was confirmed by the Court of Appeal purely and simply. No notes of the judges were transmitted to us.

The present appeal involves two questions, one of fact and one of law.

As to the facts alleged to establish the fault or negligence of the defendants, the two courts below have found unanimously against the defendants, and we have declared on several occasions that in cases of this kind we would not interfere, unless the finding was clearly wrong. There is not only some evidence in support of it, but the weight of the proof is decidedly in favour of the plaintiff.

The undertaking of driving logs and timber on a floatable river is too well known in this country to require much explanation. During the winter, the logs and timber, cut by owners of timber in the adjoining forests, are marked and put loose in the creeks, lakes and rivers emptying into the main river which will finally take them to destination, in this

instance, the Rouge River, discharging into the navigable Ottawa River, near the bridge of the respondents. As soon as the ice begins to move, large gangs of men are employed by the lumbermen to float out the lumber, keeping the logs off rocks, *battures*, islands or banks, and aiding in every way to float them with the current, loose, *à bûches perdues*, the drivers following them till they reach the booms at the mouth of the main floatable river.

In the spring of 1898, the water being rather unusually low in the Rouge River, the drive was commenced only about the middle of May, but had been so easy and successful that about the beginning of June the boom was practically jammed with logs piled up in every direction and position, the gap at the foot of it being altogether insufficient to permit their sacking or rafting by the lumbermen in the Ottawa River as quickly as they came down. The logs continuing to descend in great quantity, the jam went up into the Rouge River, soon reached the Canadian Pacific Railway bridge and even as far as Flat Rock, eleven hundred feet further up than the municipal bridge.

The trial judge found that the jam commenced at the Canadian Pacific Railway bridge, and there is some evidence in support of his view. But whether it was formed first in the boom or at the Canadian Pacific Railway bridge, there is no doubt that for more than two weeks before the accident, the jam looked more like a dam, to use the expression of one of the witnesses, and that nothing was done to prevent a flood, although there was ample evidence that there were reasonable precautions which might have been taken to prevent the jam forming if the appellants had exercised reasonable diligence. The inevitable consequence of the state of the river was the rise

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of the water, which was considerably increased by a sudden heavy freshet, not infrequent in that region even during the summer season, and finally the carrying away, on Sunday, the 26th of June, 1898, of the municipal bridge by the logs and timber of the defendants. The lumbermen and the boom company, although well aware of the imminent danger of the situation, had only some ten or twelve men working at the gap engaged in giving and receiving the logs which were put in sacks or rafts as they were intended for close or distant destination; but at no time was any man placed at or near the bridge, or any precaution taken to avoid its destruction, not only at the time of its occurrence, when they could perhaps have accomplished little, if anything, but for two or three weeks previously, when the jam commenced and could have been prevented, and even broken up after it was formed.

The different gangs of drivers had been discharged when their respective logs had reached the jam, whether at the booms, the Canadian Pacific Railway bridge, the municipal bridge or the Flat Rock, which, judging from the plan, lies at a distance of 2480 feet or more than thirteen arpents from the booms, and certainly about 1500 feet above the mouth of the Rouge River.

These facts, as I appreciate them, constitute three distinct acts of negligence on the part of the defendants, each of them being sufficient to render them liable jointly and severally for the destruction of the bridge;—1st. the abandonment of the drive at the Flat Rock, at all events before the logs had reached the booms;—2ndly. The total absence of men to protect the bridge at all times; and—3rdly. The total want of any precaution or effort to prevent or break

up the jam in the Rouge River above and below the municipal bridge.

To be brief upon these findings of fact, let me quote Mr. Reuben Weldon, a lumberman and one of the defendants. Referring to a visit he made to the bridge on Monday, the 20th June, he says:—

A. I was going up to the drive and I went there before going to the drive; I heard the thing was in danger and I went to see how it was.

Q. Did the jam extend far?

A. To the Flat Rock.

Q. How far up?

A. Perhaps four acres or more, but I could not swear to the exact distance.

Q. When you were at the bridge did you notice anyone working on the jam?

A. No.

Q. Was there any person stationed at the bridge itself?

A. Not when I saw it * * *

Q. You saw no effort on their part to break up the jam?

A. I saw no men working at the jam to my knowledge when I was there.

* * * * * * *

Q. Did you at any time before the accident to this bridge complain to Mr. Dean that there were not sufficient gaps in the boom?

A. Yes, I did * * *

Q. You think if they had two gaps and the necessary number of men, you think they could have avoided this accident?

A. Yes.

Q. That is your opinion?

A. Yes.

Q. You heard the evidence of Mr. Dauphinais that they had five men on the gap and five men on the jam; do you consider under the circumstances five men on the jam were sufficient?

A. No.

Q. To have broken up the jam, it would have taken how many men?

A. Thirty men at the very least, I would say.

Q. Do you consider that if sufficient precaution had been taken in the way of having more gaps and more men that this accident could have been avoided or prevented?

A. It could have been avoided altogether * * *

Q. Have you any idea how long this jam was in forming?

A. It was quite a time in forming.

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Q. Would it not have been an easy matter at first to have broken up this jam when it commenced to form?

A. I do not see why it could not.

* * * * * * *

Q. In the case of a jam formed here and which resulted in the carrying away of the bridge, do you not consider it would have been wiser to have attempted to break it up from the first?

A. Yes, that is when it should have been broken.

The lumbermen contend that they cannot be held responsible for any act of negligence of the boom company and they refer to the testimony of Mr. Dean, its manager and secretary:

Q. Whereabouts did the boom company begin to take charge of the logs when they came down the river?

A. The custom was that the logs were driven down right into the booms, and then the drivers were disbanded, and the company assumed any logs that were left further back, that is, the lumbermen would drive their logs into the jam.

Q. Until they touched the logs?

A. Yes, until they touched the logs, and the boom company took charge of them after that.

* * * * * * * * *

Q. Whose duty was it to prevent a jam as far as possible and break it up?

A. Well, if there was space—if there was open water between the booms and this jam, while the drivers are on, they are supposed to bring them into the boom, but in the event of the booms being full when the drive came down, the Boom Company then assumed that charge.

Thus, according to Mr. Dean, if there be a jam in the boom, the drivers cannot take the logs into it—an eventually easily understood—but if there be none, or if there be open water between the boom and the jam, they are expected to bring them in.

It is proved beyond doubt that at the time of the formation of the jam at the Canadian Pacific Railway bridge, and for some days after, there was open water space in the Heatly Bay, west of the booms, although Mr. Dean swears that as early as the 17th of June, every available place above the boom was full of logs.

Mr. Reeves, (and his testimony is corroborated by Weldon, Brown and the foreman of the boom company, Dauphinais), says:

Q. Well now, was it true that a portion of the river on the west side was open between the boom and the jam?

A. Part of this bay was empty—not very much of it.

Q. Part of the west bay?

A. Yes.

Thus, according to Mr. Dean's testimony the drivers were expected to break up the jam at the Canadian Pacific Railway bridge and above, till that open space was filled. They did not even attempt to do so.

Mr Dean finally considers the drive as accomplished only when the logs and timber have reached the booms. The exception he mentions, as being established by custom, even supports the general rule. The boom company, he says, undertakes to break up the complete jam, probably because they consider themselves in default, or look upon the formation of a jam as almost a natural event, not necessarily involving danger to property. Even in that case, it seems doubtful that they can legally be charged with default, unless certain steps have been taken by the lumbermen in accordance with the provisions contained in section 76 of ch. 68 of the Consolidated Statutes of Canada, 1859. But whether in default or not, responsible or not, the lumbermen are not relieved from their liability, if the jam be not broken by the boom company, and cause damage. They remain at all times directly and primarily liable to the riparian proprietors, save their recourse in warranty, if any, against the boom company.

It may indeed be questionable whether, under its charter, the boom company can act as suggested by Mr. Dean and operate in the Rouge River, some eight or nine arpents above its mouth. By 37 Vict. c. 111, the Rouge Boom Company is incorporated

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for the purpose of holding, maintaining and working booms *at the mouth* of the said River Rouge. (Sec. 7).

The company shall have the right to acquire all booms, lands, plant and dependencies. *at the mouth of the said River Rouge,* and all property and rights whatsoever appertaining thereto. (Sec. 8.)

Therefore, as a general rule, and under ordinary circumstances, the company cannot act, work or take care of logs outside of the mouth of the Rouge River, for instance, at and above the municipal bridge they cannot finish the job of the drivers, and when they do so, it can only be on behalf of the lumbermen to whom they may possibly be liable in damages for any default or neglect in the booms.

The Parliament of Canada could not permit the boom company to operate on the Rouge River, which in no sense is navigable, but only floatable, *à bûches perdues*, and is the property of the riparian proprietors, and as such exclusively subject (outside of the regulations of the fisheries) to the Legislature of the Province of Quebec. (Arts. 400 and 503, C. C. and the authorities collected in a foot-note to *King* v. *Ouellet* (1)).

We are now brought to face the proposition of law set up by the appellant, that "the use of the river as a highway for logs is the paramount use," and that the municipal bridge, although lawfully erected, was an obstruction of the river. I cannot assent to this proposition of law. It is contrary to the well settled jurisprudence not only of the Province of Quebec, but throughout the whole Dominion and the continent of America. Art. 503 C. C., and the decisons collected under that article by Mr. De Bellefeuille; *King* v. *Ouellet* (1); *Dunning* v. *Girouard* (2); *Drake* v. *Sault Ste. Marie Pulp and Paper Co.* (3); Am. & Eng. Encyc. of Law (2 ed.) *vo.* "Boom Companies", p. 711; and *vbis.*

(1) 14 R. L. 331.
(2) 9 R. L. 177.
(3) 25 Ont. App. R. 251.

"Floods", pp. 692-694, and "Logs and Lumber", p. 529.

The lumbermen are not the owners of floatable rivers and no law can be cited which secures them the exclusive use of these streams for the passage of their logs. They enjoy merely a right of servitude for that purpose. The riparian proprietors have also rights in and over floatable rivers, especially those *à bûches perdues*. They have a right to the use of the water running in the stream for themselves and their cattle and also to cross it in canoes, scows or on bridges, of which they cannot unnecessarily be deprived. Lumbermen, when exercising their rights of servitude for the floatage of their logs and timber, either in a public or a private river, must respect these rights, and if in the course of the drive they commit any *délit* or *quasi-délit* within the meaning of articles 1053 and 1054 of the Civil Code, they, like all other persons, must take the consequences and pay the damages caused by their fault or that of persons under their control, or by the logs and timber under their care.

It is no argument to say that under such a rule the floating of loose logs will become so onerous as to be almost impracticable, for, as it is stated, every bridge on the river, constructed according to the requirements of the law, will require protection from the drivers. That might involve some inconvenience and expense, but the lumbermen, with the large gangs of men on hand, are more able to look after their own property than the farmers. The evidence shows that this hardship is more imaginary than real. Seldom indeed a jam commences at any of the bridges; it is generally first formed in the booms, and as the municipal bridges along the whole length of the river are not exposed to the danger of booms, the risk of damaging them

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during the course of the descent of the logs is very small.

At all events, this is only an argument *ab inconvenientibus*, which cannot be taken into consideration when the law is clear. It is especially so in the Province of Quebec where the subject matter is regulated by a special statute in force since 1857—likely unknown elsewhere—which leaves no room for discussion or doubt. It lays down the rule that the owner of logs and timber floating on a private river, like the Rouge, is responsible for the damage caused by that passage, whether he is in fault or not, provided, of course, the riparian proprietors are not in fault. It was quite recently (1902) applied by the Superior Court in Sherbrooke, (Archibald J.,) confirmed in review by Tait A.C.J., Loranger and Fortin JJ. in *McKelvie* v. *Miller*. That statute is 20 Vict. ch. 40, s. 2, which was incorporated in the Consolidated Statutes for Lower Canada of 1860, chap. 26, s. 2, which is in the following words:

> 2. It shall be lawful, nevertheless, to make use of any navigable or floatable river or water-course, and the banks thereof, for the conveyance of all kinds of lumber, and for the passage of all boats, ferries and canoes, subject to the charge of repairing, as soon as possible, all damages resulting from the exercise of such right, and all fences, drains or ditches so damaged.

In 1888, when the Quebec Revised Statutes were under consideration, the provincial legislature felt, no doubt, that they had no power to deal with navigation, which, under the British North America Act, 1867, is a subject matter assigned to the Parliament of Canada. Hence the change in the wording of the clause in the Revised Statutes, by which the words "navigable or floatable" were struck out. As the clause stands, it will undoubtedly apply to a private floatable river like the Rouge, but not to a navigable

river and possibly a public floatable river. The clause 5551 of the Quebec Revised Statutes of 1888, now in force, reads as follows :—

> It shall be lawful, nevertheless, to make use of any river or watercourse, ditch, drain or stream, in which one or more persons are interested, and the banks thereof, for the conveyance of all kinds of lumber, and for the passage of all boats, ferries and canoes, subject to the charge of repairing as soon as possible, all damages resulting from the exercise of such right, and all fences, drains or ditches damaged.

We do not rest our decision upon this local statute, which has not even been invoked, and much less discussed at the bar before us. We base it upon articles 1053 and 1054 of the Civil Code, which after all, express the law in force in every civilized country. The plaintiffs have proved fault or negligence on the part of the defendants in the drive of their logs. For this reason, and without expressing any view as to the effect of the provincial statute, 53 Vict., ch. 37, upon their civil responsibility, we think the appeal should be dismissed, with costs.

DAVIES J.—The learned trial judge, before whom this cause was heard, found (*inter alia*) 1. That the logs which carried away the plaintiffs' bridge were those of defendants inextricably mixed and they were being floated down river by the defendants and had not reached the boom at the mouth of the river when the plaintiffs' bridge was carried away. 2. That the jam of logs having as its base the piers of the C.P.R. bridge 375 feet lower down the river than plaintiffs' bridge, extended up the river past plaintiffs' bridge to Flat Rock, a distance of about 1,100 feet. 3. That the accident was not due to *vis major* but to the negligence of the defendants who did nothing whatever to prevent the formation of the jam nor took any proper steps to break it up while there was still time to do so successfully.

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These findings of fact were approved of by the court of appeal for Quebec and it appears to me the evidence fully justifies them. From this evidence it appears that the jam of logs was about three weeks in forming and that after its formation there was an open space of water between the Canadian Pacific Railway bridge (the base of the jam) and the boom, capable of holding about 20,000 logs. The questions raised in the appeal and in the courts below did not involve disputes as to the right of the defendants to use the river for the purpose of floating their logs down to the boom, but were confined simply to the manner in which they exercised those rights. On the plaintiffs' part it was contended that in the exercise of their right to float their logs down the stream the defendants were bound to use proper and reasonable diligence and care to prevent jams which would injure either the property of the riparian owners, or the property in bridges or similar works built by statutory authority across the stream for the public necessity or convenience, and that the neglect to use such diligence and care made them liable for any damages caused to such property as a consequence of such neglect.

The true rule would seem to me to be that the right to float logs down such a river or stream as the one in question, being in the nature of a public easement, the rights of the log-owners and the riparian proprietors are concurrent and must be enjoyed reasonably without unnecessary interference one with the other, and without negligence. The same rule must be applicable in the cases of the owners of legally constructed bridges crossing the river for the public convenience. The degree of care, skill and diligence required on the part of the log owner must necessarily depend upon the circum-

stances of each case. Facts which might constitute proper skill and diligence in the early stages of the settlement of the country might easily assume the proportion of negligence when the country had become settled and the rivers had been crossed by numerous bridges. If the natural conformation of the river and lands through which it runs shows that there are narrow gorges or places where logs would be likely to jam, it is, in my opinion, both law and common sense that a greater degree of care, skill and diligence is required of the owner of the logs at such special places than along the ordinary and broader reaches of the river. And so, irrespectively altogether of any duty created by statute, it seems to me that at such places as that where the Canadian Pacific Railway bridge crossed the river on piers several of which were built in the river, a very much greater degree of care, skill and diligence would be required of the defendant log owners when floating their logs down the river, to prevent a jam, then in the open or ordinary reaches of the river. The Quebec statute of 1890, 53 Vict. ch. 37, amends the Revised Statutes by adding after subsection 3 of section 12, chapter 1, of title seven, the following section:—

> Every owner of logs or other merchantable timber who drives or has the same driven down the floatable rivers of this province shall station a sufficient number of men at every bridge built at least three feet above high water mark under which the said timber must pass or shall take other precautions necessary to prevent any damage which might be caused.
>
> In default of such precautions being taken the owner of the timber, the driving or floating down of which has damaged or carried away such bridge is (in addition to whatever recourse there may be against him) liable to a penalty of from ten to fifty dollars and costs or an imprisonment of one month in default of payment thereof.

It was strenuously contended for the defendants that this statute did not create a new civil remedy or make

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that a wrong for which damages could be recovered civilly unless such right existed *aliunde*. It is unnecessary for me in the view I take of the law as applicable to the facts of this case to express any opinion as to the effect of this statute upon the respective rights and liabilities of the several parties to this suit.

Apart altogether from the statute, I am of opinion that the defendants while exercising their right of floating their logs down the river had a corresponding duty to take all reasonable and proper care and precaution necessary to prevent the logs injuring the property of the riparian owners or other property, such as the plaintiffs' bridge, legally crossing the river. That bridge was admittedly built by statutory authority 10 feet above high water mark. I think the evidence establishes clearly that the defendants could have, with a proper force of men, prevented the formation of the jam at the Canadian Pacific Railway bridge, at any rate at the time it was being formed. I think if they could have done so, they were bound to employ such a force and to have continued its employment so long as it might be proved to be necessary either to prevent the formation of a jam or to break it up at once when formed. But I do not think the degree of care, skill and precaution required of the log owners by the law stopped or would have been satisfied by stationing a force of men at the bridge. If such a precaution was shewn to be insufficient to prevent a dangerous jam forming and any other reasonable steps could be taken by the log owners to prevent the jam forming and reduce and minimize its danger even when formed, I think they were bound to take them.

The jam of logs, as the evidence shewed, remained formed for about three weeks, being daily increased in size by the addition of logs floating down the

river. It is obvious that the construction of a safety boom or booms above the plaintiffs' bridge, as suggested in the evidence, would have at any time prevented further additions to the jam of logs even if it had been formed at the Canadian Pacific Railway bridge in the first instance in spite of any efforts on defendants' part to prevent its formation. But the defendants remained passive and inactive for nearly three weeks while the jam was forming and daily growing larger and more dangerous by the addition of more and more logs. They practically acted throughout as if they had no duties or responsibilities, with the result that the pent back waters of the river eventually burst over the jam and carried away the plaintiffs' bridge.

The defendants evidently assumed, as in fact they contended at the argument, that their right to float logs down the river was a paramount right to which other rights must yield. I fully agree with my brother Girouard that they have no such paramount right. They repudiated the duty of exercising care, skill and diligence or of being responsible for their absence to the owners of the bridge, claiming exemption from liability for damages caused by the floating down of their logs beyond the statutory penalty. I take an altogether different view alike of their rights and their responsibilities. I think their right to float logs down the river is a *concurrent* right which they can enjoy reasonably with those of the riparian owners and the municipalities which have by statutory authority constructed bridges in the public interest across the river, and not a paramount right, and must be exercised with due regard to the rights of these others. In the case now before us, as there was a total disregard of these duties and responsibilities subject to which, in my opinion, the log owners have the right to float

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down their logs and as the necessary connection between the plaintiffs' loss and the defendants' negligence has been properly found. I think the appeal should be dismissed with costs.

Davies J.

MILLS J.—I concur in the judgment of my brother Girouard.

Appeal dismissed with costs.

Solicitors for the appellant: *Campbell, Meredith, Allan & Hague.*

Solicitor for the respondent: *R. P. de Laronde.*

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JAMES ROSS AND WILLIAM MACKENZIE (SUPPLIANTS) ..... APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Customs duties—Lex fori—Lex loci—Interest on duties improperly levied—Mistake of law—Répétition—Presumption as to good faith—Arts. 1047, 1049 *C. C.*

The Crown is not liable, under the provisions of articles 1047 and and 1049 C. C., to pay interest on the amount of duties illegally exacted under a mistaken construction placed by the customs officers upon the Customs Tariff Act. *Wilson* v. *The City of Montreal* (24 L. C. Jur. 222) approved, Strong C.J. *dubitante.*

Per Strong C.J. The error of law mentioned in arts. 1047 and 1049 C. C. is the error of the party paying and not that of the party receiving. Money paid under compulsion is not money paid under error within the terms of those articles.

The Toronto Railway Co. v. *The Queen* (4 Ex. C. R. 262; 25 Can. S. C. R. 24; [1896] A. C. 551) discussed. *The Algoma Railway Co.* v. *The King* (7 Ex. C. R. 239) referred to.

Judgment appealed from (7 Ex. C. R. 287) affirmed.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, Girouard and Davies JJ.

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APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing the Petition of Right of the appellants with costs.

During the years 1892 and 1893 the suppliants imported into Canada at the Port of Montreal, a quantity of steel rails for use in the construction of tramways which were considered dutiable by the customs officers at that port, and, accordingly, duties were levied on the rails, and the amount thus exacted was paid by the suppliants under protest to the collector of the port. Subsequently, in the case of *The Toronto Railway Company* v. *The Queen* (2), it was held by the Judicial Committee of the Privy Council, (reversing the decisions of the Supreme Court of Canada (3) and of the Exchequer Court (4),) that duties levied and collected under similar circumstances had been improperly imposed, and that, under the true construction of the tariff, such rails were not subject to customs duties. The Crown accordingly, on 22nd January, 1897, refunded to the suppliants the duties which they had so paid under protest upon the rails in question in this case, but without interest on the money which had been so levied and collected during the time it had been retained. The suppliants by Petition of Right claimed interest on the amount of the duties from the date when the payment under protest had been made. The Exchequer Court dismissed the petition with costs and the suppliants now appeal.

During the hearing of the appeal, the question was raised as to whether the rights of the parties were to be decided according to the laws of the Province of Ontario or of the Province of Quebec, or whether the law of England should apply. The court unanimously

(1) 7 Ex. C. R. 287.
(2) [1896] A. C. 551.
(3) 25 Can. S. C. R. 24.
(4) 4 Ex. C. R. 262.

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decided that as the duties upon which the interest was claimed had been levied and collected at the City of Montreal, the law of the Province of Quebec alone applied in the decision of the appeal.

Campbell K.C. and *Helmuth K.C.* for the appellants (*Saunders* with them). The customs officers must be presumed to have known the law and, in consequence of such imputed knowledge, there is a presumption, technically, of bad faith on the part of the officers of the Crown. If the question were one between subject and subject, and the claim against a fellow subject, then the appellants would undoubtedly be entitled to succeed. We deny that provisions of the Civil Code of Lower Canada apply to this case; but, even if the Quebec law applies, under arts. 6, 412, 449, 451, 1047, 1048, 1049, 1077 C. C.; and the decision in *The Exchange Bank of Canada* v. *The Queen* (1), then interest is due by the Crown.

There was no error of fact; the appellants insisted that the duties were illegally imposed and paid under pressure in order to obtain delivery of the rails, protesting at the same time against the payments thus exacted. The Crown is consequently charged with bad faith. Larombière, "Obligations," commenting on arts. 1373 & 1379 of the Code Napoléon, at para. 14; *Wilson* v. *The City of Montreal* (2) *per* Monk J. at page 225; *The City of Quebec* v. *Caron* (3); *Bain* v. *The City of Montreal* (4); Pand. Fr. *vo.* "Obligations" n. 2347; *The Algoma Central Railway Co.* v. *The King* (5) *per* Burbidge J. at page 272.

The Crown upon the facts and under the circumstances disclosed does not occupy a position which affords exemption by reason of its perogatives, or other-

(1) 11 App. Cas. 157.
(2) 24 L. C. Jur. 222.
(3) 10 L. C. Jur. 317.
(4) 8 Can. S. C. R. 252.
(5) 7 Ex. C. R. 239.

wise, from the liability which, under similar circumstances, would exist against the subject. The Crown has accepted the benefit of what was done and is responsible to the full limit of the liability for interest to which its officers personally would have been obliged. The Crown cannot take advantage of all the wrongful acts of its officers and be only liable for the consequence of those acts so far as it may be willing to admit. This position is borne out by *Turner* v. *Maule* (1); *Edgar* v. *Reynolds* (2); *Attorney-General* v. *Kohler* (3); *Bauer* v. *Mitford* (4); *Partington* v. *The Attorney-General* (5).

Under any circumstances any good faith there may have been on the part of the Crown or the officers of the Crown ceased upon the rendering of the judgment in *The Toronto Railway Co.* v. *The Queen* (6) and from that date, 31st July, 1896, we ought to have our interest.

The Attorney General of Canada and *Newcombe K.C.* for the respondent (*Lafontaine K.C.* with them). Interest, as such, in cases where there is no statute affecting the common law rule, can only be recoverable where there is a contract to pay interest. It is not pretended that there is any contract in this case and the claim therefore fails, unless bad faith is proved. There is entire absence of any such proof, even if bad faith could, in any case, be attributed to or presumed against the Crown.

The cause of action arose in the Province of Quebec and it is submitted that there the jurisprudence is clearly settled against the appellants' contention by the decisions in *Wilson* v. *The City of Montreal* (7) and a long series of cases which have followed the

(1) 18 L. J. Ch. 454.
(2) 27 L. J. Ch. 562.
(3) 9 H. L. Cas. 654.
(4) 3 L. T. 575.
(5) L. R. 4 H. L. 100.
(6) [1896] A. C. 551.
(7) 24 L. C. Jur. 222.

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principle there laid down by Chief Justice Dorion. We also refer to *Baylis* v. *The City of Montreal* (1); *Buckley* v. *Brunelle* (2); *The Queen* v. *Henderson* (3); *The Queen* v. *St. Louis* (4).

The CHIEF JUSTICE.—This appeal must be decided by the law of the Province of Quebec in which province the cause of action arose inasmuch as the duties were received by the Collector of Customs at Montreal. The suppliants themselves allege in their Petition of Right that the cause of action arose in Quebec.

I rest my judgment entirely on the authority of *Wilson* v. *The City of Montreal* (5) and the cases which have followed that decision.

Had it not been for the jurisprudence thus established and acted on by the courts of the Province of Quebec for a long series of years I might have come to a different conclusion.

Independently of authority I should have thought that the law was as laid down by Merlin and Rolland de Villargues in the quotation from their works in the judgment of Chief Justice Dorion. In other words, I should have considered that the rule that interest was recoverable in respect of money paid under compulsion was general and not confined, as the Chief Justice held it to be, to the single case of money paid under pressure of a judgment afterwards reversed in appeal. I confess I see no reason apart from authority why it should have such a restricted application.

Articles 1047 and 1049 of the Civil Code, in my opinion have no application to the present case. The

(1) 23 L. C. Jur. 301.
(2) 21 L. C. Jur. 133.
(3) 28 Can. S. C. R. 425.
(4) 25 Can. S. C. R. 649.
(5) 24 L. C. Jur. 222.

money exacted by the Collector of Customs which the Judicial Commitiee have held to have been illegally demanded, was not paid by the suppliants under any error of fact or law but with full knowledge of the facts and accompanied by a protest insisting that it was, (as it was ultimately judicially determined to have been), illegally claimed. It was, therefore, not paid in error, but under compulsion. The error mentioned in Articles 1047 and 1049 is clearly the error of the party paying, not that of the party receiving.

The *condictio indebiti* of the Roman law is no doubt the source from which the French law, on this head, is derived. The *condictio indebiti* would not, however, be the appropriate action in a case of this kind. The *condictio ob turpem vel injustam causam* was the proper action according to the Roman law to recover money not paid voluntarily, in error of fact or law, but illegally exacted and paid under compulsion such as duress of person or goods (1). It is also to be remarked that where money is paid for an illegal cause where the party making the payment was not a participator in the illegality but has paid innocently under such pressure as was used in the present case, interest is not according to the Roman law recoverable, although the natural fruits of a thing unduly given in payment under such conditions are recoverable (2). This would tend to confirm the view taken in *Wilson* v. *The City of Montreal* (3) were it not that the Roman law of actions has no application in French law (4). I am, it is true, not bound by the case referred to, but any decision of Chief Justice Dorion carries with it such great weight that, in view of that authority and the constant jurisprudence which has followed it for

(1) Dig. 12-5-2 ; Molitor (2 ed.) vol. 2, pp. 243-274 ; Maynz, Droit Rom. (5 ed.) vol. 2, 485.

(2) Code 4-4-7 ; Molitor, (2 ed.) vol. 2, p. 274.

(3) 24 L. C. Jur. 222.

(4) Garsonnet, Procédure, vol. 1, 246.

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twenty-two years, and further, considering that my learned brothers Taschereau and Girouard think *Wilson* v. *The City of Montreal* (1) rightly decided, I do not feel inclined to differ from them by holding that the judgment of the Court of Queen's Bench in the case cited should be overruled. I have, however, I must admit, grave doubts.

It was argued that if articles 1047 and 1049 applied, there could be no right to recover interest because bad faith could not be attributed to the Crown. If, however, the officer of the Crown by whom payment was compelled was in bad faith, I am at a loss to see why interest should not be recovered by Petition of Right. I find no authority on this point in the decisions of the Quebec courts possibly for the reason that it has been the usual course in this and all other jurisdictions for the Crown to pay interest on money received for duties afterwards found to have been illegally imposed by customs officers, thus renouncing any advantage which the public might have derived from the use of money illegally exacted and withheld from the individual subject paying it. So far, however, as the facts of this case are before us in evidence, there is nothing to show that the Collector of Customs was otherwise than in good faith in insisting on the payment of these duties before permitting the appellants to take possession of the goods.

The observations of the Judicial Committee in dismissing the petition to vary the order in appeal in the case of *The Toronto Railway Company* v. *The Queen* (2) according to the shorthand writer's notes, as stated by the judge of the Exchequer Court in *The Algoma Central Railway Company* v. *The King* (3) were not intended as a decision on the law as to the question

(1) 24 L. C. Jur. 222.
(2) [1896] A. C. 551.
(3) 7 Ex. C. R. at page 272.

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of interest. The petition was dismissed for the reason that it was not presented until the order in council adopting the report of the Judicial Committee had been signed.

The appeal is dismissed with costs.

TASCHEREAU, SEDGEWICK and DAVIES JJ. concurred in the judgment dismissing the appeal with costs for the reasons stated by His Lordship Mr. Justice Girouard.

GIROUARD J.—We have already held in the course of this argument that this case must be decided according to the laws of the Province of Quebec, where the Customs entries and the payment of the duties were made to the Customs authorities under protest. Article 1047 of the Civil Code of that province says:

He who receives what is not due to him, through error of law or of fact, is bound to restore it, or if it cannot be restored in kind, to give the value of it. If the person receiving be in good faith, he is not obliged to restore the profits of the thing received.

Article 1049 C. C. says:

If the person receiving be in bad faith he is bound to restore the sum paid or the thing received, with the interest and profits which it ought to have produced from the time of receiving it, or from the time that his bad faith began.

These articles dispose of this appeal.

Under error of law the Crown, acting through its representatives, levied a duty which was not authorised by Parliament. So the Judicial Committee held in *The Toronto Railway Company* v. *The Queen* (1). But in so doing the Crown cannot be in a worse position than individuals. Was the money received in good faith? That is the point. Good faith was so apparent that the Exchequer Court and this court upheld the interpretation given by the officials to the statute. *The Toronto Railway Company* v. *The Queen* (2).

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

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It is contended that the Crown, like subjects, is presumed to know the law. Granting this proposition for argument's sake yet, as a matter of fact, the Crown, or rather its officials, like individuals, commit errors of law and it is to meet such cases that article 1047 C. C. and other provisions of the Civil Code have been enacted. Mere ignorance of law does not constitute bad faith. Good faith is always presumed and it ceases only from the moment the error of law is made known by judicial authority. Art. 412 C. C. No interest is recoverable on moneys received under a mistake of law till that mistake has been pronounced. The court of Quebec have so decided in a long array of well considered decisions which will be found in *Wilson* v. *The City of Montreal* (1).

Possibly an action may lie for interest running after judicial determination if there be unnecessary delay in refunding, but the demand made by the appellant is not one of that character. The circumstances of the repayment are not set up; unnecessary delay is neither alleged nor proved, and, in consequence, we are not in a position to say that the good faith of the Crown or its representatives had ceased at any time after the rendering of the judgment of the Judicial Committee.

For these reasons the appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Kingsmill, Hellmuth, Saunders & Torrance.*

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

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(1) 24 L. C. Jur. 222.

CHARLES ROUSSEAU AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

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AND

GEORGE B. BURLAND (DEFENDANT) ..... } RESPONDENT.

AND

THE MONTREAL PARK AND ISLAND RAILWAY COMPANY } MISE EN CAUSE.

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

Title to land—Interdiction—Marriage laws—Authorisation by interdicted husband — Dower — Registry laws—Sheriff's sale—Warranty—Succession—Renunciation—Donation by interdict—Arts. 1467, 2116 *C. C.* —44 *&* 45 *V. c.* 16—46 *V. c.* 25—47 *V. c.* 15, *(Que.)*.

The registration of a notice to charge lands with customary dower must, on pain of nullity, be accompanied by a certificate of the marriage in respect of which the dower is claimed and must also contain a description sufficient to indentify the lands sought to be affected.

A sale by the sheriff under execution against a debtor in possession of an immoveable under apparent title discharges the property from customary dower which has not been effectively preserved by registration validly made under the provisions of article 2116 of the Civil Code.

Per Taschereau J.—Neither the vendor nor his heirs, who have not renounced the succession, nor his universal donees, who have accepted the donation, can on any ground whatever, attack a title for which such vendor has given warranty.

Semble, that voluntary interdiction, even prior to the promulgation of the Civil Code of Lower Canada, was an absolute nullity and that the authorisation to a married woman to bar her dower is not invalidated by the fact that her husband had been so interdicted at the time of such authorisation.

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*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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

The plaintiffs claimed title to lands under a conveyance to them, in 1883, by one Moïse Turcot, the younger, alleged to be owner of a moiety thereof in virtue of a deed of donation by the father to him made in 1883 and owner of the other moiety thereof in virtue of his right of dower as the only child issue of the marriage of his parents, both deceased, who were married in 1840 without ante-nuptial contract, the lands having accrued to the father in 1862, during the marriage, by succession *en ligne directe*.

It appeared that the father, Moïse Turcot, the elder, had been voluntarily interdicted in March, 1864, on application made by him personally, and his wife appointed his judicial adviser with full powers to act as such in all matters affecting his estate. Subsequently, in 1865, Moïse Turcot, Sr. and his wife, assisting as his judicial adviser, conveyed the lands to one Hubert, the deed of conveyance containing a renunciation of her right of dower in the property so conveyed by the wife authorised and assisted for the purposes of such renunciation by her said husband. The interdiction was never removed and was still in force at the time of the donation (after the wife's death) in 1883. Moïse Turcot, Jr. did not renounce to his father's succession and accepted the donation.

In 1899 the property thus purchased by Hubert was purchased by the respondent at a sale by the sheriff under an execution against one of the Huberts' heirs who had acquired the lands by succession and was then in possession thereof as proprietor.

The plaintiffs contended that the renunciation of the right of dower by the deed of 1865 was ineffectual,

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on the ground that the husband, being then interdicted, could not validly authorize his wife for that purpose, and that Moïse Turcot, the younger, became, on the opening of the dower, entitled to the right of dower in the lands. It was also contended by plaintiffs that the right of dower had been effectually preserved by the registration in the registry office of the County of Jacques-Cartier, in 1882, of a notice claiming that right given in conformity with the Quebec Statute, 44 & 45 Vict. ch. 16, which was not accompanied by the certificate of the marriage of the parents of Moïse Turcot, Jr. This notice described the lands sought to be affected as "une part indivise comprenant environ dix arpents de terre en superficie dans une terre connue et désignée sous le numéro trois mille six cent six (3606) d'après le plan et livre de renvoi officiels pour la Côte St-Paul, en la Municipalité de la Paroisse de Montréal."

The learned judges in the court below gave reasons for the judgment appealed from as follows:

"Considérant que le droit au douaire coutumier légal n'est conservé que par l'enregistrement de l'acte de celébration du mariage avec une description des immeubles alors assujettis au douaire; vu que dans la présente cause, le droit au douaire est réclamé par les demandeurs en raison du mariage, sans contrat de mariage de Dame Flavie Dudevoir avec Moïse Turcot, père, le 11 février 1840; vu que l'acte de célébration du mariage n'a pas été enregistré; vu que l'enregistrement effectué désigne l'immeuble en question comme 'une part indivise, environ dix arpents de terrain en superficie dans le numéro trois mille six cent six du cadastre de la Côte St. Paul;'"

"Considérant que cette mention de l'immeuble n'est pas la description requise par l'article 2116 du Code Civil;

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"Considérant que pour chacune de ces deux raisons, le droit au douaire réclamé, s'il a jamais existé, n'a pas été conservé sur la partie de l'immeuble que le demandeur réclame comme héritiers de sa mère douairière; vu la vente judiciaire du 21 janvier 1899, vente faite sur le seul héritier de R. A. R. Hubert, acquéreur de la totalité du dit immeuble par acte du 27 janvier 1865; vu que cette vente a été ainsi effectuée sur un défendeur en possession comme propriétaire en vertu de titres apparents;

"Considérant qu'une telle vente a purgé les droits de propriété invoquée par les demandeurs en raison des actes des 7 et 10 mars 1883 et ces droits étaient existants lors de la dite vente judiciaire;"

and dismissed the appeal taken by the plaintiffs from the judgment of the trial court dismissing their action.

Larochelle for the appellants;

Aimé Geoffrion for the respondent was not called upon for any argument.

The judgment of the court was delivered by:

TASCHEREAU J.—By these appellants' deeds of purchase of the litigious rights in question, one of them is styled *agent d'affaires contentieuses*, and the other one is an attorney at law and barrister. I read the words *agent d'affaires contentieuses* as meaning "speculator in litigious rights" in partnership with a member of the bar.

I am not sorry to have to dismiss their appeal. Such speculations are never viewed with favour in any court of justice. Their contentions are utterly unfounded. What surprises me is that after having failed in the two courts of the province, they have had the courage, relying undoubtedly on the axiom *audaces fortuna juvat*, to bring the present appeal.

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The reasons given by the Court of Appeal in dismissing their action, as the Superior Court had done, are unanswerable. The registration required of this right to the dower claimed on the property in question has never effectually been made, and the sheriff's title to the respondent has wiped off any right to the said dower, if any, that existed previously thereupon. Art. 2116 C. C.; 44 & 45 Vict. ch. 16; 46 Vict. ch. 25; 47 Vict. ch. 15, sec. 2.

Then, who is it that attacks the deed of sale to Hubert in 1865, of this property? No one else but the vendors or their heir who has never renounced to their succession, or universal donee who has accepted the donation. That is to say, the claimants, or the party under whom they claim, are in law, and by express stipulation, the very parties who are the warrantors of Hubert's title, and of those who hold under him, the very parties who have to hold Hubert and his representatives harmless from any attack made upon the deed of 1865. How can they be admitted to attack, upon any ground whatever, that which in law and by their express undertaking they are bound to defend? *Quem de evictione tenet actio eum agentem repellit exceptio* is a rule founded on principles that will always govern. Pothier, Vente, nos. 167, 168.

And a very important feature of the case, in the deed of sale to Hubert, is that Turcot's wife was actually a party to the deed as warrantor and was therefore obliged herself to defend Hubert's title and, of course, her son and heir not having renounced to her succession cannot attack that title. Art. 1467 C. C.; *Betournay* v. *Moquin* (1). The argument that Turcot, Jr., did not accept his father's nor his mother's successions cannot help the appellants. The law transmitted those successions to him. *Le mort saisit le vif.* He was seized of all their

(1) 2 Dor. Q. B. 187.

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rights and obligations at the moment of their deaths, and renunciation is never presumed. Arts. 606, 607, 651 C. C.

Then if necessary to determine the point, I would be strongly inclined to hold that the interdiction of Turcot, in 1864, was radically null, that the renunciation by his wife to her dower was legal and entirely put an end to it, and that the sale to Hubert was valid to all intents and purposes.

But if, as contended for by the appellants, the sale to Hubert was null because Moïse Turcot, the vendor, was interdicted, I fail to understand how the donation to his son by this same interdicted person can be valid.

However, it is unnecessary for us to expressly determine other questions than those determined by the judgment appealed from, and the appeal should, in my opinion, be dismissed with costs, for the reasons given by the said court.

Appeal dismissed with costs.

Solicitor for the appellants: *M. G. Larochelle.*

Solicitors for the respondents: *Geoffrion, Geoffrion & Cusson.*

ROBERT P. CAMPBELL.....APPELLANT;

AND

MARGARET FRASER YOUNG AND OTHERS ..... } RESPONDENTS.

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*Oct. 8, 9.
*Oct. 10.

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

Parol testimony — Commencement of proof in writing — Admissions — Arts. 1233, 1243 *C. C.*—60 *V. c.* 50, *s.* 20 (*Que.*)

Where a contract is admitted to have been entered into, by the party against whom it is set up, no commencement of proof in writing is necessary in order to permit of the adduction of evidence by parol as to the amount of the consideration or as to the conditions of the contract.

In such a case, the rule that admissions cannot be divided against the party making them does not apply.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Quebec, which had established a balance of $881.38 as due to the appellant on an account of his administration of the estate of the late D. D. Young, deceased, and, on the same statement of accounts, condemning the appellant to pay the respondents, as a balance due by him, the sum of $3,447.75 with interest.

The case as presented in the Superior Court involved a contestation of a number of items of the appellant's account and the respondents asked judgment for $22,772.21 against him. The questions at issue on the present appeal are stated in the judgment of the court delivered by His Lordship Mr. Justice Taschereau.

* PRESENT :—Sir Henry Strong C.J. and Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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Stuart K.C. for the appellant.

L. P. Pelletier K.C. and *Hogg K.C.* for the respondents.

The judgment of the court was delivered by:

TASCHEREAU J.—This case originated by an action *en reddition de compte* by the respondents against the appellant who had acted as their agent at Quebec from March, 1893 to June, 1899. The appellant having duly rendered the account so demanded from him, the respondents filed a contestation thereof as to the amount he charged for his salary, upon which the appellant having joined issue, the Superior Court found that he had proved his claim that the respondents had agreed in 1893 to pay him as their agent a sum of $750 per annum, 5 per cent commission upon all revenue collected by him, 2½ per cent commission upon capital sums realised by him to the extent of $10,000, and 1½ per cent on all additional capital received by him over and above the sum of $10,000, upon which finding judgment was given against the respondents in favour of the appellant for a balance of $881.38. The Court of Appeal, reversing that judgment, found that no agreement as to appellant's salary had been proved and condemned him to pay to the respondents, as being the balance of the account of his administration, the sum of $3447.76, allowing him but a small sum as a *quantum meruit* for his services. That is the judgment now appealed from.

The case as submitted to us is a very simple one, and is limited to the determination of the amount of the remuneration which the appellant is entitled to as respondents' agent as aforesaid.

The judgment appealed from, if I do not misunderstand the opinion of the learned judge who pronounced it for the court, is based exclusively on this part of

the case upon the ground that the oral evidence adduced by the appellant of his alleged contract with the respondents as to the amount of his remuneration not being supported by a commencement of proof in writing had been illegally admitted and should be read out of the record. There is nothing in the case that would have justified the reversal of the findings of fact, upon contradictory evidence, of the learned judge at the trial who had heard the witnesses. And I take it that the Court of Appeal would not have interfered with his judgment had they been of opinion with him that the appellant's oral evidence in support of his contentions was admissible and had been legally received. So that the only point before us is one of law, whether that oral evidence was legal or not.

I am of opinion that the Superior Court's solution of this point was the correct one, and that its judgment in favour of the appellant should consequently be restored.

To begin with, this objection by the respondents to the admissibility of the oral evidence adduced by the appellant seems to me one which is perhaps not open to them. They themselves contested the appellant's demand for his salary upon the ground that by a special contract with him the appellant had agreed to act for them, but at a much lower price than what is claimed by him; and gave oral evidence of their said plea. But when the appellant, admitting that there was a special agreement between him and the respondents as pleaded by them, but contending that by that agreement his remuneration was to be on a much higher scale than contended for by them, proceeded to offer oral evidence in support of his contention, the respondents objected and argued that he could not bring such evidence.

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Now, if such evidence was legal when brought by the respondents, how could it be illegal when brought by the appellant? If they had the right by oral evidence to prove that his salary had been fixed by mutual consent at say $200 a year, I fail to see why he could not be allowed to prove in the same manner that it was $500 and not $200 a year that was agreed to.

Upon a contestation of this nature, elementary rules of evidence put the *onus probandi* on the plaintiff who contests the account rendered, though in this case the parties seem to have proceeded differently. Dal. 78, 1, 85, n. 4. If the case had been submitted without evidence on either side, the respondents could not have had judgment for the $22,772 they asked by the conclusions of their contestation. However, leaving that view out of the question, and assuming that the respondents are not debarred from taking the objection, I think that it cannot be maintained.

It is not a commencement of proof of a contract that is in question. There is as full a proof of it as can be. Or rather, the appellant had not to prove it, since it is admitted, pleaded by the respondents themselves. But, would argue the respondents, we admitted a contract for $200, not one for $500. That is so, but when once a contract is admitted, no commencement of proof in writing is required for the admissibility of oral evidence of the amount of the consideration thereof. The rule of the indivisibility of admissions has then no application. Art. 1243 C. C. as amended by 60 Vict. ch. 50, sec. 20 makes that clear, had there been previously any room for doubt on the question. That amendment extended to all admissions whatever the exceptions to indivisibility that were previously enacted by art. 231 of the old Code of Procedure in relation to interrogatories on

faits et articles. Dal. 65, 1, 63; Dal. Rep. *vo.* "Obligations," nn. 4780, 5142. 8 Aubry & Rau, page 178; 5 Marcadé, page 214, last par; 30 Dem. no. 533; *Viger* v. *Beliveau* (1); 20 Laurent, par. 200; Sirey, Code Civ. Ann., under art. 1347, no. 43; under art. 1356, nn. 83, 97. The contract, in such a case, must be proved by the opposing party, *aliunde* of the admission. But the admission is sufficient as a commencement of proof in writing to legalise oral evidence of it and of its conditions. *Cox* v. *Patton* (2); *Forget* v. *Baxter* (3).

An allusion has been made on the part of the respondents to the fact that all the interested parties were not represented by the special agent Howlin, when he made the agreement in question with the appellant. But there is nothing in this; the plea is on behalf of all and every one of the respondents. As to the limitation of that special agent's authority, which has been relied upon at bar by respondent's counsel, though but faintly, there is no issue on that point on the record, and it is consequently rightly omitted from consideration in both the Superior Court and the Appeal Court.

I would for these reasons and those given by the Superior Court allow the appeal with costs and restore the judgment in favour of the appellant for $881.38 with interest and costs as mentioned therein. That judgment rests principally upon the credibility of the appellant's testimony, and the trial judge's finding as to that is conclusive.

Then that evidence so believed by the judge who saw the witness in the box is corroborated not only by the witnesses Lindsay and Rattray, but also by the entries made in the books, wherein appellant from the beginning charged his salary against the respondents

(1) 7 L. C. Jur. 199.
(2) 18 L. C. Jur. 316.
(3) [1900] A. C. 467.

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upon the scale he contends for, and left his books daily open to the inspection of the respondents and their attorney. These entries as part of the *res gestæ*, certainly go to prove the sincerity and good faith of the appellant. There was nothing to induce him to believe that his books would not be inspected by the interested parties or on their behalf.

Appeal allowed with costs.

Solicitors for the appellant: *Caron, Pentland, Stuart & Brodie.*

Solicitors for the respondents: *Drouin & Pelletier.*

THE TRUSTS AND GUARANTEE COMPANY, ADMINISTRATORS OF THE ESTATE OF JAMES HART (PLAINTIFFS) ..... APPELLANTS;

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*Mar. 24, 25.

*Nov. 8.

AND

GEORGE D. HART AND THE STANDARD BANK OF CANADA (BY ORIGINAL ACTION) AND JAMES D. HART, GEORGE P. HART AND LLOYD HART, INFANTS, ADDED PARTIES AT THE TRIAL (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Gift—Confidential relations—Evidence—Parent and child—Public policy—Principal and agent.

The principle that where confidential relations exist between donor and donee the gift is, on grounds of public policy, presumed to be the effect of those relations, which presumption can only be rebutted by showing that the donor acted under independent advice, does not apply so strongly to gifts from parent to child or from principal to agent. Thus, in case of a gift to the donor's son, for benefit of the latter's children, when said son had for years acted as manager of his father's business, when he was the only child of the donor having issue, and when the donor, nine years before his death, had evidenced his intention of making the gift by signing a promissory note in favour of the son, by renewing it six years later and by voluntarily paying it before he died, such presumption does not arise.

Judgement of the Court of Appeal (2 Ont. L. R. 251) reversing that of the Divisional Court (31 O. R. 414) affirmed, Sedgewick and Davies JJ. dissenting.

APPEAL from the decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court (2) and restoring that given at the trial in favour of the defendants.

*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

(1) 2 Ont. L. R. 251. (2) 31 O. R. 414.

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The plaintiffs' action was brought against the defendant George D. Hart (1) for an account of the dealings of the defendant George D. Hart with the estate of the deceased since his death; (2) for the payment of the sum of $20,000, represented by a deposit receipt given by the Standard Bank at Picton; and (3) for $5,802. The second item only was pressed at the trial.

The deceased James Hart was in business as a general merchant at Demorestville where he continued to reside until 1869. In 1869 he opened a store at Picton and moved to Picton with his family except that the younger son James remained at Demorestville to look after the store at that place. From 1869 to the date of his death on 18th September, 1898, the deceased carried on both stores, James managing the store at Demorestville and George having the management of the store at Picton.

The evidence shows that deceased always persisted in carrying on the business of both stores in his own way and by the same methods he had always followed. He always refused to take stock, or carry any insurance, and, until a short time before 1883, to have any bank account. Some time before 1883, the deceased was induced to open an account with the Standard Bank, but he always refused to sign cheques, and the cheques were, accordingly, signed by the defendant George D. Hart. In 1883 the manager of the bank required a formal power of attorney to evidence George's authority to sign cheques, bills, etc., and a power of attorney was executed and delivered to the bank, and from that time George did all the banking business under this power of attorney.

James Hart's wife died in 1886, and in July, 1887, George D. Hart married, and from that time until his death James Hart resided together with George and

his wife and their children in the house in connection with the store premises.

In December, 1889 two children of George had been born, the elder of whom was named after the deceased and was a cripple with no prospects of ever being able to earn his own living. George was then 44 or 45 years old, and had been continuously in the employ of his father for over 30 years. He had devoted his whole energies to the business and had undoubtedly assisted materially in making it a financial success. He had never received anything out of the business except his bare living, and had no means whatever of his own. So long as he was unmarried he appears to have been content with this, but according to his own evidence and that of his wife, when his two children were born he pointed out to his father that he ought to have some definite assurance for his own and their future beyond the uncertain expectations he might have from his father's estate. Certain propositions were advanced by deceased and finally he proposed to give respondent a note for $20,000, without interest, to which the latter assented.

Accordingly, on the 26th December, 1889, the deceased gave George his promissory note for $20,000 without interest. The note was handed by George to his wife and by her deposited in a private drawer in the business safe where she kept her own valuables. On the 30th December, 1895, George drew his father's attention to the fact that the note was about outlawed, whereupon the father, in order that his liability on the note might not be barred by the Statute of Limitations, signed a new note for $20,000 and delivered it to George in substitution of the first note. The second note was handed by George to his wife and by her deposited in the same safe drawer as the first note had

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been kept in, and there it remained until 3rd June, 1898, when the deposit receipt in question was given.

At the date of the transaction of 3rd June, 1898, the deceased was worth from $80,000 to $85,000. George Hart was 54 years old, his brother James Hart a year or two younger, and the sister Mrs. Bongard, 50 or 51 years old. James had never married (and is still unmarried). Mrs. Bongard had married in 1876 and had no children. She had been provided with (and occupied) a house purchased by the deceased. George had three children and the probability was strong that they were the only grandchildren the deceased would ever have. At this time the deceased had in the Standard Bank $17,000 on deposit and $7,486 to his credit on current account. On the day mentioned he directed George to take the deposit receipt for the $17,000 to the bank and place it to the credit of the deceased's current account there, and then to have a new deposit receipt for $20,000 issued to George D. Hart. The defendant did as he was directed and brought the new deposit receipt and the bank book to his father, who examined them. The father then handed the new deposit book back to George saying, "all right, I want this kept intact for your children," and he asked for and received back the $20,000 note which he destroyed.

The trial judge dismissed the action holding that the note was given as a free gift for deceased's grandchildren. This judgment was reversed by the Divisional Court on the ground that confidential relations existed between the donor and donee and that independent advice to the former should have been established. The Court of Appeal restored the original judgment and the plaintiffs appealed to the Supreme Court of Canada.

Wallace Nesbitt K.C. and *Young* for the appellants. The rule is well settled that where confidential relations exist between donor and donee the gift is presumed to have been made under the influence of such relationship which presumption can only be rebutted by establishing that the donor acted under independent advice or by proving circumstances equivalent thereto. *Barron* v *Willis* (1); *Wright* v. *Carter* (2); *Liles* v. *Terry* (3).

The case of a gift from parent to child is no exception to the rule. *Morley* v. *Loughnan* (4); *Armstrong* v. *Armstrong* (5).

Aylesworth K.C. and *Davidson* for the respondents, infant children of George D. Hart and *Widdifield* for the respondent George D Hart, referred to *Armstrong* v. *Armstrong* (5); *Beanland* v. *Bradley* (6); *Wright* v. *Vanderplank* (7).

The judgment of the majority of the court was delivered by

TASCHEREAU J.—In this action, the plaintiffs, the administrators of the estate of James Hart, deceased, seek to make George Hart, his elder son, accountable for twenty thousand dollars which he, acting under a power of attorney, withdrew from his father's account, not long before the death of his father, and deposited to his own credit. The trial judge, Meredith J., found as a fact that the father had of his own free will given these twenty thousand dollars to his son for the benefit of his grandchildren, and dismissed the action. His holding was reversed by a Divisional Court, (Armour C.J. and Falconbridge and Street JJ.),

(1) [1900] 2 Ch. 121.
(2) 18 Times L. R. 256.
(3) [1895] 2 Q. B. 679.
(4) [1893] 1 Ch. 736.
(5) 14 Gr. 528.
(6) 2 Sm. & G. 339.
(7) 8 DeG. M. & G. 133.

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but was restored by the Court of Appeal for Ontario (1). The plaintiffs now appeal. I would dismiss their appeal.

The case, as I view it, turns upon questions of fact. The law that it involves is well settled. It is principally upon the application of the law to the facts of this case that the diversity of opinion between the Divisional Court and the Court of Appeal has arisen.

The appellants rightly argue that where confidential relationship exists between a donor and a donee, the law, on grounds of public policy, presumes that the gift, even although in fact freely made, was the effect of the influence produced by those relations. That presumption is rebutted, however, as argued by the respondents, if it is shewn that the donor had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances. *Morley* v. *Loughnan* (2).

It is settled law that when the gift is by a client to a solicitor, it is impossible to rebut the presumption of undue influence if the gift is made while the confidential relation exists, unless the donor had competent advice. *Morgan* v. *Minett* (3); *Holman* v. *Loynes* (4); *Liles* v. *Terry* (5); *In re Haslam* (6).

But the principle cannot be so strongly applied to the relation of parent and child; *Wright* v. *Carter* (7); or of principal and agent. If it is proved, as found by the learned judge at the trial and the judges *à quo*, that there was no undue influence by George Hart over his father when he received the notes and the deposit receipt in question, and that his father perfectly understood what he was doing, and was not taken advantage

(1) 2 Ont. L. R. 251.
(2) [1893] 1 Ch. 736-752.
(3) 6 Ch. D. 638.
(4) 4 DeG. M. & G. 270.
(5) [1895] 2 Q. B. 679.
(6) 18 Times L. R. 461.
(7) [1902] 18 Times L. R. 256.

of in any way, the action fails. Bigelow's Story's Equity Jurisp., vol. 1, Nos. 309, 315.

The findings of fact by the trial judge, concurred in by the unanimous judgment of the Court of Appeal, are amply sustained by the evidence. At three different times at long intervals, the deceased repeated the determination he had reached of giving twenty thousand dollars for his grandchildren. First, in 1889, nine years before his death, when he gave the first note; then in 1895, when he renewed it, and lastly, in 1898, when, of his own motion, without any suggestion whatever from his son, he paid it.

It would indeed require strong, very strong, evidence to make me believe that during those nine years (for the note of 1889 was merely evidence of the gift he then made, or at least of his intention), this man was not a moment free to change his intention and revoke the gift, had he been disposed to do so. He never in fact was under his son's influence. It is a gift by his son to him that might have been suspicious. Pollock on Contracts (5 ed.), page 591; *Beanland* v. *Bradley* (1).

To allow this appeal, we would have to reject as incredible the evidence under oath of George Hart and his wife, though the trial judge who heard them and the Court of Appeal believed them. That evidence, moreover, is fully corroborated by witnesses Widdifield, Yerex, German, Pine, Slater and Williams, and the amount given was not an unreasonable one, under the circumstances.

Since the argument, we have been referred by counsel for the appellants to the recent decision (March, 1902), in *Radcliffe* v. *Price* (2), where gifts by a patient to her medical adviser are set aside, though there was no evidence of pressure or misrepresen-

(1) 2 Sm. & G. 339. (2) 18 Times L. R. 466.

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tation, or that the patient was of weak intellect when she made them. That case, it seems to me, goes very far, and I would probably not feel bound to follow it. However, here the facts proved are different and entirely rebut the presumption of undue influence or pressure and it is unnecessary further to allude to the *Radcliffe Case*.

GIROUARD J. concurred in the judgment dismissing the appeal for the reasons stated by His Lordship Mr. Justice Taschereau.

SEDGEWICK J. dissented for the reasons given by His Lordship Mr. Justice Davies.

DAVIES J. (dissenting).—The facts of this case are stated by Mr. Justice Street in delivering the judgment of the Divisional Court, consisting of himself and Chief Justice Armour with Mr. Justice Falconbridge, as follows:

The defendant, George D. Hart, had acted from the year 1883 down to the time of the death of his father, the deceased James Hart, in September, 1898, as the manager of his business at the town of Picton. In 1887, George married, and he and his wife and the deceased from that time forward, with the three children who were born of the marriage, lived together at the back of or over the shop of the deceased until his death. The deceased had been ill for about two years before his death, but it was not until about the 24th of May, 1898, that his illness became serious and acute. The defendant, George D. Hart, transacted the whole of the banking business of his father from 1883, under a power of attorney under seal authorising him to sign cheques and to accept and sign drafts, bills of exchange and all other documents necessary for conducting his father's business with the Standard Bank of Picton. He had the entire control and handling of the cash, and took what he wished for the use of himself and his family without rendering any account to his father, who appears to have trusted him implicitly.

The deceased had two other children, a son James, who had a shop at a place called Demorestville, and a daughter, Mrs. Bongard, who

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also lived away from him. The manager of the Standard Bank, where the account of the deceased was kept, stated that he had been manager at Picton for eleven years and that, in that time, although his office was only two doors from the shop of the deceased, he had never signed cheques upon his own account; all had been drawn by George under the power of attorney.

After the death of his father, George claimed a sum of twenty thousand dollars, represented by a deposit receipt of the Standard Bank, payable to himself, bearing date on 3rd June, 1898, which he alleged was a gift from his father. The money represented by this deposit receipt had been at the credit of the deceased in the Standard Bank in the shape of a deposit receipt for seventeen thousand dollars and accrued interest and cash at the credit of his current account, down to the 3rd June, 1898, when the defendant, George, purporting to act under the power of attorney from his father, had surrendered the deposit receipt, the amount of which, with accrued interest, was then placed to the credit of the deceased. George then drew a cheque payable to himself, for twenty thousand dollars, signed his father's name to it, under the power of attorney, and handed it to the bank, which then, at his request, issued a new deposit receipt payable to George, for the twenty thousand dollars.

This transaction does not appear to have been known to any person outside the bank manager, George and his wife, until after his father's death. George sent for his brother James, a fortnight before his father's death, for the special purpose of discussing the desirability of a settlement of his father's affairs, in view of his approaching death, and, in the discussion which took place between the brothers, both in the presence of and in the absence of the father, the fact of this gift was not made known to James, and the proposed arrangement of the affairs of the father was discussed by James in ignorance of any such transaction. No settlement was in fact arrived at and the father died intestate.

The present plaintiffs were appointed administrators of his estate, and the transaction was first brought to light when George was asked for and produced his father's bank-book containing the entries of the transaction, which was then, and afterwards upon his examination for discovery, stated by George to have been for his own benefit, but upon the trial he stated that it was for the benefit of his three children and not for himself at all. Upon each occasion, however, he stated that the transaction which ended in the gift to him of the deposit receipt began in December, 1889, when he says that his father made a note to him for twenty thousand dollars, payable three days after date. The account he gave at the trial and upon which the learned judge

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who tried the case acted, was that this note was given to him, not for his own benefit, but as a settlement for his children, with regard to whose future he himself had expressed some anxiety, to relieve which his father declared his own desire to see them provided for and, at once, drew and gave him the note in question. George further stated throughout, that this note remained in his wife's possession until December, 1895, when he called his father's attention to the fact that it was almost outlawed, whereupon his father gave him a new note for the same sum, in the same form, and destroyed the original note. He says that the new note likewise remained in his wife's custody until the 3rd June, 1898, when his father directed him to take the deposit receipt in his own name in lieu of it, and that when he had carried out this direction, the second note was likewise destroyed. This story was corroborated in all its details by George's wife and a clerk, who had been employed in the shop, gave evidence that, at the time the second note was given, he had happened to see it lying upon a desk after it had been signed by the deceased, and before it had been seen by George. There was no other evidence that the notes in question had ever been seen by any person. There was, however, the evidence of several persons to whom the deceased had stated when they applied to him to borrow money or for similar purposes that George held his note for a large sum or for twenty thousand dollars which he had to pay.

Upon these facts the Divisional Court unanimously found that the alleged gift of twenty thousand dollars should be declared void on the ground that, at the time it was completed, the donee, George Hart occupied towards his father, James Hart, such confidential relations as in the absence of "independent advice" raised an irrebuttable presumption of "undue influence." Chief Justice Armour added that, apart from the question of law, he was not convinced beyond reasonable doubt by the evidence that there ever was a gift by the father to the son of the money in question.

There is no doubt very much in the evidence to justify these reasonable doubts, and I confess that, at times during the argument and since then when reading the evidence over, I have entertained also doubts upon this important fact. It must be remembered that both notes, the original and the renewal, said to

have been given by the deceased father to George, were destroyed, that the cheque transferring the twenty thousand dollars to George's credit was signed by George himself as his father's attorney, that not a scrap of writing from the father remains to shew what his intentions were, and that at the family conference, held shortly before the father's death at which George and his brother James were both present, not a hint was given with reference to this alleged gift.

The learned trial judge, however, who characterised the transaction as an "extraordinary" one, was of the opinion that there was enough of corroborative evidence of disinterested persons to satisfy him that the father had given the twenty thousand dollar note to George for his children and he found accordingly and directed the money to be paid into the court to their credit in equal shares.

This finding has not been reversed either by the Divisional Court or the Court of Appeal for Ontario and we must therefore assume that it is justified by the evidence. The Court of Appeal reversed the judgment of the Divisional Court, Mr. Justice Maclennan dissenting, and from that judgment this appeal is taken.

Mr. Justice Osler, who expressed himself as satisfied with the findings of the trial judge, was of the opinion that it

> would be extremely difficult to maintain that the notes were gratuities or without consideration and did not constitute a valid claim against the maker or the estate,

while Mr. Justice Moss is still stronger upon this point, saying:

> It is quite apparent that neither he nor George considered the notes as given as a merely voluntary gift for which there was no consideration whatever. They were given not only as a recognization of past valuable services, but as compensation for the years spent and to be

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spent by George in sustaining the burden of a business in which, as he said, he had no tangible prospects.

If I was able, on the evidence, to concur in this conclusion of fact, I would have no difficulty in agreeing with the legal conclusion these learned judges reached. If the notes were given for valuable consideration and were legally binding on the father there was no gift at all and no room for the invocation of the equitable principle on which I think this case should be decided. I am free to say also that it seems to me beyond doubt that such was the case with which the defendant George entered upon his defence. His pleadings clearly shew that. Such too seemed to be his view when he was examined for discovery. But the evidence not only failed to support such a defence but clearly negatived it. The learned trial judge found himself compelled to find that the notes were not given for George but for his children. The father, of course, was dead; there was no writing extant of the transaction and the only witness who could speak to it was George. In his main examination he says, speaking of the circumstances under which the note was first given:

Q What was the outcome of the conversation?

A. And he went on to say, "You can feel no greater interest in your children than I do, and as an assurance of my wish to make special provision for them I will give you a note for twenty thousand dollars without interest." It was an argument, of course, that would satisfy so far as my ambition went in relation to my children. I was satisfied to accept his promise, and he gave the note, remarking at the same time, so far as the note is concerned; "It has no relation as to the future prospects of yourself in the final disposition of my estate."

HIS LORDSHIP.—That is to say, it was for the children's benefit, not for you?

A. No sir, he remarked, at the time, for the "special benefit of your children."

Q. That is to say, the twenty thousand dollars was not to go to you but to your children, your prospects remaining the same?

A. That is what I mean ; that is what I understood.

Mr. AYLESWORTH.—Had he ever said anything before that as to his intention ?

A. He had talked with me several times about providing for my children by way of real estate in tail.

Q. That had been discussed ?

A. Yes.

Q. What was your own idea about that ?

A. I offered pretty strong objections to it on the ground that of course my children were very young, and farm property, as he expected me to continue the Picton business——

Q. At all events you raised objections to that or reasoned against it ?

A. Yes.

And, in cross-examination, he says that his father said ;

he would give him a note for twenty thousand dollars to represent * * a special gift in the interest of his children.

I frankly confess that, if the witness had felt himself able to say that this note had been given in consideration of his services past or future, I would have had no difficulty in accepting his statement It would not appear to me to have been an unfair or unreasonable family arrangement. The length of time George had spent in his service, the nature of his services, the whole of the surrounding circumstances, would have satisfied me that the contract and arrangement was one which the court would not interfere with. But, with every deference to the learned judges whose opinions I have quoted on this material point, I am bound to say that George's evidence completely negatives any such theory. There was no hint of the note having been given "in compensation for the years spent and to be spent by George." On the contrary, it was given, if given at all, "as an assurance of his wish to make special provision for them" (the children). The old man expressly told him—

It (the note) had no relation as to the future prospects of yourself in the final disposition of the estate (but), was for special benefit of his children.

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This latter object is again, in his cross-examination, repeated and still more explicitly.

It was to represent a special gift in the interest of his children.

There was, therefore, neither payment nor compensation for services, past or future, or "advancement," as it was to have no relation to his future prospects in the final disposition of the estate. It was, as expressed, "a special gift in the interest of his children" and "for the special benefit of the children."

This being the only witness who did or could testify to the facts connected with the giving of the note, I cannot, while accepting his testimony, have any doubt as to the transaction being a voluntary gift. If the notes then were without consideration, the validity of the gift must be determined with reference to the relation of the parties and the state of facts existing in June, 1898, when the twenty thousand dollars were transferred to George's credit.

We are thus brought face to face with the main question argued before us. Is a gift of such an amount, about a quarter of his entire estate, given under such circumstances, from a father to one of his sons, standing in the confidential and fiduciary relation that this son did to his father, to be sustained in the absence of any evidence shewing that the father had independent advice, or that there were circumstances surrounding the gift which the court might hold equivalent to that advice?

There is no suggestion made that, as a fact, the father had obtained independent advice when he made the gift, though attention is called by Mr. Justice Moss and reliance evidently placed by him upon the testimony of Mr. Widdifield, that when, shortly before his death, the father, James Hart, went to consult him as his solicitor about his will, in the course of a discussion which arose about the disposition to be made

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of his estate and the proportions in which the residue (after making certain provisions for the daughter), was to be divided between his two sons, he, the father, said,

I have already made a large provision for George which I want to consider in making the division of the estate ;

and further, that thinking this referred to a farm which George had received from his father some years previously, and so suggesting, the old gentleman replied,

I am not thinking of that. James has the Whitney farm ; they are about equal on that score.

I am quite unable to agree that this general statement can possibly be held, even combined with the evidence relative to his examination of the bank-book and cheques after the withdrawal of the twenty thousand dollars, to amount to such "equivalent circumstances" as would dispense with the necessity for independent advice. There was not only nothing to shew that the old gentleman had informed Mr. Widdifield of the facts connected with the alleged gift but much to negative any such suggestion. While George's testimony with respect to the alleged gift of the twenty thousand dollars, was that his father had expressly stated that

it was to have no relation to his future prospects in the final disposition of the estate,

the "large provision" Mr. Widdifield understood the father to say he had made for George was

to be considered in the division of the residue of his estate.

There was clearly some misunderstanding, therefore, either on George's part or on the part of his father.

With regard to the most important fact, the relation in which George stood towards his father, I have no difficulty whatever in adopting the conclusion reached by the Divisional Court.

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That relation, for many years before the father's death, was of a highly confidential and fiduciary character. George was, in fact, the trusted agent, manager and adviser, having the fullest control of his affairs. His transactions were, no doubt, to some extent overlooked by the father, and the records of them appear to have been always open to and from time to time more or less carefully examined by the father. But there was the fullest authority given and the fullest trust reposed. If such confidential and fiduciary relations had existed between the father and a third person, could it be contended that a gift of one-quarter of his estate to that third person, without any independent advice having been taken, could stand? Wherein does the mere fact of the donee having been the son take it out of the rule? If the son was a trustee, or solicitor, or held any other special relation towards the father from which and during the existence of which the law prohibits large gifts being made and accepted, except under prescribed conditions, would the fact of his being a son absolve him from the rule requiring proof of compliance with those conditions?

The rule of equity is clear that, where persons stand in such confidential relations to each other, the party benefited by a gift must be able to shew that the donor had competent and independent advice, and that, in such cases, the age or capacity of the person conferring the benefit and the nature of the benefit would seem to be of minor importance. These latter are of importance only when no such confidential relation exists and the gift is attacked on the ground of undue influence having been used. When confidential relations exist between the donor and the donee undue influence is assumed; *Rhodes* v. *Bate*

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(1). The rule is stated by Lord Justice Lopes and Lord Justice Kay, in the Court of Appeal in *Liles* v. *Terry* (2) to be a rule "founded on public policy" and of great importance. It is a "definite rule of equity" and, as Lord Esher says, in the case just quoted, "raises such a presumption of undue influence as cannot be met or rebutted by evidence."

In a late case, heard last January, of *Wright* v. *Carter* (3), Mr. Justice Kekewich, delivering judgment, says:

After reflection on the numerous authorities cited in argument and the comments of counsel thereon, I am satisfied that the accepted rule of the court is as stated by Lord Justice Turner in *Rhodes* v. *Bate* (1), and that, notwithstanding large differences in the language employed by different judges in other cases, there has been no intention to depart and really no departure from that statement. This is what Lord Justice Turner says, at page 257: "I take it to be a well established principle of this court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can shew, to the satisfaction of the court, that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." The Lord Justice there speaks of persons standing in a confidential relation generally, but he intended to embrace solicitors in that description, and what he says has always been so understood. There are many cases to shew that other relations, and especially that of parent and child, stand on the same footing as that of solicitor and client, but to the latter there is applied more strongly than to any other the principle stated by Lord Justice Kay in *Liles* v. *Terry* (2), that while the confidential relation exists it is impossible to rebut the presumption of undue influence unless the donor had competent and independent advice. This presumption of influence is the key to all declarations on the subject.

In the case now before us the father, the donor, was, it was contended, a man of strong mind, the founder of his own fortune and, beyond doubt, fully capable of understanding thoroughly what he was

(1) L. R. 1 Ch. 252. (2) [1895] 2 Q. B. 679.
(3) 18 Times L. R. 256.

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doing when he is alleged to having signed the note, and probably also when the cheque was signed. But, even if that were so, it cannot affect the result. Assuming the donor did understand what he was doing, the presumption of undue influence still exists. The rule of equity is a hard and fast one, founded on public policy, and although in some exceptional cases it may possibly work hardship, in the generality of cases it is highly beneficial. It peremptorily demands that, where confidential relations exist at the time of the donation, and the voluntary gift is large as in this case, and made and accepted *inter vivos*, independent advice must be shown to have been had or what, in the absence of such advice, the law holds amounts to equivalent circumstances. Otherwise, the presumption of undue influence is irrebuttable. Now in this case, where the absence of independent advice is conceded and the presumed influence existed, where is the evidence of any adoption of the transaction, at any time, when the influence was removed?

I have already attempted to shew that there were no circumstances which the law accepts as equivalent to such independent advice, and I am, therefore, of the opinion that the appeal should be allowed and the judgment of the Divisional Court restored. *Morley* v. *Loughnan* (1).

MILLS J.—I agree with the judgment of the trial judge for the reasons stated by Mr. Justice Moss in his judgment.

I would, apart from the testimony of Mr. Widdifield, have had great doubt as to whether James Hart, Sr., had ever given to his grandchildren the sum of $20,000; but I think the testimony of Mr. Widdifield makes it plain that this was done, and that because of this

(1) [1893] 1 Ch. 736.

liberal provision he had not, when conversing with Mr. Widdifield, quite made up his mind how he would apportion, amongst his children the balance of his estate. I have little doubt from what was said that he would have dealt more liberally with James than he will be dealt with under the law, and perhaps Mrs. Bogrand will fare as well as if her father had disposed of his property by will. But, however this may be, we can only recognise the estate as he left it. He had already, as he said to Mr. Widdifield, made a large provision for George, and could thereafter only deal with what remained to him, upon which he never took any action.

I think the judgment of the trial judge should be restored.

Appeal dismissed with costs

Solicitor for the appellants: *E. Malcolm Young.*

Solicitor for the respondent, George Hart: *C. H. Widdifield.*

Solicitors for the respondents, The Standard Bank of Canada: *Francis & Wardrop.*

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*Oct. 8.
*Nov. 6.

THE QUEBEC BRIDGE COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

MARIE ROY (PLAINTIFF).....RESPONDENT.

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

Railways—Construction of statute—Tramway for transportation of materials —Expropriation—51 *V. c.* 29, *s.* 114 (*D.*)—2 *Edw. VII.* c. 29 (*D.*)

The place where materials are found referred to in the one hundred and fourteenth section of "The Railway Act" means the spot where the stone, gravel, earth, sand or water required for the construction or maintenance of railways are naturally situated and not any other place to which they may have been subsequently transported.

Per Taschereau and Girouard JJ.—The provisions of the one hundred and fourteenth section of "The Railway Act" confer upon railway companies a servitude consisting merely in the right of passage and do not confer any right to expropriate lands required for laying the tracks of a tramway for the transportation of materials to be used for the purposes of construction.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Quebec, by which the plaintiff's action had been dismissed with costs.

The appellants, contractors for the construction of the Quebec bridge over the River St. Lawrence, brought materials for its construction from a distance and deposited them on a wharf near the bridge-site, and then built a tramway across the respondent's land for the transportation of the materials from the wharf to the works. Upon the institution of a possessory action against him, the appellants, assuming to act

* PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

either under their charter, the Acts, chap. 98 of the Statutes of Canada of 50 & 51 Vict. and chap. 69 of 60 & 61 Vict., (D.) or under sections 113 and 114 of "The Railway Act", 51 Vict. chap. 29 (D.), caused a notice of expropriation to be served on the respondent. Thereupon the respondent instituted the present action *en complainte* by which she also asked for a declaration that the appellants had no right to expropriate her said lands, and that the notice of expropriation should be declared null and void.

The learned judge (Routhier J.) at the trial, considering that the company had power under sections 113, 114 and 146 of "The Railway Act" to give the *moyens* of expropriation and take possession of the strip of land occupied by the tramway, dismissed the plaintiff's action. This judgment was reversed by the judgment now under appeal which contains, as reasons formally expressed, the following *considérants:*

"Considérant que, soit en vertu de sa charte, (50-51 Vict Canada, chap. 98 et 60-61 Vict. Canada, chap 69), soit en vertu de l'acte des chemins de fer du Canada (51 Vict. chap. 29, sections 113 et 114) l'intimée est, dans l'espèce, non fondée à procéder à l'expropriation du terrain de l'appelante.

"Considérant que l'avis d'expropriation signifié à l'appelante est le commencement de procédures en expropriation, qui doivent avoir pour résultat de déposséder l'appelante de son terrain, *nolens volens.*

"Considérant que l'appelante a raison de se plaindre que cette procédure lui cause un trouble sérieux dans la possession de sa propriété et qu'elle est en conséquence bien fondée à faire déclarer que cette procédure est illégale et à y mettre fin."

In delivering the reasons for the judgment the Court of King's Bench, Mr. Justice Ouimet said:

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"Ces deux sections de l'acte des chemins de fer ne me paraissent pas avoir été faites en prévision du cas présent. Il me semble qu'en adoptant les prétentions de l'intimée, cette cour étendrait au delà des limites prévues par la loi et même du raisonnable, les pouvoirs extraordinaires d'expropriation déjà conférés aux compagnies de chemin de fer. D'après une pareil interprétation, il suffirait que la compagnie ou quelqu'un pour elle dépose des matériaux de construction sur un terrain quelconque, disons, sur un quai à Québec pour l'autoriser à demander l'expropriation non seulement de ce terrain ou du quai, mais aussi d'un droit de passage sur toutes les propriétés situées entre ce terrain et la ligne du chemin de fer. Nous sommes d'opinion que ce pouvoir d'expropriation aux terrains avoisinant le chemin de fer et dans lequel la nature a déposé des matériaux pouvant servir et requis pour la construction et le maintien du chemin."

The company by the present appeal asked for the restoration of the judgment of the trial court.

Alexandre Taschereau for the appellants.

L. P. Pelletier K.C. for the respondent.

In the absence of the Chief Justice Mr. Justice Taschereau pronounced the judgment of the court dismissing the appeal with costs for the reasons given by the court below.

The following remarks were added by:

TASCHEREAU J.—Je suis d'avis de renvoyer cet appel pour la raison qu'en supposant que la compagnie ait un droit quelconque d'expropriation sur le terrain en question, sans en rien décider, ce droit ne peut consister, d'après la section 114 de l'Acte des Chemins de Fer de 1888, qu'en un droit de passage, une servitude,

et non un droit à la propriété tel que réclamé par la compagnie.

Appeal dismissed with costs.

Solicitor for the appellants: *L. A. Taschereau.*

Solicitors for the respondent: *Drouin & Pelletier.*

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G. N. HARTLEY AND OTHERS, (PLAINTIFFS) ..... } APPELLANTS;

AND

C. A. MATSON AND OTHERS, (DEFENDANTS) ..... } RESPONDENTS.

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*Oct. 20.
*Nov. 6.

ON APPEAL FROM THE TERRITORIAL COURT OF THE YUKON TERRITORY.

Appeal—Jurisdiction—Yukon Territorial Court—Decisions of Gold Commissioner—Special appellate tribunal—Finality of judgment—Legislative jurisdiction of Governor-in-Council—62 & 63 V. c. 11, s. 13—1 Edw. VII. O.-in-C. p. lxii.—2 Edw. VII. c. 35—Mining lands.

The Supreme Court of Canada has jurisdiction to hear appeals from the judgments of the Territorial Court of the Yukon Territory, sitting as the Court of Appeal constituted by the Ordinance of the Governor in Council of the eighteenth of March, in respect to the hearing and decision of disputes affecting mineral lands in the Yukon Territory. The Governor-in-Council has no jurisdiction to take away the right of appeal to the Supreme Court of Canada provided by 62 & 63 Vict. ch. 11 of the Statutes of Canada.

MOTION to quash an appeal from the judgment of the Territorial Court of Yukon Territory, sitting as the Court of Appeal constituted by the ordinance of the Governor-General-in-Council of 18th March, 1901, respecting disputes in relation to mineral lands

* PRESENT:—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills JJ.

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in the Yukon Territory, which affirmed the judgment of the Gold Commissioner's Court of the Yukon Territory dismissing the plaintiffs' action with costs.

The questions raised upon the hearing of the motion to quash and the statutes and ordinances affecting them are stated in the judgments now reported.

Latchford K.C. for the motion. The action was instituted and final judgment rendered previous to the passing of the statute, 2 Edw. VII., ch. 35, providing for appeals to the Supreme Court of Canada from judgments of the Yukon Territorial Court sitting as a special Court of Appeal under the provisions of the ordinance of the Governor-General-in-Council of 18th March, 1901. The appeal from the decision of the Gold Commissioner was taken under the provisions of the fourth section of that ordinance and there can be no appeal inasmuch as the ninth section thereof declares that the Territorial Court judgments in such matters shall be final and conclusive. We refer to *Hurtubise* v. *Desmarteau* (1); *Williams* v. *Irvine* (2); *Taylor* v. *The Queen* (3); and the cases collected in *Hyde* v. *Lindsay* (4).

Peters K.C. contra. Independently of the statutes of Edward VII. this court has jurisdiction under the thirteenth section of chapter 11, of the statutes of 62 & 63 Vict., and the Supreme Court Act as amended to hear such appeals as the present one and, if the meaning or intention of the ninth section of the Ordinance of the Governor-in-Council is that such appeals shall be taken away, then that section is *ultra vires.*

The judgment appealed from is final so far as the territorial jurisdictions are concerned and, therefore, appealable under the Acts governing this court. This appeal cannot be taken away by any local territorial

(1) 19 Can. S. C. R. 562.
(2) 22 Can. S. C. R. 108.
(3) 1 Can. S. C. R. 65.
(4) 29 Can. S. C. R. 99.

legislation, even though it be by the Governor-General-in-Council acting under the powers delegated by the Parliament of Canada, so long as Parliament has not itself expressly granted that authority and, in the present instance, that has not been done.

THE CHIEF JUSTICE dissented from the judgment of the majority of the Court dismissing the motion with costs.

SEDGEWICK J.—The respondents have moved to quash this appeal on the ground that this Court has no jurisdiction to entertain it. The majority of the judges are of the opinion that it has.

By the statute, 61 Vict., ch. 6 (1898) intituled "An Act to provide for the Government of the Yukon Territory," it is provided,

Sec. 10. There is hereby constituted and appointed a Superior Court of Record in and for the said territory, which shall be called the Territorial Court.

By section eight it is enacted as follows:—

Subject to the provisions of this Act, the Governor-in-Council may make ordinances for the peace, order and good government of the territory and of Her Majesty's subjects and others therein.

Section eleven is as follows:—

11. The law governing the residence, tenure of office, oath of office, rights and privileges of the judge or judges of the court, and the power, authority and jurisdiction of the court shall be the same, *mutatis mutandis*, as the law governing the residence, tenure of office, oath of office, rights and privileges of the judges, and the power, authority and jurisdiction of the Supreme Court of the North-west Territories, except as the same are expressly varied in this Act.

By the sixth section of the statute, 62 & 63 Vict., ch. 11, (1899) it is enacted as follows:—

Section 11 of the said Act is hereby repealed and the following substituted therefor:—

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11. The law governing the residence, tenure of office and oath of office of the judge or judges of the court, and the rights, privileges, power, authority and jurisdiction of the court and the judge or judges thereof, shall be the same, *mutatis mutandis*, as the law governing the residence, tenure of office and oath of office of the judges and the rights, privileges, power, authority and jurisdiction of the Supreme Court of the North-west Territories and of the judges of that court, except as the same are expressly varied by this Act.

And by sections seven and thirteen of the last mentioned Act it was enacted as follows:—

7. The Supreme Court of British Columbia is hereby constituted a Court of Appeal for the territory.

(2) An appeal shall lie from any final judgment of the Territorial Court to the judges of the said Supreme Court, sitting together as a full court, where the matter in controversy amounts to the sum or value of five hundred dollars or upwards, or where the title to real estate or some interest therein is in question, or the validity of a patent is affected, or the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a public or general nature affecting future rights, or in cases of proceedings for or upon mandamus, prohibition or injunction.

(3) The said Supreme Court and the judges thereof shall have the same powers, jurisdiction and authority with reference to any such appeal and the proceedings thereon as if it were an appeal duly authorized from a like judgment, order or decree made by the said Supreme Court or a judge thereof in the exercise of its ordinary jurisdiction.

13. An appeal shall lie to the Supreme Court of Canada from the judgment upon any appeal authorized by this Act of the Supreme Court of British Columbia, wherever such an appeal to the Supreme Court of Canada would have been authorized had the judgment appealed from been delivered by the Supreme Court of British Columbia in a like case in the exercise of its ordinary jurisdiction upon appeal in respect of cases originating in the courts of the said province.

2. An appeal shall also to the Supreme Court of Canada direct from any final judgment of the Territorial Court from which it is herein provided that an appeal may be taken to the Supreme Court of British Columbia, and the provisions of sections 8, 9 and 11 of this Act shall apply, *mutatis mutandis*, to such appeal.

On the eighteenth of March, 1901, the Governor General in Council, by virtue of the provisions of sec-

tion eight of "The Yukon Territory Act," above referred to, passed an ordinance for the purpose of governing the hearing and decision of disputes in relation to mining lands in the Yukon Territory. Sections one, four and nine of this ordinance are the only ones affecting the present motion and they are as follows:

1. The Gold Commissioner shall have jurisdiction to hear and determine judicially all matters in difference in regard to entries for mining claims under regulations or in any way relating to mining property or mining rights upon Dominion lands in the said Territory; also to adjudge any patent, lease or other instrument which purports by or on behalf of the Crown to grant or convey mining property or any estate or interest therein or any right with respect to or affecting such property to be void on the ground that the same was issued in error or improvidence or that the issue thereof was obtained through fraud.

* * * * * * *

4. There shall be an appeal from any final judgment of the Gold Commissioner to the Territoral Court, of which, for all purposes of and incident to such appeals, the Gold Commissioner shall be deemed to be a member, having equal powers in all respects with the judges of the said court and sitting with them upon the hearing of such appeal; provided that, if at any time hereafter a third judge of the Territorial Court is appointed to be resident at Dawson City, the Gold Commissioner shall cease to be a member of the said court for the purposes of such appeals.

9. The judgment of the Appeal Court as constituted by section 4 hereof, upon any such appeal, shall be final and conclusive.

From these sections it appears that a judgment of the Court of Appeal thereby constituted was to be "final." If it was intended by the use of that word "final" to exclude the appellate jurisdiction of the Supreme Court of British Columbia and of this court, the object of the framers of the ordinance has signally failed. It is only in judgments of the Territorial Court where there is finality that an appeal lies to the British Columbia court or to this court. If section nine of the ordinance had gone on to enact "and no appeal shall lie either to the Supreme Court of British

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Columbia or to the Supreme Court of Canada, notwithstanding anything contained in the Yukon Territory Act and the Act amending the same" that would, on elementary principles, be inoperative as no ordinances or regulations passed by the Governor in Council, repugnant to the express provisions of the Act of Parliament giving the subordinate authority jurisdiction to make them can have any legal effect.

For the purposes of the argument it may be admitted that, had there been an appeal from the Territorial Court to the Supreme Court of British Columbia and thence to this court, there would be no appeal here. In that case, the Supreme and Exchequer Courts Act, designating the cases in which an appeal lies to the Supreme Court of Canada would govern. But it is not necessary to decide the point as the appellants have adopted the second alternative provided by the amending Act of 1899 above set out, which gives to this court all the appellate powers which the British Columbia court would have had in case the appeal had been to it.

As to the contention of Mr. Latchford that the court from which this appeal is taken is not the Territorial Court but a specially constituted and independent tribunal, we cannot find anything either in the Act or ordinance referred to to support that view.

The motion will be dismissed with costs.

GIROUARD J.—I am of opinion that, independently of the recent statute, 1 Edw. VII. we have jurisdiction to hear this appeal under section thirteen of 62 & 63 Vict. ch. 11. Section nine of the Yukon Ordinance is *ultra vires* of the latter statute.

The motion to quash should be rejected with costs.

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DAVIES J. concurred in the judgment dismissing the motion with costs for the reasons stated by His Lordship Mr. Justice Sedgewick.

MILLS J. concurred in the judgment dismissing the motion with costs.

Motion dismissed with costs.

Solicitors for the appellants: *Woodworth & Black.*

Solicitors for the respondents: *Pattullo & Ridley.*

THE WESTERN BANK OF CANADA (PLAINTIFFS) .... } APPELLANTS;

AND

DORA STUART LESLIE McGILL, ADMINISTRATRIX OF THE ESTATE OF THE LATE WILLIAM McGILL, (DEFENDANT)..... ..... } RESPONDENT.

1902

*May 27.

*Oct. 7.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Promissory note—Duress—Verdict of jury.

In an action against the maker of a promissory note, the local manager of the plaintiff bank, the defence was that he had been coerced by the head manager, under threats of dismissal and criminal prosecution, into signing the note to cover up deficits in customers' accounts in which he had no personal interest. His evidence at the trial to the same effect was denied by the head manager.

Held, that the jury having believed the defendant's account and given him a verdict which the evidence justified, such verdict ought to stand.

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*PRESENT:—Sir Henry Strong C. J. and Taschereau, Sedgewick, Davies and Mills JJ.

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WESTERN BANK OF CANADA v. McGILL.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of the Divisional Court, which ordered a new trial, and restoring the original verdict for the defendant.

The facts of the case are fully stated in the judgment of His Lordship Mr. Justice Mills, and sufficiently appear from the above head-note.

W. Cassels K.C. and *C. A. Jones* for the appellants.

Holman K.C. and *Drayton* for the respondent.

The CHIEF JUSTICE concurred in the judgment dismissing the appeal with costs.

TASCHEREAU, SEDGEWICK and DAVIES JJ. concurred in the result of the judgment dismissing the appeal with costs for the reasons given in the court below.

MILLS J.—In this case Mr. McGill had been local manager of the Western Bank, in Port Perry, for a period of several years. His difficulties began very shortly after his appointment. After he had entered upon his duties, application was made by Paxton Tait & Co. for credit at the bank. They had been previously customers of the Bank of Ontario, and were, at the time that they made application to the Western Bank, indebted to the Bank of Ontario for the sum of $20,000. McGill informed McMillan, who was the general manager of the Western Bank, that he did not think that Paxton Tait & Co. were likely to prove desirable customers on account of their seriously embarrassed circumstances. But Mr. McMillan, who knew the circumstances of Paxton Tait & Co., nevertheless instructed McGill to give them credit to the extent of $5,000, and if their account proved satisfactory it might be increased to $10,000. McMillan received a

fortnightly report of the business done at this branch, so that he knew exactly what the state of the various accounts were, as well as the financial standing of the parties. There were no specific instructions written by him to McGill, forbidding further advances or further accommodation of this company. High rates of interest were charged by the bank on these unsatisfied accounts and the indebtedness grew very rapidly, not because of further advances having been made to them, but by reason of the high rate of interest charged. McMillan seems to have been a man violent in his language and imperious in his disposition, and he constantly addressed Mr. McGill as though he were in some way a very serious offender against the bank. His communications to McGill were based upon this assumption, and so he succeeded in making McGill assume the responsibility of the indebtedness of Paxton Tait & Co, and of Laing & Meharry, although McGill had no responsibility for these accounts, nor had he in any way profited by the advances which the bank made to the parties.

McGill swears that McMillan had instructed him to credit Paxton Tait & Co. with advances to the amount of $15,000 or $20,000 when he well knew what the financial standing and circumstances of this company were. McGill testified that in April, 1888, this company were largely indebted to the Bank of Ontario and he did not know how their indebtedness of $20,000 to that bank could be satisfied out of advances amounting to $5,000 or $10,000 made by the Western Bank. McMillan terrorized McGill into giving his own note for $9,200 for the indebtedness of Paxton Tait & Co., with good indorsers, to whom he was instructed by McMillan to represent the note as a private loan, for a private venture of his own, and upon this representation he succeeded in getting Curts, Carnegie &

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Ross to become his indorsers. In December, 1893, he was intimidated into giving the bank another note for $4,000 for a debt of Laing & Meharry who were customers of the bank, and in 1897 he became liable for $7,200 more. In none of these transactions had he any interest whatever; so that McMillan had intimidated him into making himself liable to the bank for upwards of $21,000. In fact this seems to have been done by McMillan solely for the purpose of escaping any criticism by the directors in reference to these accounts.

Mr. McGill was an officer of the bank at a salary which, for some time, was but $800 a year, and which at no time ever exceeded $1,000 a year, and it was a most unusual proceeding that he should have been pressed by a superior officer into making himself a surety for customers to whom large advances had been made. He was dependent for his continuance in the service of the bank upon Mr. McMillan, and it would seem that this officer did not hesitate to use his power over McGill to force him to become surety for the accounts of customers of questionable financial soundness. McGill's testimony was that he had been charged by McMillan with having grossly violated his duties, that he was accused of having made himself criminally liable by what he had done. His own testimony was that he had discharged his duties to the best of his ability, and that he was not aware of any failure of duty on his part, as an officer of the bank, but he had no experience in the business of banking, and he seemed not to have been well informed in respect to what he might or might not do in the discharge of the duty of local manager. He was quite ignorant as to whether he had incurred legal liabilities as manager of this branch, and so he was frightened by his superior officer into assuming

large responsibilities by reason of the threat and intimidation to which he was subjected.

The jury heard the statements made by Mr. McGill and by Mr. McMillan, and they credited Mr. McGill's testimony and disbelieved the testimony of Mr. McMillan. The evidence leaves upon my mind the impression that they were not wrong in their verdict, and if so McGill was not liable, because this was a promise without any consideration, not freely and voluntarily made, to answer for the debts of others. *Williams* v. *Bayley* (1).

I concur in the conclusion reached by a majority of the Court of Appeal. The case was fairly submitted to the jury and in my opinion their verdict ought to stand. It was one to which reasonable men might come. The jury found that the liability of Mr. McGill was not based upon his free and voluntary action, but was procured through fear and undue influence of McMillan. The majority of the Court of Appeal thought the verdict right, and I do not dissent from their conclusion. I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *C. A. Jones.*

Solicitors for the respondent: *Holman, Drayton & Slaght.*

(1) L. R. 1 H. L. 200, at pp. 218, 219.

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*Oct. 23, 24, 27.

*Nov. 18.

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

AND

WILLIAM CHAPPELLE (SUPPLIANT)..... } RESPONDENT.

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

AND

GEORGE W. CARMACK (SUPPLIANT)..... } RESPONDENT.

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

AND

JAMES TWEED AND CHARLES WOOG (SUPPLIANTS)..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Mining law—Royalties—Dominion Lands Act—Publication of regulations—Renewal of license—Payment of royalties—Voluntary payment—R. S. C., c. 54, ss. 90, 91.

The Dominion Government, by regulations made under The Dominion Lands Act, may validly reserve a royalty on gold produced by placer mining in the Yukon though the miner, by his license, has the exclusive right to all the gold mined. Taschereau and Sedgwick JJ. dissenting.

The "exclusive right" given by the license is exclusive only against quartz or hydraulic licensees or owners of surface rights and not against the Crown. Taschereau and Sedgwick JJ. dissenting.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, Girouard and Davies JJ.

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The provision in sec. 91 of the Dominion Lands Act that regulations made thereunder shall have effect only after publication for four successive weeks in the Canada Gazette means that the regulations do not come into force on publication in the last of the four successive issues of the Gazette but only on the expiration of one week therefrom. Thus where they were published for the fourth time in the issue of September 4th they were not in force until the 11th and did not affect a license granted on September 9th.

Where regulations provided that failure to pay royalties would forfeit the claim, and a notice to that effect was posted on the claim and served on the licensee, payment by the latter under protest was not a voluntary payment.

One of the regulations of 1889 was that "the entry of every holder of a grant for placer mining had to be renewed and his receipt relinquished and replaced every year."

Held, per Girouard and Davies JJ., Sedgewick J. dissenting, that the new entry and receipt did not entitle the holder to mine on the terms and conditions in his original grant only but he did so subject to the terms of any regulations made since such grant was issued.

The new entry cannot be made and new receipt given until the term of the grant has expired. Therefore, where a grant for one year was issued in December, 1896, and in August, 1897, the renewal license was given to the miner, such renewal only took effect in December, 1897, and was subject to regulations made in September of that year.

Regulations in force when a license issued were shortly after cancelled by new regulations imposing a smaller royalty.

Held, that the new regulations were substituted for the others and applied to said license.

Judgment of the Exchequer Court (7 Ex. C. R. 414) Reversed in part.*

APPEALS from judgments of the Exchequer Court of Canada (1), in favour of the suppliants.

The respective suppliants by petition of right sought to recover from the Crown the amounts paid under protest for royalties on the products of their placer mining operations in the Yukon Territory. The several grounds on which they claimed that the royalties were illegally exacted were as follows:—

* Leave to appeal to the Privy Council his been granted.

(1) *Chappelle* v. *The King*, 7 Ex. C. R. 414.

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In Chapelle's case, that the regulations imposing the payment of royalties were not published for four successive weeks in the Canada Gazette.

In all the cases, that when the royalties were exacted the licenses under which the suppliants operated were renewals of the original grant and not subject to regulations made since said grant issued; that the licenses gave the miners the exclusive right to all the proceeds realized from their claims and the regulations could not derogate from the grant; and that while the licenses were in force the regulations governing them (if they did govern them) were cancelled by new regulations which could not apply as they were made subsequent to the grant and the old regulations could not as they did not exist.

In the Exchequer Court judgment was given for each of the suppliants for the amount claimed. The Crown appealed.

The Attorney General for Canada and *H. S. Osler, K. C.* for the appellant. The publication was complete on insertion in the fourth issue of the Gazette. *Coe* v. *Township of Pickering* (1).

The payment was voluntary and could not be recovered back. See *Bain* v. *City of Montreal* (2); *Ex parte Lewin* (3); *Benjamin* v. *County of Elgin* (4); *Langley* v. *Van Allen* (5).

As to the regulations that affect a renewal, see *Smylie* v. *The Queen* (6). And see Dalloz, *vo.* "Mines."

Armour K.C. and *J. Travers Lewis* for the respondents. The license to mine gave the miners the property in the minerals taken out. See *Gowan* v. *Christie.*

(1) 24 U. C. Q. B. 439.
(2) 8 Can. S. C. R. 252.
(3) 11 Can. S. C. R. 484.
(4) 26 U. C. Q. B. 660.
(5) 32 Can. S. C. R. 174.
(6) 27 Ont. App. R. 172.

(1); *Duke of Sutherland* v. *Heathcote* (2); *Osborne* v. *Morgan* (3). Bainbridge on Mines p. 288.

The grant is a lease from year to year and the terms are in force as long as it is renewed. *Bulmer* v. *The Queen* (4). Preston on Conveyancing, pp. 76-77.

As to the right of the Crown to make regulations taking away the miners' property, see *Les Ecclésiastiques de St. Sulpice* v. *City of Montreal* (5); and for the primary meaning of "royalty," *Mercer* v. *Attorney General for Ontario* (6).

The CHIEF JUSTICE.—I am of opinion that the appeal in the case of *The King* v. *Chapelle* should be allowed and the Petition of Right dismissed as to the sum of $1,637; that the appeal should be dismissed as to the sum of $10,429, and that there should be no costs of the principal appeal to either party. Further that the cross-appeal should be allowed with costs.

In the case of *The King* v. *Carmack*, I am of opinion that the appeal should be allowed and the Petition of Right dismissed with costs, the Crown to have the costs of the appeal.

In the case of *The King* v. *Tweed* and *Woog*, I am of opinion that the appeal should be allowed with costs and the Petition of Right dismissed with costs.

TASCHEREAU J. (dissenting).—As I view this case (*The King* v. *Chappelle*), it is not a complicated one.

By the two licenses of 1897 the Crown, for consideration, granted to the respondent for one year, not only the exclusive right of entry upon the mining claims therein described, but also, in express terms, the *exclusive right to all the proceeds realised therefrom* dur-

(1) L. R. 2 H. L. Sc. 273.
(2) [1892] 1 Ch. 475.
(3) 13 App. Cas. 227.
(4) 23 Can. S. C. R. 488.
(5) 16 Can. S. C. R. 399.
(6) 5 Can. S. C. R. 538.

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ing that year, in accordance with both the regulations of 1889 (sec. 23,) and the regulations of the 21st of May, 1897, (secs, 17 and 23,) then in force.

The Crown now contends that these documents do not mean what they say, and that the respondent was not entitled to the *exclusive* right to *all* the proceeds he realised from the said mining claim, though that was the right granted to him in so many words. That contention is based upon the ground that the grant was made subject to the provisions of the mining regulations, by which regulations, as amended on the 29th of July, 1897, a royalty was imposed upon the proceeds of the said mining claims and was therefore, as it is contended, due by the respondent and rightly collected by the Crown. In my opinion, that contention cannot prevail.

Assuming that the Crown had the right to reserve or impose a royalty in the respondent's said licenses, it did not do so. And I cannot accede to the proposition that, having expressly granted all the proceeds of the mines without restriction, such a wide construction should be given to the words "subject to the mining regulations" as to give to the Crown the right to derogate from that grant or cut it down entirely. What is subject to the mining regulations? The *exclusive* right to *all* and every particle of gold taken from the claim. It cannot be implied, in my opinion, that by reserving the right to regulate the grant to all the gold extracted the Crown, thereby, reserved the right to curtail or diminish the grant itself, nay, to extinguish it in whole or in part.

By section thirty-seven of the regulations of the 18th of January, 1898, a royalty is now specially reserved, and in all licenses issued thereafter the grant is made upon the express condition that the royalty prescribed by the regulations shall be paid, (so by section thirty-

seven of the regulations of March, 1901,) but the respondent's licenses contain no such restriction

Though, previous to the issue of the respondent's licenses, the said royalty had been imposed, yet the regulation giving all the gold to the licensee without restriction and the form of the license itself to that effect were then left in force. And though it may well be argued that the regulation imposing such royalty should be taken as an amendment to the previously existing ones, yet if the Crown, notwithstanding its right to impose it, contracted with the respondent that it would not do so, but that he would have the *exclusive* right to *all* the gold extracted from his claim, as theretofore, I cannot see upon what ground those contracts can be construed as not granting to the respondent, according to their unambiguous terms, the right to all that gold, exclusive from the grantor; for the word "exclusive" therein must extend to the Crown. The Crown cannot be permitted to contend, it seems to me clear, under the most elementary rules on the construction of contracts, that, as this one reads, the exclusive right of the grantee to the thing granted admits of the right of the grantor to diminish or take away the thing granted. The power to regulate implies the continued existence of that which is to be regulated. *The City of Toronto* v. *Virgo* (1).

The words "subject to the mining regulations" must be construed as if followed by the words "not inconsistent with the grant of the *exclusive* right to *all* the minerals." A grant implies a contract not to revoke or impair the grant. It is a transfer of all the rights of the grantor implying a covenant by him not to reassert those rights in any shape or form. Any reservation by the grantor to the contrary must appear in clear and unambiguous terms.

(1) [1896] A.C. 88.

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Here the Crown, by claiming the royalty in question, seeks to revoke *pro tanto* the grant to the respondent. Is that regulating it?

It is pleaded for the Crown, in the statement of defence, that if these licenses are to be construed as not imposing this royalty upon the respondent, they have then been issued improvidently and were *ultra vires* of the Gold Commissioner. Now, so to repudiate the Act of the Gold Commissioner, after having acted upon it and treated these grants as in full force till this petition of right was brought in, is, I am sure, a position that will not be insisted upon on the part of the Crown, assuming it to be well founded in law and open to the Crown in this case.

Then, under our statutes, it must not be lost sight of, the rule *respondeat superior* applies with as much force almost between subject and the Crown as between subject and subject. It was under these licenses exclusively that the Crown claimed the right to this royalty; it was under these licenses that this royalty was paid and received, and, if they did not entitle the Crown to the said royalty, if it was therefore illegally imposed upon the respondent, the moneys he paid should be refunded to him. The Commissioner had to issue those licenses as they read. The regulations by the Crown obliged him to do so. How then can it be contended that he acted *ultra vires* and that the respondent was a trespasser upon this property and is not entitled to a particle of the gold he extracted therefrom?

It is further contended on the part of the Crown that even if the money has been illegally collected under these licenses, yet the Crown is entitled to keep it because, the respondent being an alien, the grant to him is void. I am not surprised that the Attorney-

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General refrained from relying at bar upon that part of the Crown's factum.

As to the contention that the money has been paid voluntarily, I would not interfere with the finding of fact of the Exchequer Court upon this part of the case. The respondent had no option but to pay or be ejected.

I would dismiss the appeal with costs. The cross appeal I would allow with costs. As to the two other cases, I am bound by the judgment of the court in the *Chappelle Case* and do not dissent.

SEDGEWICK J.—One William Chappelle, one George W. Carmack and James Tweed and Charles Woog, each filed a petition of right in the Exchequer Court to obtain the relief therein asked. These petitions were heard together, and judgment given in the suppliants' favour. The Crown appeals from these judgments.

The importance of the present appeals is enhanced by the fact that there are upwards of 54 other similar Petition-of-Right suits—a number of which have received the fiat and been filed—involving like claims aggregating upwards of $300,000. The determination of these other cases, for the sake of avoiding multiplicity of suits it has been agreed between the Crown and the several suppliants, shall depend on the final decision in these three cases now in appeal, the documentary evidence being admittedly the same, and the law common to all.

The litigants mentioned are all pioneer miners of 1896—relatively few in number—the gold in the Klondike having been first discovered by the Suppliant Carmack on 17th August, 1896.

There are no disputed facts and hence no conflict of evidence. The Crown called no witnesses, and adduced no documentary evidence in defence, except some title papers produced by the suppliants.

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These cases turn, therefore, principally upon the true construction of the suppliants' grants and upon the proper interpretation of the various mining regulations in force in the Yukon, coupled with the evidence of the suppliants and their witnesses.

All evidence—oral and documentary—adduced in any of the three cases, was by agreement at the trials made evidence in all.

The suppliants oppose the Crown's appeal, and cross-appeal against the reference permitted by the judgment of the Exchequer Court—the suppliants contending that they should have judgment absolutely without any reference.

The case of *Chappelle* v. *The King* is reported in 7 Exchequer Court Reports, at page 414, where some of the arguments in the Court below are shortly stated—the judgment of Mr. Justice Burbridge being printed at pp. 427 *et seq.* of the report.

Part of the judgment of the Exchequer Court, now appealed against by the Crown, is expressed in the head-note of the reported case (1), as follows:—

The Suppliant by right of discovery, under the provisions of *The Dominion Lands Act* and *The Dominion Mining Regulations* of 1889 made thereunder, obtained a grant of a certain gold mining claim in the Yukon district in December, 1896. His grant, *inter alia*, gave him, for the term of one year from its date, the exclusive right to all the proceeds realized therefrom; and the rights which it conferred upon him were, it was declared, those laid down in *The Dominion Mining Regulations*, and no more, and were subject to all the provisions thereof whether the same were expressed in the grant or not. During the currency of the original grant, an order-in-council was passed making grants of gold mining claims in the district generally subject to a royalty. Afterwards, namely, on the 7th December, 1897, the suppliant's grant was renewed in the same terms as those expressed in the original grant.

Held, that the terms of the renewal should be construed by reference to their meaning in the original grant; and that the renewal was not subject to the royalty imposed by the order-in-council.

(1) 7 Ex. C. R. 414.

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The operative words of the order-in-council imposing the royalty were "a royalty shall be levied and collected.

Held, that the expression quoted contained apt words for the imposition of a tax, but that such a tax could not be levied without legislative authority therefor.

The evidence showed that the suppliant had paid the amount of the royalty claimed by the Crown under protest, and in the belief that payment was necessary to protect his rights.

Held, that he was entitled to recover it back.

Before the trials in the Exchequer Court, counsel for the Crown and for the suppliant Chappelle agreed upon a chronological statement which will prove useful for reference in considering the following facts.

The material facts in Chappelle's case, and the legislation and documentary evidence upon which it is based, may be stated, in somewhat abridged form, as follows:—

By the British North America Act, 1867, sec. 146, the Queen, with the advice of the Imperial Privy Council, was authorized to admit the North-western Territory into the Canadian Union, on address from both Houses of the Canadian Parliament,

on such terms and conditions as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act.

Accordingly, by Imperial order-in-council of the 23rd June. 1870, it was ordered

that from and after the 15th day of July, 1870, the North-western Territory shall be admitted into and become part of the Dominion of Canada, upon the terms and conditions set forth in the first hereinbefore recited address, and that the Parliament of Canada shall, from the day aforesaid, have full power and authority to legislate for the future welfare and good government of the said Territory.

The joint Address of the Senate and House of Commons of Canada of December, 1867, upon the terms and conditions whereof the North-western Territory was admitted into and became part of Canada, is scheduled to this Imperial order-in-council, and recites (amongst other things) that

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the development of the mineral wealth which abounds in the North-west, and the extension of commercial intercourse through the British possessions in America from the Atlantic to the Pacific, are alike dependent on the establishment of a stable government for the maintenance of law and order in the North-western Territories,

and prays Her Majesty

to unite Rupert's Land and the North-western Territory with this Dominion, and to grant to the Parliament of Canada authority to legislate for their future welfare and good government; and we most humbly beg to express to Your Majesty that we are willing to assume the duties and obligations of government and legislation as regards these Territories, (and) that in the event of Your Majesty's Government agreeing to transfer to Canada the jurisdiction and control over the said region, the Government and Parliament of Canada will be ready to provide that the legal rights of any corporation, company, or individual within the same shall be respected, and placed under the protection of courts of competent jurisdiction.

By the Revised Statutes of Canada, ch. 22, sec. 4, it is enacted that

the Minister of the Interior shall have the control and management of all Crown Lands which are the property of Canada.

By sec. 3 of *The Dominion Lands Act*, Revised Statutes of Canada, 1886, ch. 54, the said Act is made applicable

to the public lands included in Manitoba and the several Territories of Canada;

and, by sec. 47, it is enacted that:—

47. Lands containing coal or other minerals, whether in surveyed or unsurveyed territory, shall not be subject to the provisions of this Act respecting sale or homestead entry, but shall be disposed of in such manner and on such terms and conditions as are, from time to time, fixed by the Governor-in-Council, by regulations made in that behalf.

Accordingly, by regulations known as "The Dominion Mining Regulations," approved by order-in-council of 9th November, 1889, it is provided, by sec. 1, that said regulations "shall be applicable to all Dominion lands containing gold, silver, &c.;" while sec. 2 of these regulations of 1889 provides that:—

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2. Any person or persons may explore vacant Dominion lands, not appropriated or reserved by the Government for other purposes, and may search therein, either by surface or subterranean prospecting, for mineral deposits, with a view to obtaining under these regulations a mining location for the same; but no mining location, or mining claim, shall be granted until actual discovery has been made of the vein, lode or deposit of mineral or metal within the limits of the location or claim.

Then, by sec. 4 of these regulations of 1889, it is further provided that:—

4. Any person having discovered a mineral deposit may obtain a mining location therefor under these regulations, &c.

After providing, by clause (*b*) that the miner having marked out on the ground the location he desires, shall within sixty days file a declaration with the Dominion Lands Agent, and pay a fee of $5.00, sec. 4, s.s. (*c*), provides as follows:—

(*c*). The agent, upon such payment being made, shall grant a receipt according to the form B in the schedule to these regulations. This receipt shall authorize the claimant, his legal representatives or assignees, to enter into possession of the location applied for; and subject to its renewal from year to year as hereinafter provided, during the term of five years from its date, to take therefrom and dispose of any mineral deposit contained within its boundaries provided that during each of the said five years after the date of such receipt he or they shall expend in actual mining operations on the claim at least one hundred dollars, &c.

Then, by sec. 17 of these regulations of 1889, it is provided:

17. The regulations hereinbefore laid down in respect of quartz-mining shall be applicable to placer mining, so far as they relate to entries, entry fees, assignments, marking of locations, agents' receipts, and generally where they can be applied, save and except as otherwise herein provided.

The following further sections of the regulations of 1889 are also of importance on this appeal:—

Sec. 19. The forms of application for a grant for placer mining, and the grant of the same, *shall* be those contained in Forms H and I in the schedule hereto.

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Sec. 20. The entry of every holder of a grant for placer minin *must* be renewed and his receipt relinquished and replaced every year, the entry fee being paid each time.

Sec. 23. Every miner shall, during the continuance of his grant, have the exclusive right of entry upon his own claim, for the miner-like working thereof, and the construction of a residence thereon, and shall be entitled exclusively to all the proceeds realized therefrom; but he shall have no surface rights therein; and the Superintendent of Mines may grant to the holders of adjacent claims such right of entry thereon as may be absolutely necessary for the working of their claims, upon such terms as may to him seem reasonable.

Sec. 25. A claim shall be deemed to be abandoned and open to occupation and entry by any person when the same shall have remained unworked on working days by the grantee thereof for the space of seventy-two hours, unless sickness or other reasonable cause be shown, or unless the grantee is absent on leave.

Sec. 26. A claim granted under these regulations shall be continuously and in good faith worked, except as otherwise provided, by the grantee thereof or by some person on his behalf.

Sec. 77. Any miner or miners shall be entitled to leave of absence for one year from his or their diggings, upon proving to the satisfaction of the Superintendent of Mines, that he or they have expended on such diggings, in cash, labour, or machinery, an amount of not less than $200 on each of such diggings without any return of gold or other minerals in reasonable quantities for such expenditure.

It will be observed that there is no provision in the Dominion Mining Regulations reserving any royalty whatever. Yet it is noteworthy that the corresponding (but earlier) Mining Regulations governing Indian Lands, dated 15th September, 1888 (printed in Bligh's Orders-in-Council, p. 199), from which these Dominion Mining Regulations of 1889 were otherwise practically copied, do provide for a reservation of a royalty to the Crown of four per cent as follows:

Sec. 81. The patent for a mining or mineral location shall reserve to the Crown, forever, a royalty of four per cent on the sales of the products of all mines therein, in trust for the Indians interested in the lands patented.

But the Dominion Mining Regulations of 1889, now under consideration, omit all reference to a royalty of

any kind, and do not reserve or provide for any such payment.

By Order-in-Council of 24th December, 1894, the length of the creek claims in the Yukon District was increased to 500 feet, and the fee to be charged for an entry for a claim was increased to $15; and the Dominion Mining Regulations of 9th November, 1889, were thereby made applicable in all other respects to the Yukon District.

As will be seen by reference to Chappelle's own evidence, the suppliant Chappelle went into the Yukon country in the spring of 1896, and ultimately staked Fractional Claim No. 3-A below "Discovery" on Hunker Creek in that year, under the above Dominion Mining Regulations of 1889, made applicable to the Yukon by the above mentioned order-in-council of 24th December, 1894.

Chappelle says that he had to go 75 miles to record this claim at Fort Cudahay, at the Government offices in charge at headquarters of Captain Constantine, of the North-west Mounted Police. Constantine, accordingly, on the 7th December, 1896, issued a grant to Chappelle, in the form of Schedule I to the Dominion Mining Regulations of 1889, for this Fractional Claim on Hunker Creek of 185 feet. This 1896 grant of No. 3-A Lower Hunker is filed as an Exhibit. It read as follows:—

No. 370. Form I.

GRANT FOR PLACER MINING.

DEPARTMENT OF THE INTERIOR,
DOMINION LANDS OFFICE,
YUKON AGENCY. 7th December, 1896.

In consideration of the payment of five and a-half dollars, being the fee required by the provisions of the *Dominion Mining Regulations*, sections 4 and 20, by William Chappelle, of Dawson, accompanying his application No. 370, dated 7th December, 1896, for a mining claim in the Throndik Mining Division of the Yukon District, more par-

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ticularly described as Fractional Mining Claim No. 3-A below "Discovery" on Hunker Creek, in the aforesaid Mining Division, said claim being 185 feet or so.

The Minister of the Interior hereby grants to the said William Chappelle, for the term of one year from the date hereof, *the exclusive right of entry* upon the claim for the miner-like working thereof and the construction of a residence thereon, *and the exclusive right to all the proceeds realized therefrom.*

The said William Chappelle shall be entitled to the use of so much of the water naturally flowing through or past his claim, and not already lawfully appropriated, as shall be necessary for the due working thereof, and to drain his claim, free of charge.

This grant does not convey to the said William Chappelle any surface rights in the said claim, or any right of ownership in the soil covered by the said claim; and the said grant shall lapse and be forfeited unless the claim is continuously and in good faith worked by the said William Chappelle, *or his associates.*

The rights hereby granted are those laid down in the *aforesaid Mining Regulations, and no more,* and are subject to all the provisions of the said regulations, whether the same are expressed herein or not.

C. CONSTANTINE,
Agent of Dominion Lands.

About three months previous to this, one Louis Emkins, on the 9th September, 1896, similarly obtained from Captain Constantine a grant of a claim of 500 feet in length, known as claim No. 7 on Eldorado Creek (in form also as provided by schedule I of the 1889 r gulations), which original grant is in precisely the same terms—*mutatis mutandis*—as Chappelle's grant of of No. 3-A Lower Hunker, printed above.

Louis Emkins sold an undivided half interest in this claim No. 7 on Eldorado to the suppliant Chappelle and the ten per cent royalty tax was subsequently collected from Chappelle, on 16th July, 1898, in respect of $104,290 of gold mined in 1897-8 on this claim, as well as on the $16,370 of gold mined on the claim he had himself staked on Hunker Creek, No. 3-A, Lower Hunker.

In May, 1897, the Governor decided to issue a new set of regulations governing placer mining in the Yukon.

The section of the Dominion Lands Act (Revised Statutes of Canada, ch. 54, above quoted) enabling regulations to be thus made, had been amended in 1892, (1) since the issue of the 1889 regulations, and then read (in 1897) as follows:

> Lands containing coal or other minerals * * * shall not be subject to the provisions of this Act respecting sale or homestead entry, but the Governor-General-in-Council may, from time to time, make regulations for the working and development of mines on such lands, and for the sale, leasing, licensing, or other disposal thereof. * * *

Accordingly, new regulations governing placer mining in the Yukon were promulgated, dated 21st May, 1897, the publication of which, under sec. 91 of the Act, was completed on the 9th July, 1897.

These new regulations of 1897 were in terms substituted, so far as placer mining were concerned, for the regulations of 1889 (under which the suppliants had previously obtained grants) but the *form* of the grant (schedule I) was not altered thereby, and (by the last clause of the new regulations of May, 1897) it was expressly provided that

> if any cases arise for which no provision is made in these regulations, the provisions of the regulations governing the disposal of mineral lands other than coal lands, approved by His Excellency on the 9th November, 1889, shall apply.

The 1889 regulations were thus kept alive.

No provision was made in these new regulations of 1897 for either the imposition or the reservation of a royalty, and its material sections are practically the same as those relating to Placer Mining in the original regulations of 1889.

As an important example, sec. 8 of the new regulations is identical with sec. 19 of the regulations of 1889, as follows:

> 8. The forms of application for a grant for placer mining and the grant for the same *shall* be those contained in forms H and I in the schedule hereto.

(1) 55 & 56 Vict. c. 15, s. 5.

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And, again, sec. 14 of the new regulations is likewise identical with sec. 20 of the 1889 regulations, thus:

> 14. The entry of every holder of a grant for placer mining *must be renewed* and his receipt relinquished and replaced *every* year, the entry fee being paid each time.

The new regulations also repeated the provisions of section 23, of the regulations of 1889, by providing in section 17 that;—

> Every miner shall, during the *continuance* of his grant, have the exclusive right of entry upon his own claim, for the miner-like working thereof and the construction of a residence thereon, and *shall be entitled exclusively to all the proceeds realized therefrom.*

It will be remembered that the 1896 grant for Claim No. 7 on Eldorado Creek was issued on the 9th September, 1896, and hence had to be renewed on or before 9th September, 1897,—while the other grant in question herein, for Fractional Claim No. 3-A on Lower Hunker, had similarly to be renewed before the 7th December, 1897.

But, before the arrival of these dates, namely, on 29th July, 1897, the Government passed an order-in-council purporting to impose a royalty tax on all gold mined in the Yukon. This order-in-council was framed in apt words for the imposition, levy, and enforced collection of a tax of ten per cent on the gold itself, and, in some circumstances, of twenty per cent; but without any antecedent legislative authority, as is now admitted.

The material clauses of this order-in-council of 29th July, 1897, purporting to impose the tax in question, are as follows:—

> That upon all gold mined on claims referred to in the regulations for the governance of placer mining along the Yukon River and its tributaries, a royalty of ten per cent shall be levied and collected by officers to be appointed for the purpose, provided that the amount mined and taken from a single claim does not exceed $500 per week;

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and, in case the amount mined and taken from any single claim exceeds $500 per week, there shall be levied and collected a royalty of ten per cent upon the amount so taken out up to $500, and upon the excess or amount taken from any single claim over $500 per week, there shall be levied and collected a royalty of twenty per cent, such royalty to form part of the consolidated revenue, and to be accounted for by the officers who collected the same in due course;

That the times and manner in which such royalty shall be collected, and the persons who shall collect the same shall be provided for by regulations to be made by the Gold Commissioner, and that the Gold Commissioner be and he is hereby given authority to make such regulations and rules accordingly;

That default in payment of such royalty, if continued for ten days after notice posted upon the claim in respect of which it is demanded, or in the vicinity of such claim, by the Gold Commissioner or his agent, shall be followed by cancellation of the claim;

That any attempt to defraud the Crown by withholding any part of the revenue thus provided for, by making false statements of the amount taken out, may be punished by cancellation of the claim in respect of which fraud or false statements have been committed or made;

And that in respect of the facts as to such fraud or false statement, or non-payment of royalty, the decision of the Gold Commissioner shall be final.

JOHN J. McGEE,
Clerk of the Privy Council.

But before the spring wash-up in 1898, the Government decided to *repeal* all existing placer mining regulations (including the order imposing the royalty tax), and to issue a new and amended set of regulations. Accordingly, this was done by order of the 18th January, 1898, which enacted that the placer mining regulations

established by order-in-council, dated 21st May, 1897, and subsequent orders of the Governor-in-Council, shall be and the same are hereby *cancelled*, and the following regulations * * * substituted in lieu thereof.

These new regulations did not become effective by publication until the 11th March, 1898. Their most important provisions, which are relevant or material

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to the present issues, are that by section 37, the rights of miners under mining grants are modified, by making the same—for the first time—subject to the payment of royalty. Sec. 37, of these new regulations of 1898, reads as follows:—

37. Every free-miner shall, during the continuance of his grant, have the exclusive right of entry upon his own claim for the miner like working thereof, and the construction of a residence thereon, and shall be entitled exclusively to all the proceeds realized therefrom, *upon which however the royalty prescribed by these regulations shall be payable.* (The words in italics are new).

These new 1898 regulations also, for the first time, altered the form of mining grant, to correspond with foregoing sec. 37; and thus for the first time providing *by contract* for payment by the grantee of the royalty.

As already mentioned, these new 1898 regulations in terms repealed the 1897 order purporting to impose the royalty tax; and, by secs. 30 and 31, purported to impose instead a straight tax of 10 per cent on all gold mined, and thus abandoned the more excessive 20 per cent tax provided for in the repealed 1897 order. These new 1898 regulations, secs. 30 and 31 (under which, be it noted, the royalty in question herein was subsequently collected from the suppliant Chappelle and from the other 1896 miners), read as follows:—

(30). A royalty of ten per cent on the gold mined shall be levied and collected on the gross output of each claim. The royalty may be paid at banking offices to be established under the auspices of the Government of Canada, or to the Gold Commissioner, or to any Mining Recorder authorized by him. The sum of $2,500 shall be deducted from the gross annual output of a claim when estimating the amount upon which royalty is to be calculated, but this exemption shall not be allowed unless the royalty is paid at a banking office or to the Gold Commissioner or Mining Recorder.

When the royalty is paid monthly or at longer periods, the deductions shall be made ratable on the basis of $2,500 per annum for the claim. If not paid to the bank, Gold Commissioner or Mining Re-

corder, it shall be collected by the customs officials or police officers when the miner passes the posts established at the boundary of a district. Such royalty to form part of the consolidated revenue, and to be accounted for by the officers who collect the same in due course. The time and manner in which such royalty shall be collected shall be provided for by regulations to be made by the Gold Commissioner.

(31). Default in payment of such royalty, if continued for ten days after notice has been posted on the claim in respect of which it is demanded, or in the vicinity of such claim by the Gold Commissioner or his agent, shall be followed by cancellation of the claim. Any attempt to defraud the Crown by withholding any part of the revenue thus provided for, by making false statements of the amount taken out, shall be punished by cancellation of the claim in respect of which fraud or false statements have been committed or made. In respect to the facts as to such fraud or false statements or non-payment of royalty, the decision of the Gold Commissioner shall be final.

It will be observed that this new tax of ten per cent was, as formerly, on the gold itself. It might be paid to the bank; but, if not

it shall be collected by the customs officials or police officers when the miner passes the posts established at the boundary of a district.

The tax thus collected was to form part of the consolidated revenue, and the method of collection was to be provided by regulations to be made by the Gold Commissioner. The consequence of default in payment—after ten days notice of demand had been posted on or in the vicinity of any mining claim by the Gold Commissioner or his agent—was the cancellation or forfeiture of the claim itself—the decision of the Gold Commissioner to be final.

As has been observed, in 1898 there admittedly existed no legislative authority or Act of Parliament which, directly or indirectly, authorized or justified the imposition or collection of such a tax.

It ought to be here added that these new placer mining regulations of 1898 (effective, as we have seen, on 11th March, 1898) also took care to provide, by sec. 40, that:—

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40. If any cases arise for which no provision is made in these regulations, the provisions of the *Regulations governing the disposal of Mineral Lands other than coal lands*, approved by His Excellency the Governor-in-Council on the 9th November, 1889, or such other regulations as may be substituted therefor, shall apply;

thus perpetuating and keeping alive the old 1889 regulations under which the miners got their original grants.

Yet one important fact admittedly stands out clearly, namely, that the original order purporting to impose the royalty tax in the first instance in September, 1897, was effectively cancelled and repealed by the Order and Regulations of March, 1898, *before* anything was ever done under it. Not a dollar was ever collected under the 1897 order, which was thus repealed in 1898, before the spring wash-up of that year. The collection of the ten per cent royalty tax, complained of in these suits, was in all cases made under and by virtue of secs. 30 and 31 of the 1898 regulations—which could not, by any conceivable construction, be made to apply to the then current renewal grants, issued in 1897.

Meanwhile, during the winter working season of 1897-8, Chappelle had mined a large quantity of gold bearing gravel from both his Eldorado and Hunker Creek claims, which he subsequently sluiced and washed up, in the early summer of 1898, realizing from his Hunker Fraction $16,370 (in gross), and from the Eldorado Claim $104,290.

It will be remembered that, up to the spring of 1898, Captain Constantine, of the North-west Mounted Police, had been the chief executive officer of the Government in the Yukon region, and had, with Gold Commissioner Fawcett, administered law and justice throughout the Territory.

During the summer of 1898, however, Major Walsh (who had arrived at Dawson on 21st May, 1898), was appointed by order-in-council as

Chief Executive Officer of the Government of the Yukon Territory, to be known as the Commissioner of the Yukon Territory, "with the fullest authority over all the officials in the various departments of the Government," and "in full command of the North-west Mounted Police Force," with "power to vary, alter, or amend any mining regulations issued under the authority of His Excellency-in-Council governing the granting of mining claims, where such change may, in his opinion, be necessary in the public interest.

This order appointing Commissioner Walsh also made provision that the Commissioners should make a full report to the Minister; and this Major Walsh did, on the 15th August, 1898.

In this report, Major Walsh mentions that

Gold Commissioner Fawcett had reported that little royalty could be collected this year (1898), owing to the best paying claims being renewed under the old regulations, and that the mines which were being worked under the new regulations would be unable to pay royalty, as their expenses would be greater than their output this year. Under these circumstances, Major Walsh continues, it appears to me that my place was at the coast, where so many matters had to be attended to.

Again, the government's chief executive officer reports as follows:

On arrival at Dawson (21st May, 1898), I found a great many questions awaiting solution, which could only be disposed of by the authority of the commissioner. For instance, the question of royalty, over which there had been considerable discussion, appeared to be somewhat mixed. I immediately announced that royalty would be collected on all claims the leases of which were renewed subsequent to the date when the law came into force. Nearly all the leaseholders of the larger prospected claims showed a disposition to respect the collection of royalty. Others, however, were not so tractable; their principal objection being that their leases were granted for one year; and that, once being granted, subsequent restrictions could not be placed upon them. I pointed out to the leaseholders that collection of royalty was necessary for the maintenance of courts of justice, for police protection, mail communication, and other public services.

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While acknowledging the force of these reasons, they submitted that a more thorough examination of the real cost of out-putting the gold would convince the Government that the royalty is a severe tax, and expressed a hope that next year would see it removed. Royalty was not collected from any claim which had not got into good working order, or which could not show a profit after paying royalty, and this would represent a large sum.

Again the Commissioner continues,

more than half the leases were exempted from royalty on account of having been renewed previous to the date of the law requiring the payment of royalty coming into force. The collection of royalty will amount to about half a million dollars.

After mentioning that the Canadian Bank of Commerce and the Bank of British North America had opened branches in Dawson City, the Commissioner continues, in his report, as follows:

Officials of any Government entering into a new and isolated district, where the people are not closely restricted by law and are free from taxation, have almost invariably met with just such an experience as we have had. The introduction and enforcement of law and taxation naturally made us unpopular with the older residents, who were unaccustomed to that sort of thing.

Parliament prorogued in 1898 on the 13th June, on which day the new *Yukon Territory Act* (61 Vict. ch. 6) was assented to and became law. It is here worth mentioning that, by section 8 of *The Yukon Territory Act*, empowering the Governer-in-Council to make ordinances for the peace, order, and good government of the Yukon Territory, it is specially provided also that

no ordinance made by the Governor-in-Council or the Commissioner-in-Council shall impose any tax.

Notwithstanding, this, however, the Government officers four days later, on 17th June, 1898, collected $1,637 for Government royalty from the suppliant Chappelle, for gold mined on his Hunker Creek Fraction, and later, on the 16th July, 1898, in like manner, collected from the suppliant Chappelle $10,429

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government royalty, in respect of gold mined on Claim No. 7 on Eldorado Creek.

It will be remembered that the royalty regulations of 1898 provided that the method and manner of collecting the royalty was to be prescribed by regulations to be made by the Gold Commissioner. It seems, however, that Gold Commissioner Fawcett did not promulgate any formal regulations on the subject, but he made a report thereon to Government which is printed.

Gold Commissioner Fawcett's report must be read in the light of Regulation No. 31 of 1898, which provided that

> default in payment of such royalty, if continued for ten days after notice has been posted on the claim in respect of which it is demanded, or in the vicinity of such claim, by the Gold Commissioner or his agent, shall be followed by cancellation of the claim.

Accordingly, Gold Commissioner Fawcett reported that, during the summer of 1898,

> notices were posted at intervals all along these creeks, through which claim-owners were informed that the royalty should be paid on the 1st and 15th of each month to the Mining Inspectors at the Forks of Eldorado, or at the Bank of Commerce in Dawson. On Hunker Creek, the miners were notified to report at the Commissioner's office, Dawson, on the 1st of each month. These reports were required, whether royalty was payable or not. On Bonanza and Eldorado, the Mining Inspectors examined the claims to ascertain if all who were working had reported. On Hunker, a policeman was appointed to that duty by Commissioner Walsh.
>
> When a claim was found that was being worked, for which returns had not been made, a notice was posted on the claim allowing the delinquent ten days in which to report, and drawing his attention to the penalty for non-compliance, referred to in sec. 31 of the regulations governing placer mining in the Territory * * * The Commissioner (Commissioner Walsh) himself superintended to a great extent the collection of royalty.
>
> As to valuation, I may say that one-tenth of the dust was taken as royalty. This would be the proper proportion, whatever the gold would assay, and is independent of the valuation. * * * * The

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collection of the royalty this year is in the hands of the North-west Mounted Police, and I think they can be depended upon to see that none are missed.

In spite of the foregoing evidence, and notwithstanding the fact that the tax was thus collected from the miners under the stress and threat of the exercise by the Gold Commissioner of the power of summarily forfeiting to the Crown the mining claims of any delinquent miners—who were without means of redress or relief in the then very remote and isolated region of the Klondike—the Crown has pleaded that Chappelle and his fellow-suppliants paid the royalty tax voluntarily, and hence cannot recover it. And this, in spite of the fact that the Gold Commissioner was not only Tax-Collector-in-Chief, but also himself the sole judicial and executive functionary empowered to cancel placer gold mining grants for non-payment of the said tax, and whose decisions thereon it was expressly provided should be conclusive and final.

The Yukon Territory Act of 1898 was subsequently amended in 1899 (62 & 63 Vict., ch. 11), whereby Parliament again affirmed by section 8 (*c*), "nor shall any tax be imposed except as in this Act provided," referring to municipal taxation therein mentioned.

But this was not all. After these petition-of-right suits had been tried in the Exchequer Court and judgment given for the suppliants, Parliament awakened to the necessity of legalizing the future levy of taxation of Yukon gold; and by an Act passed in 1902 (2 Edw. VII., ch. 34, sec. 3) the Yukon Territory Act of 1898 was again amended and the following new clause enacted:—

8. Subject to the provisions of this Act, the Governor-in-Council may make ordinances for the peace, order and good government of the Territory, and of His Majesty's subjects and others therein; but no such ordinance shall—

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(*a*) for the enforcement of any ordinance, impose any penalty exceeding five hundred dollars;

(*b*) alter or repeal the punishment provided in any Act of the Parliament of Canada in force in the Territory for any offence;

(*c*) appropriate any public land or other property of Canada without authority of Parliament, or impose any duty of customs or any excise;

Nor shall any tax be imposed by ordinance except as in this Act provided; Provided always that the Governor-in-Council may make ordinances—

(*d*) imposing a tax or royalty (not exceeding five per cent thereof) upon gold and silver the output of mines in the Territory, to be levied from and after the date of the ordinance imposing it;

(*e*) prescribing and regulating the place and manner of collection of such tax or royalty, and the methods of securing and enforcing the payment thereof;

(*f*) providing for the confiscation and forfeiture of gold and silver upon which such tax or royalty has not been duly paid, as well as for the confiscation and forfeiture of any vessel, vehicle, cart, or other receptacle containing it, or used or intended to be used for the transportation thereof;

(*g*) giving to any officer of the Crown, in respect of searches, examinations, and other proceedings for the enforcement of the provisions of any such ordinance, all such powers, rights, privileges, and protection as officers of customs have under the provisions of *The Customs Act*.

2. Every ordinance made under the authority of this section shall remain in force until the day immediately succeeding the day of prorogation of the then next session of Parliament, and no longer, unless during such session of Parliament such ordinance is approved by resolution of both Houses of Parliament.

3. Every ordinance made by the Governor-in-Council under the provisions of this Act shall have force and effect only after it has been published for four successive weeks in *The Canada Gazette;* and all such ordinances shall be laid before both houses of Parliament within the first fifteen days of the session next after the date thereof.

Thus, on the 15th May, 1902, or nearly four years after the illegal levy and collection of the royalty tax complained of in this action, Parliament for the first time by statute authorized taxation of this sort *in the future*, but took care also to provide for the present liti-

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gants by enacting, in section 6 of the above Act of 1902:—

> 6. Nothing in this Act or in any ordinance made thereunder shall prejudice or affect or apply to any claim, matter or suit now pending in any court of competent jurisdiction, nor to the claims of any person against the Crown heretofore made by petition of right and lodged for fiat, nor to any claim or cause of action heretofore accrued.

As an immediate result of this Act of 1902, an ordinance was passed by the Governor-in-Council the following week, dated 21st May, 1902, repealing and rescinding the obnoxious regulations in question herein, which purported without legislative authority to impose a royalty or tax on the gold mined, and instead now enacting (under the legislative authority of the 1902 Act) that an *export duty* of 2½ per cent *ad valorem* should be thereafter collected on all gold shipped away from the Yukon—and that

> all ordinances or orders-in-council heretofore passed, in so far as they relate to or provide for the collection of any tax or royalty on gold mined in the Yukon Territory, or to be taken or shipped therefrom, are hereby rescinded.

In the foregoing, I have substantially stated what is contained in the suppliant Chappelle's factum, which I found, upon careful examination, contained an accurate statement both of the facts and of the statutes and regulations therein in part recited.

The pivotal fact in this case is that the levy or exaction of the 10 per cent royalty was made under the regulations of 1898, while the grants, or leases, or licenses, or by whatever name they may be called, under which the suppliants held their original title, were made under the regulations of 1889. The instruments of title, called in the regulations of 1898 "grants," partake in part of all these characters. So far as they transfer the property in the gold when mined, they are grants. So far as they give possession or occupation for a specified term, they are in the nature of leases.

And so far as they give right of entry, they are licenses; and, if licenses, irrevocable, since they are coupled with an interest. I shall describe the instrument, pursuant to the term used in the regulations, as a grant.

Now, the contention of the appellant, the Crown, in these appeals is that this grant is but a license for a year, and for one year only; that the grantee has no right to obtain, and that the Crown is under no obligation to give a renewal grant; and that, whether that be so or not, any renewal thereof must be governed, not by the regulations of 1889 under which the original grant was obtained by the miner, but on the contrary by any regulations which were in existence at the time that the renewal grant was issued or obtained.

There is not much difference of opinion as to the nature and extent of the original discovery grants issued in 1896, under the regulations of 1889. The Crown admits that any change in the regulations, made during the currency of the first or original grants, would not in any way affect the rights thereunder of the grantees respectively. One of the main questions in controversy, however, is whether the suppliants' discovery grants of 1896 were renewable grants—whether the suppliants were entitled to renew their original grants. I entertain no doubt as to their right to renew. It is unnecessary here to decide whether their right of renewal extends to five years from the date of the discovery grant, or whether it extends until the mining claim is worked out or exhausted. It must be remembered that the rights of the suppliants in this regard do not depend alone upon the terms of the grant as above set out, being form 1 of the regulations of 1889. That instrument is not the measure of their rights, inasmuch as there must be read into it, so far as necessary, the regulations of 1889

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and the provisions of the parent Act, the Dominion Lands Act, under authority of which the regulations were made.

The grant, it is true, includes a license for one year, but there is nothing in it to indicate that it may not be renewed. It purports to be issued under the regulations of 1889 then subsisting; and, if these regulations provide for a renewal, then the holder is entitled to such renewal. These regulations of 1889, denominated "The Dominion Mining Regulations," were made operative in the Yukon Territory in 1894, and, in the year 1896, when the discovery grants in question herein were issued, contained the whole mining code, both with regard to quartz mining and placer mining. The regulations respecting placer mining were, subsequently, mechanically separated from the Dominion Mining Regulations of 1889, by the issue of the 1897 placer mining regulations (effective 9th July, 1897), which also however, by the concluding clause thereof, expressly kept alive the original 1889 Dominion Mining Regulations.

To my mind, a perusal of the 1889 regulations will clearly indicate the renewable character of the 1896 grants now under consideration. The general policy of the regulations, as indicated by many of their provisions, affords cogent evidence that the grantee was entitled to renew his grant. I will indicate a few of them. Before so doing, it is noteworthy that the Crown, in its defence in the Chappelle case, pleads that Chappelle was entitled to his grant for a further period, in other words, was entitled to a renewal of his 1896 discovery grant. (See also paragraph 7 of the Crown's defence). The law officers of the Crown, when delivering this defence, must then have considered that a right of renewal was part of the suppliant's contract.

To particularize, however, the sections in the 1889 regulations from which a right of renewal of the grant must reasonably be implied :—

(*a*) Section 20 of the 1889 regulations (as well as section 14 of the 1897 placer regulations), provides that the entry of every holder of a grant for placer mining *must* be *renewed* every year, the entry fee being paid each time, otherwise the miner would lose his mining claim. The word here used is "must." It is not "may," but "must." The word "may" is facultative and permissive, but "must" is the most uncompromisingly imperative word in our language. "Shall" is even sometimes construed as futuritive only, and hence permissive; but "must" is dominant and compulsory.

(*b*) Section 77 of the regulations of 1889 provides that any miner shall be entitled to leave of absence for *one year* from his diggings, on proving an expenditure of $200 on such diggings. Does not this provision clearly contemplate an interest extending beyond one year?

(*c*) Then, the order-in-council of the 24th December, 1894 (making the Regulations of 1889 effective in the Yukon), recites the fact that "it takes *two seasons* to make a start on the work" on placer claims, the length of which is thereby increased to 500 feet. Can it be supposed for a moment that, when the Government made its regulations of 1889 effective in the Yukon in 1894, whereby all persons the world over were invited to come in and explore, and take for their own exclusive benefit, all that they could find in any mining claims discovered by and granted to them, it was intended that all that the discoverers should get was a right to extract the gold from their mining claims for one year only?

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(*d*) Section 40 of the Regulations of 1889 enables the Minister of the Interior to grant

> exclusive rights of way through and entry upon any mining ground, for any term not exceeding five years

for drainage purposes. Does not this provision necessarily contemplate that the holder is entitled to a renewal of his mining grant for a period at least co-terminous with such drainage grant?

(*e*) By section 45 of the regulations, the Minister is empowered to "grant to any person, for any term not exceeding five years," the right to divert water and to construct flumes and ditches, and

> every such grant shall be deemed to be appurtenant to the mining claim in respect of which it has been obtained.

The expression "claim" is defined in the interpretation clauses of the regulations as the "personal right of property in a placer grant or diggings," as distinguished from the word "location," which is there interpreted as referring only to quartz mining areas. If the Crown's contention be correct, that the regulations do not entitle the miners to a renewal of their grants as a matter of right, subject otherwise to the performance of the conditions under which the grants are held, then the minister can, under this section 45, grant an appurtenance to a placer claim for a period four years longer in duration than the life of the claim itself. The form of this flume grant, set out in the regulations, makes it appurtenant to the mining claim, and provides that the same shall cease and determine, not at the expiry of the first year's holding, but "whenever the *said claim* shall have been worked out."

(*f*) Section 17 of the 1889 regulations, which as before stated include the whole mining code both for placer and quartz mining, makes the Dominion Mining Regulations of 1889 applicable to placer mining,

so far as they relate to entries, entry fees, assignments, marking of locations, agent's receipts, and generally where they can be applied, except as therein otherwise provided. The word "entries" there includes all those things necessary to be done, both by the discoverer or applicant on the one hand, and by the mining recorder on the other, in order to entitle the applicant to a legal right to his claim. In fact, were it not for that provision, there would be no machinery at all for obtaining an entry for any placer mining claim. Section 4 previously points out how a location may be acquired, by staking (after discovery), and making the necessary affidavit and entry, and paying the fee; and then proceeds to provide that the entry shall be subject to renewal from year to year during the term of five years from its date. It is, in my view, very plain that this provision, giving the right of renewal to the quartz miner, gives the same right of renewal to the placer miner.

(*g*) Sec. 12 of 1897 placer mining regulations provides that

an entry fee of $15 shall be charged the first year, and an annual fee of $100 for each of the *following* years. This provision shall apply to locations for which entries have been already granted.

These 1897 placer mining regulations became effective on the 9th July, 1897, and the concluding words of sec. 23 thereof provide that the 1889 Dominion regulations shall still continue to apply to all cases unprovided for. Thus the 1889 regulations were perpetuated and kept alive.

(*h*) Sec. 23 of the 1889 regulations, as well as sec. 17 of the 1897 placer regulations, provides that

every miner shall, *during the continuance* of his grant, have the exclusive right of entry upon his own claim for the miner-like working thereof, and shall be entitled exclusively to all the proceeds realized therefrom.

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The miner's exclusive rights, therefore, subsist during the continuance of his grant. The word "continuance" is employed, not "currency" or "term." It imports a prolongation of existence, and implies that the grant might be continued, or in other words "renewed."

(*i*) Sec. 22 of the 1889 regulations, as also sec. 16 of the placer regulations of 1897, provides that

> any miner or miners may sell, mortgage, or dispose of his or their claims provided such disposal be registered, &c.

Thus, viewed only as a mere license, it is assignable, and therefore not revocable.

(*j*) The form of grant for placer mining provides for a term of one year, "subject to all the provisions of the Dominion Mining Regulations," and the rights thus acquired are in terms stated to be "those laid down in the aforesaid mining regulations," which regulations, as I have before stated, must therefore be all read into the form of grant. These regulations include the foregoing provisions, which evidence the right of renewal from year to year, "until the claim shall have been worked out."

For these reasons it appears to me that the 1896 grants must be held to be renewable grants.

Assuming, however, that the miner is entitled to a renewal of his discovery grant, under what terms should he obtain it? It is elementary law that if a lease be renewable from year to year, every subsequent year is part of the same term. Shepherd's Touchstone, 270 n.(*c*); 3 Preston's Conveyancing, 76, 77; *Legg* v *Strudwick* (1); *Harris* v. *Evans* (2). Then, if a renewable lease is to be renewed, it must be renewed at the former rent, if not otherwise agreed; *Doe d. Bromley* v. *Bettison* (3), and a reservation of a rent or

(1) 2 Salk. 414.
(2) 1 Wils. 262.
(3) 12 East 305

royalty must be made by the contract at the time of the making of the lease; Bacon's Abridgement, tit. "Rent," D. 1, 141.

But the Crown contends that the suppliant miners' future rights were cut down, during the currency of the 1896 discovery grants held by them, by the passing of the order-in-council imposing a royalty (operative if otherwise valid, on the 11th September, 1897), so as to make any renewal grants claimed by the miners in the autumn of 1896 subject to this new royalty impost. It is upon this contention alone that the Crown seeks to justify the Government in exacting from the miners, in the summer of 1898, ten per cent of the gross proceeds realized from the mining claims, during the working winter season of 1897-98, notwithstanding that, by the express terms of the miners' original and renewal grants, they were to have the exclusive right of entry upon their own claims and also the exclusive right to all the proceeds realized therefrom. In other words, the Crown's position is this: that although the Crown made a contract with a miner, by which it gave to him the exclusive right of entry upon a placer mining claim, and also the exclusive right to all the proceeds realized therefrom, yet, notwithstanding such contractual rights, the Crown is entitled to exact and deduct, *in invitum*, from such proceeds realized therefrom, 10 or 20 per cent thereof; or, in other words, to take possession and convert to the Crown's use whatever percentage of the gross proceeds of such mining claim the Crown may think fit to exact by promulgation of an order-in-council. But this would be equivalent to supporting confiscation or taxation under the guise of regulating the gold fields.

The placer mining regulations of 1897 (in which there is no reference to or provision for payment of

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any royalty) became effective by publication on the 9th July, 1897. As already mentioned, the royalty order-in-council was passed and published subsequently; and became effective, if valid, on the 11th September, 1897. If the placer regulations of 1897 are to govern the conditions upon which the 1896 discovery grants were renewable, then it is significant that these 1897 regulations themselves provided for a form of grant or license in almost exactly the same terms as the form of grant under the regulations of 1889. Hence it is found that every renewal given, after the expiration of the first year, contained in the body of the renewal itself the same specific grant to the miner of the exclusive right of entry and the exclusive right to all the proceeds realized from the claim. Even, therefore, if the renewal of the 1896 discovery grants was not obligatory, the miners at all events did renew them, in the autumn of 1897, in the only form then possible or legal, and by which form of renewal grant no royalty was reserved. Section 8 of the 1897 regulations provides that the form of a grant for placer mining *shall* be that contained in the schedule; thus imperatively prescribing the form of grant to be used, and leaving the Gold Commissioner no discretion in the matter.

The royalty order-in-council of 1897 did not purport to abridge or modify the then subsisting exclusive rights of the miners, by *reserving* a royalty to the Crown as was subsequently done in 1898, both in the regulations of that year and in the form of future grants thereby provided. The Gold Commissioner was thus bound to use the form he did, when renewing the grants in the autumn of 1897, and to do so until the form then prescribed was expressly altered or modified by apt amending regulations, as was subsequently done in 1898. It would have been *ultra*

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vires of the Gold Commissioner to have changed the imperatively prescribed form of grant in the autumn of 1897, by making it subject to a royalty, which had not then been in apt terms reserved to the Crown either by regulation or contract.

The subsequent regulations of 1898, which do not govern the renewal grants in question, whereby a royalty was specifically reserved by way of reddendum in the case of future grants, may be *intra vires*; but the royalty thereunder would be payable, not by virtue of any taxing power, but by reason of a contractual relationship existing between the Crown and the miners under such future grants expressly reserving a royalty. But, in so far as the royalty order of 1897 purports to limit or add a term to the original contracts between the parties, the order is *ultra vires* of the authority which purported to pass it, and can have no retroactive operation.

But the Crown contends also that the royalty impost by order-in-council on the 11th September, 1897, affected and attached to the suppliants' renewal grants of 1897, and must be read into the suppliants' renewal grants, because the concluding clause of the grants provides that

> the rights hereby granted are those laid down in the aforesaid mining regulations, and no more, and are subject to all the provisions of said regulations, whether the same are expressed herein or not.

It is urged that these last words rendered the 1897 renewal grants subject to the royalty impost, and it is contended that there is thus an implied contract on the part of the suppliants to pay the royalty. But the earlier and operative portion of the 1897 renewals, expressly and for valuable consideration, grants to the miner both exclusive rights of entry and the exclusive right to all the proceeds realized from the mining claim; and this later and repugnant gene-

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ral provision should not be construed to affect or modify the earlier and specific terms of the grant itself. *Generalia specialibus non derogant.* The only effect of the concluding general words above quoted is to incorporate into the grant all of the regulations, consistent with the specific and operative terms of the instrument, "and no more."

Moreover, if the royalty impost of September, 1897, was in form and effect *ultra vires* of the authority which promulgated it, not as a reservation of a royalty but as a species of tax, then no contract on the part of the miner, to be thus implied from the above quoted concluding general words of the 1897 grant, could avail the Crown anything. The miner would only be bound by *intra vires* regulations, in any event; and cannot on such an alleged constructive contract render himself subject to pay royalty imposed by a regulation clearly *ultra vires; Waugh* v. *Morris* (1); *per* Lord Blackburn, at page 208; Anson on Contracts (9 ed.) p. 217.

It is further contended, however, on behalf of the Crown, that these amending regulations have legislative force and effect; and that, notwithstanding the prohibition contained in the Yukon Territory Act against imposing any tax by ordinance, the Governor-in-Council had authority under section 47 of the Dominion Lands Act to effectively pass the royalty regulation in question. But that Act does not clothe these regulations with the force or effect of law; and it has been repeatedly held that unless the parent Act states either that regulations thereunder "shall have the force of law," or "shall have force or effect as if they formed part of the Act" (or like expression), such regulations can be judicially called in question, if they plainly transcend the scope of the parent Act, or if they

(1) L.R. 8 Q. B., 202.

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are repugnant to the Act itself or the law of the land or if they purport to deal with matters which Parliament has prohibited; *Institute of Patent Agents* v. *Lockwood* (1); Hardcastle's Statutory Law (3 ed.) p. 286. In certain cases (*e. g.*, Orders-in-Council under the Extradition Acts) the statutory power provides that the validity of the statutory orders shall not be questioned in any legal proceedings whatever. But where the statute does not contain this or a similar provision, the court can canvass a regulation, and can determine whether or not it was within the power of those who made it: (*per* Lord Herschel, (1); *Attorney General* v. *Sillem* (2).

The Crown cannot, therefore, impose new burdens on current grants, by making or amending regulations which have not any legislative force *per se*. The nature of the royalty regulations of 1897 is essentially derogatory to the grants of 1896, and is not within the original contemplation of the parties. Such a regulation would have to be proved in Court like any other by-law; and it is not entitled, under the parent Act, to judicial cognizance. It is undisputed, in the present case, that the royalty order of 1897 did not even reach the Gold Commissioner at Dawson until the 29th September, 1897, before which date neither the government officers in the Yukon nor the miners themselves had any notice whatever of the passage or existence of such an impost.

Regulations having been made in 1889 under the Act, upon which grants were issued and vested rights had accrued, the Crown ceases to be a legislator *quoad* such grants, and becomes a contractor; and the Crown cannot afterwards purport to legislate by regulation so as to affect such contracts during their continuance,

(1) [1894] A. C. 347, at 360. (2) [1864], 10 H. L. 704.

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unless such right be expressly reserved: *The City of Toronto* v. *The Canadian Pacific Railway Co.* (1).

It is noteworthy that no evidence is to be found in the parent Act that Parliament intended to *reserve* any royalty on minerals. Section 47 is silent on this point; whereas sections 66 and 74, relating to timber berths, specifically provide for and contemplate payment of royalties, and empower the Governor-in-Council to make regulations "respecting royalties and other dues which shall be paid in connection therewith." *Expressio unius, exclusio alterius.* In fact, neither by the Act itself, nor by the regulations of 1889 or 1897, is there any intention apparent to reserve any royalty on minerals. The regulations of 1889 were practically copied from the earlier Indian Land Mining Regulations of 1888 [Bligh's Orders-in-Council, p 199], which do provide, by section 81, for an express reservation of a four per cent royalty on sales of the product of mines. But this particular reservation was significently omitted from the Dominion Regulations of 1889, now under review. Again, in the new quartz regulations of 1898, sec. 53 (*a*) provides for payment of a royalty by way of *reddendum*; and, again, the Dominion Mining Regulations of 1889, now under review, themselves provide, by section 82, for payment of a five per cent royalty on quarried stone. The maxim just quoted applies here also, with added force. Further, in a license for valuable consideration, imposing mutual obligations, a right to revoke or to derogate therefrom will not be implied: *Wood* v. *Leadbitter* (2); *Guyot* v. *Thomson* (3), where this whole subject is fully discussed.

In Bainbridge on Mines (5 ed.), 282, it is said that

(1) 23 Ont. App. R. 250 at p. 254; 26 Can. S.C.R. 682, at p. 687.

(2) 13 M. & W. 838.

(3) 16 Eng. Rul. Cas. 64; [1894] 3 Ch. 388, at p. 398.

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the license to work may be in such a form as effectually to vest in the grantee the sole and exclusive right to the minerals; and, if it appear to be the intention of the deed, whereby the license is granted, that the grantee shall be solely and exclusively entitled to work the minerals, the license will be an exclusive one, and the grantor will be precluded from afterwards abridging or derogating from the grant.

If the grantor intend to reserve any right over the tenement granted, it is his duty to *reserve* it *expressly in the grant*, founded on a maxim which is as well established by authority as it is consonant to reason and common sense, viz.: that a grantor shall not derogate from his grant: *Wheeldon* v. *Burrows*, (1) *per* Thesiger, L.J.

As I have already stated, if the Crown could take one-tenth of the gold as a royalty, under a regulation subsequently passed, the Crown could also (by parity of reasoning) pass the title thereto to any one else, or could grant 10 per cent, or any other per cent, of the total proceeds of a mining claim to a third person, notwithstanding that the exclusive right thereto during the continuance of the license had been already granted to the original grantee.

It was urged on behalf of the Crown in argument that these discovery grants were gratuitous and without consideration; but in my opinion the discovery in each case is, not only the root of the title (as held in the analogous case of *Collom* v. *Manley*) (2), but also one of the chief considerations for the grant, as indicated in sec. 2. of the 1889 regulations. Again, the discoverer was obliged to pay a $15 entry fee for the first year, and $100 "for each of the following years." In addition thereto, the grantee was under obligation subsequently to develop his claim, to constantly and actively occupy it, except when on leave of absence (sec. 25), and to effectively work it, on pain of forfeiture by abandonment (secs. 74 and 86).

It appears clear that the 1897 renewal grants related back to the 1896 discovery grants, thus obtained for valuable considerations. In the three cases before us,

(1) 12 Ch. D. 31, at p. 49. (2) 32 Can. S.C.R., 371.

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the 1897 renewal grants in terms refer to the miners' applications made in 1896. There were no new applications made in 1897 on the obtaining of the renewals, and no new affidavits were required. The applicants could not purport in 1897 to rediscover their original claims. Again, the size of the original discovery claims of 1896 was 500 feet in length. On the 16th August, 1897, the length of placer claims was reduced to 100 feet by an amendment of the regulations, yet the evidence is that, when the suppliants renewed their 1896 discovery claims in the autumn of 1897, the size of the claims remained the same, viz.: 500 feet, pursuant to their original 1896 discovery grants.

As already mentioned, the first royalty order of 1897 did not purport to reserve a royalty by way of *reddendum*. A regulation thus purporting to impose a new burden, without the consent of the miner, is essentially a tax. In the final repeal of the royalty in 1902, it is called a tax; and up to the time of the commencement or these proceedings it has always been deemed to have been nothing but a tax, so far as I can find. It certainly contains all the characteristics and machinery for the enforced collection of taxes for the benefit of the consolidated revenue.

Adverting to the more general questions above considered, the observation of Lord Watson in *Osborne* v. *Morgan* (1) may be usefully referred to. The Court was there dealing with the Mining Act and regulations made thereunder in the Colony of Queensland, Australia, the Act in question being very similar to the Act and regulations in question here. At p. 231, Lord Watson says:

> The general policy of the Act is to encourage gold mining within the Colony, by giving a *certain fixity of tenure* to all persons who are willing, either by virtue of a "Miner's Right," or under a lease from

(1) 13 App. Cas. 227, at pp. 231, 232.

the Crown, to occupy Crown land for that purpose, and to work efficiently and continuously.

And, at p. 232:

"Miners' Rights" are documents in the nature of a license, which are issued by the warden of the goldfield to any person applying for the same, and may be kept in force for ten years by his making an annual payment of the same amount for that period. The effect given to it, by the statute and regulations, is that, when the holder has by virtue of it lawfully occupied and duly worked in quest of gold a certain area of Crown land within the limits of the goldfield (called a "claim"), he thereby acquires a right to remain in undisturbed occupation of the claim, and an absolute proprietary right to all the gold which it contains, these rights being indefeasible, unless forfeited by his contravention of the Act of the statutory regulations.

In *Hollyman* v. *Noonan* (1) at p. 606, the Privy Council held that

the holder of a miner's right must, during the *continuance* of such right, be deemed to be the owner of the claim occupied by him, and that all gold in and upon such claim must be deemed to be the absolute property of such owner.

And at p. 610, the court held also that the rights and interests of the parties to that case,

which were created before the making of the rules of 1868, or the rules of 1870, must be determined with reference to the rules of 1866, the only rules which were in force when the claims of both parties were allotted.

Finally, it appears to me that if, for argument's sake, the 1897 royalty order should nevertheless be now impliedly read into the 1897 renewal grants, yet this will avail nothing, because the original royalty tax was cancelled before any money was or could be collected under it, and also before any right of collection had accrued under it. It was thus cancelled by the order-in-council of the 18th January, 1898, before any gold was, or could have been, severed from the soil by the spring sluicing or wash-up; before it was thus physically possible to put the order into

(1) 1 App. Cas. 595.

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operation, and also before a penny was or could be collected under it. The word "cancelled" is even stronger than "repealed," and the rule is that (but for the provisions of the Interpretation Act) a repealed statute is considered as if it had never existed, except as to transactions past and closed. The effect is to obliterate it as completely as if it had never been passed. The general rule, says Lord Campbell, is that a statute, from the time it is repealed, can no longer be acted upon. The effect of the repeal is the same, whether the alterations affect procedure only, or matter which is of more substance; *The Queen* v. *Denton* (1). See also *Surtees* v. *Ellison* (2), *per* Lord Tenterton, at p. 752; *Kay* v. *Goodwin* (3); *Grisewood and Smith's Case* (4) at p. 557; and *Attorney General* v. *Lamplough* (5).

But it was contended by the Crown that our Interpretation Act, R. S. C. ch. 1, sec. 7 (52), preserved the right of the Government to levy in 1898, under the cancelled royalty order of 1897. The subsection mentioned reads:

> *In every Act* of the Parliament of Canada, the repeal of an Act, or the revocation of a regulation, at any time, shall not affect any act done or any right or right of action existing, accruing, accrued or established before the time when such repeal or revocation takes effect.

This provision of the Interpretation Act is thus confined to statutes, and their interpretation. It is not made applicable to the repeal or cancellation of a regulation by an order-in-council or by another regulation. In England, since the Interpretation Act of 1889, the law is otherwise, under section 31 of that Act. Repealed regulations have hence to be construed in accordance with the earlier decisions above quoted,

(1) 18 Q. B. 761 at p. 770.
(2) 9 B. & C. 750.
(3) 6 Bing. 576, at p. 582.
(4) 4 DeG. & J. 544.
(5) 3 Ex. D. 214.

unless the repealing regulations expressly preserve the remedy under the old regulations, which was not done in the present instance. The only saving clause contained in the 1898 regulations is section 40, which merely keeps alive the 1889 regulations, the regulations of 1897 being thus completely cancelled and obliterated as if they had never existed, save as to transactions past and closed. In any event, no right to collect the 1897 graded royalty was accruing or accrued in January or March, 1898.

The Crown's position at bar was that the gold belonged to the Crown until severed from the soil and won by washing in the spring, and that there were no proceeds of the claim which were taxable until after the completion of such severance and sluicing in the summer of 1898. The wash-up did not take place until May and June, 1898, and no attempt was made to collect the 20 per cent graded tax under the abortive order of July, 1897. The royalty actually collected was the 10 per cent 1898 reserved royalty, for which there was no justification. The 1897 impost differed essentially from the reserved royalty of 1898. The former provided for a 20 per cent levy in some cases, and it did not purport to reserve the royalty, as the 1898 regulations subsequently did. Neither was it implemented nor supplemented by apt amendments to the other regulations, so as to abridge and modify the then subsisting exclusive rights of the miners. On the contrary, it called for an unwieldy accounting, respecting the output of the better mining claims, and made provision for its enforced collection as an impost.

For these reasons, I am of opinion that the Crown's appeals should be dismissed.

I have not here discussed, nor do I think it necessary to discuss, the question arising as to the particular claim of Chappelle under his renewal grant

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of 9th September, 1897, because, in the view I have expressed as to the rights of all the suppliants, he is certainly entitled to judgment. Nor do I think it necessary to more than express my opinion that the payments in question here were not voluntary payments. One-tenth of the gold itself was taken under duress, and under police pressure. The whole situation was essentially coercive; and the miners had practically no choice in the matter, directly the notices threatening forfeiture were posted, the miners being without means of redress, and the Gold Commissioner's decision being made final.

For these reasons the appeals should be dismissed with costs. The judgments of the Court below should be varied, in so far as they order references. The gold-dust itself, in specie, was taken from the possession of the suppliants. After severance the gold-dust was a chattel, the possession of which constituted title. According to the tax regulation which afforded the pretext for the levy, the gold-dust itself became, on severance, taxable wheresoever found, and could be taken from the miner's person as he passed the police posts. The Crown did not plead want of title in the suppliants, and the defence cannot set up the *jus tertii*.

The judgments of the Exchequer Court should be varied accordingly, with costs.

GIROUARD J.—The grant issued by the Crown provides that

> the rights hereby granted are those laid down in the aforesaid mining regulations and no more and are subject to all the provisions of the said regulations, whether the same are expressed herein or not.

The latter words seem to convey the idea that at least the regulations must be in existence, for, otherwise, they could not be expressed. Regulations here do not and cannot mean future or past regulations in

force when the previous yearly grants were made. They mean regulations in force at the time of the issue of the grant, whether it be the first, second or any other renewal. Therefore, whatever royalty was due under the regulations existing at that time is demandable by the Crown.

For this reason I think that the judgments appealed from should be modified accordingly.

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DAVIES J.—These cases come before us on appeal from the Exchequer Court and have been argued together as if practically consolidated. They raise the important questions of the right of the Crown to make the payment of a certain fixed royalty on the gold extracted or mined from placer mining claims in the Yukon Territory a condition of the licenses or grants made to those who, being free miners, legally apply for such grants, and whether or not, assuming the Crown to have any such power, it was legally exercised in the cases now before us. A subsidiary question was raised as to whether or not the royalty or money was paid voluntarily and so could not be recovered back irrespective of whether or not it was lawfully imposed.

With respect to the claim for a return of $10,429 paid by Chappelle on the 16th July, 1898, as a royalty on the product of claim No. 7 on Eldorado Creek in the Yukon District, a distinct claim not applicable to any of the others is presented and may perhaps be conveniently dealt with at first. Chappelle had on the 9th day of September, 1896, obtained under the Dominion Mining Regulations of 1889, a placer mining grant or license for a year for the claim in question. On the 9th day of September, 1897, he obtained a renewal grant or license for the same claim for another year. The question which arose with respect to the

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royalty of $10,429 paid by him on the total production of gold obtained from this claim during the year 1897–8, amounting in all to $104,290, was whether or not the royalty regulations passed by the Governor-in-Council authorising the collection of royalty and which were published in the Canada Gazette of September 4th, 1897, for the fourth consecutive week, applied to his renewal license which was properly issued to him on the 9th September, 1897. The answer to that depends upon the proper construction of the 90th and 91st sections of The Dominion Lands Act, ch. 54 of the Revised Statutes of Canada. Subsection *h* of the 90th section empowers the Governor-in-Council

> to make such orders as are deemed necessary from time to time to carry out the provisions of this Act according to their true intent or to meet any cases which arise and for which no provision is made in this Act; and further make and declare any regulations which are considered necessary to give the provisions in this clause contained full effect; and from time to time alter or revoke any orders or any regulations made in respect of the said provisions and make others in their stead.

Section 91 enacts that

> Every order or regulation made by the Governor-in-Council in virtue of the provisions of the next preceding clause of this Act shall unless otherwise specially provided in this Act have force and effect only after the same has been *published for four successive weeks* in the *Canada Gazette.*

A previous section of the Act, the 47th, had provided that:

> Lands containing coal or other minerals whether in surveyed or unsurveyed territory shall not be subject to the provisions of this Act respecting sale or homestead entry, but shall be disposed of in such manner and on such terms and conditions as are from time to time fixed by the Governor in Council by regulations made in that behalf.

Regulations for the disposal (*inter alia*) of placer mining claims had been made in 1889 by the Governor in Council and it was common ground on both sides of these appeals that the Governor-in-Council under

this section possessed the necessary authority to make regulations respecting the disposal of lands containing the precious minerals of gold and silver. The regulations imposing a "royalty," the application of which to the Eldorado grant or license of the suppliant Chappelle was challenged, were published in Canada Gazette for the fourth successive week on the 4th day of September, 1897, and the question to be determined is whether that was a sufficient and complete publication so as to bring the regulation into force immediately, or whether the full time of four weeks must elapse from its first publication.

If the latter construction is the correct one the regulations would not be in force until the 11th day of September, two days after Chappelle obtained his renewal grant. After a careful examination of the authorities I am of the opinion that the word "for" in the section must be construed as meaning "for the space of" or "during," and that publication was not complete until the 11th of September or until the whole time of four weeks had elapsed. It was the length of time the statute provided for publication and not the number of issues of the Gazette in which the regulations should appear. They could not be said to have been published for four weeks when they had been printed in four issues of the Gazette for three weeks and a day. This conclusion would dispose of the suppliant's case in his favour so far as the claim for the return of the $10,429 is concerned, but for the question raised that the payment was voluntarily made by him. I have carefully read and examined the evidence on this point and I agree with the learned judge below that the payment was not a voluntary, but a compulsory one. The regulations provided that failure to pay the royalty required would operate as a forfeiture of his entire mining claim. A written notice to that

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effect was posted on the claim and the suppliant was personally notified by the police that he must pay and that if he failed to do so he would forfeit the claim. Looking at the circumstances, and the situation, I do not see what option the man had. The penalty of immediate forfeiture was presented to him if he failed to comply with the demands of the Government, and he practically paid with a pistol at his head. I am therefore of opinion that so far as the claim for this $10,429 is concerned the appeal should be dismissed and judgment given for the suppliant.

With respect to all the other claims these questions already discussed do not arise. The licenses or grants were issued after the regulations were in force and the questions for determination are whether or not these regulations applied to renewal grants or licenses of claims, the original grants or licenses of which had been obtained before the regulations came into force; and secondly, assuming they did so apply, does the language used in them justify the collection of the royalty.

Chappelle's grant for placer mining on Hunker Creek known as Fractional Mining Claim No 3 A. below Discovery was as appears first applied for in December of 1896, when the necessary affidavit and entry were made by him and the grant or receipt given to him. In accordance with the regulations then in force, and which in this regard have never been altered, the term for which the grant of license ran, and during which the grantee or licensee had the exclusive claim and the exclusive right to the gold won by him from the claim, *was for one year from its date.* An argument was advanced on the use of the term "exclusive right" as negativing any right on the part of the Crown to impose a royalty. But in my opinion this phrase has simply reference to

other persons and does not refer and cannot refer to any reservation which in the same document the Crown may reserve to itself. There was no necessity or sense in using it with respect to the Crown, the licensor, because the grant would, without the words in question, confer on the licensee the right, as against the grantor, but they were used as against other persons holding quartz licenses or hydraulic licenses or surface rights on and over the claim, and to ensure the placer licensee the indisputable right to the gold he won from his claim.

By the 20th section of the regulations of 1889, under which Chappelle's grant or license of 1896 issued, the

entry of every holder of a grant for placer mining had to be renewed and his receipt relinquished and replaced every year.

The receipt referred to in the regulation was the license or grant, the form of which was set out in the schedule to the regulations. The miner did not receive any other document but this grant or license or receipt, as it was indifferently called, and his entry had to be renewed and his receipt relinquished and replaced yearly, otherwise his rights would lapse.

In May, 1897, new placer mining regulations were passed by the Governor in Council, so far as "the Yukon River and its tributaries" were concerned, in substitution for those of 1889. No change was made as regards the time for which the grant was issued. The provision requiring a renewal of the miner's entry and the relinquishment and replacement of his receipt was continued and the forms of affidavit and grant or license set out in the schedule were substantially the same. But so far as these regulations for placer mining could be made complete in themselves they were made so, and the General Mining Regulations of 1889 were only thereafter to be appealed to so far as placer mining in the Yukon and its tributaries was concerned

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in special cases arising for which no provision was made in these new regulations. By an amended regulation passed by the Governor in Council and which came into force 11th September, 1897, the form of license which had been adopted from the general regulations of 1889 and set out in the schedule to the new placer mining regulations, was amended so as to show that it was issued under those new regulations and not under the general ones of 1889. The amended form prescribed by the new regulations reads as follows:—

> In consideration of the payment of the fee prescribed by clause 12 of the mining regulations for the Yukon River and its tributaries.

These new regulations, amended as above stated, as also the regulations of the 29th July, 1897, imposing for the first time a royalty

> upon all gold mined on claims referred to in the regulations for the governance of placer mining along the Yukon River and its tributaries,

came into force in the month of September, 1897. The precise date when the royalty regulation came into force became important so far as the Eldorado Creek claim of Chappelle was concerned, which I have already disposed of.

But with respect to the Hunker Creek renewal license or grant the original of which only expired on the 9th December, 1897, these regulations were then in force and the question arises: Do they apply to and form part of such renewal? As a matter of convenience the officer in charge had handed the renewal license to Chappelle undated in the month of August, 1897, and some four months before his then existing grant or license expired. But it is in my opinion very clear that no officer or employee of the Government in the Yukon could anticipate the date prescribed by the regulations for the renewal entry by the holder of a

placer mining grant and for the relinquishment and replacement of his receipt. That had to be done by the miner every year. It could not, in my opinion, be legally done until the expiration of the year for which he had already received his license or grant. If any such miner could renew his entry and have his receipt or grant renewed by the officer during the currency of his year's license or grant, it would or might enable such officer to defeat the whole policy of the government as embodied in any new or amended regulations they might pass during the year.

It is plain beyond reasonable controversy that such new grant which was undated although issued for the miner's convenience on August 16th, could only have effect or vitality from and after the 9th December, 1897, when his license or grant of the Hunker Creek claim for the year 1896 expired. And it is further equally plain to my mind and follows as a consequence from what I have already said, that it could only be issued in the form and subject to the regulations at that day existing and in force. If, as is contended by the suppliant, he had an indefeasible right to a renewal of his license on the same terms and conditions and subject only to the regulations in force when the original grant or license was obtained, then it seems to me the express limitation for a year contained in such original grant would not have been inserted in it, or at any rate his right to have it renewed on the same terms as granted originally would have been in express terms stated. This was the case with regard to quartz mining grants or leases and it is singular that so vital and important a provision should have been omitted from the placer mine grants, if it was intended to have been put there. The inference to my mind is very strong that no such intention ever existed and that the grant was intended

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to cover the period for which it was issued and no other or longer period, and that while its renewal was imperative so far as the miner was concerned in order to preserve to him continued rights in the claim, its issue was not imperative on the part of the Crown, but depended altogether upon the regulations which might at any time be in force and in any event would be subject to those regulations. On the day when Chappelle's original license or grant expired, viz., the 9th December, 1897, the regulations imposing a royalty on all gold mined in the Yukon Territory, were admittedly in force and unless therefore, the petitioner Chappelle had a legal right to renew his entry for his Hunker Creek claim and relinquish and have replaced for another year his receipt or grant on the identically same terms and conditions as those on which he obtained his first yearly license or grant in 1896, his renewal grant would be subject to the payment of the royalty imposed.

Now the first thing which strikes one about the petitioner's argument is that if successful it would practically defeat the whole purpose and intent of the statute and the regulations made under it. The 47th section of the Dominion Lands Act under which the regulations were passed and the license or grant to the suppliant issued, I have already set out in full. We start, therefore, with a statutory authority to the Governor in Council to dispose of those lands containing gold in such manner and on such terms and conditions as may from time to time be fixed by regulations made in that behalf. No more effective or comprehensive language could have been used by Parliament than has been used in this section. The very nature of the subject matter to be dealt with required that in the matter of framing regulations the powers of the Government both as to its general policy

and as to all necessary details should be unrestricted, and the powers given in subsection (*h*) of sec. 90 to make regulations were as large as could possibly be given. Regulations suitable for conditions existing when the population is sparse and mining is pursued on a very small scale may be found quite inadequate and unsuitable at a time when the mining population becomes congested and operations in the different kinds of mining are followed on a gigantic scale. The Government responsible for the peace, order and good government of a distant, vast and almost inaccessible territory might require to pass the most stringent regulations and as exigencies required from time to time to alter, relax and amend them. Why did Parliament expressly confer the power of making and amending these regulations from "time to time" if it was not to provide in the fullest and amplest way that changing conditions and circumstances could always be adequately provided for? Why did these regulations fix the time for which the license was to issue arbitrarily at one year if it was not to provide that such yearly grants if and when they came to be renewed, should be subject to whatever new or amended regulations it might have been found desirable to pass? To argue as the petitioner has done here, that although the regulations under which he obtained his license or grant expressly restricted his rights under it to one year from its date, he was nevertheless entitled as of right to a renewal of his license every year while he chose to demand it and that on the terms and conditions contained in the regulations existing at the time he obtained his first license or grant, and irrespective of any amendments found to be necessary, appears to me to defeat the object Parliament had in view in conferring the power to pass and amend these regulations from time to time

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and which I think the Governor-in-Council had clearly before them when they inserted the limitation of one year in the placer miner's grant. It is admitted that the regulations do not expressly confer on the miner the right to obtain a renewal, but it is said such right must be inferred from the clause requiring the miner to renew his entry each year and relinquish or replace his receipt or license. But I fail to follow any such reasoning.

Some speculation has been indulged in as to why the Crown should have required a renewal of the placer miner licenses to be taken out every year if it was not intended to give the miner a legal right to obtain such renewal. But all such speculation is calculated to lead us far afield and will be found to be productive of little good. We have to deal with facts as we find them and not with the reasons why those facts exist. We find that the Crown, no doubt for excellent reasons, while giving a comparatively long term to the quartz and hydraulic miner, together with an express right of renewal, has only given to the placer miner a term of one year and has withheld the express right of renewal. It has, by regulation, further required of the placer miner that he shall every year renew his entry and surrender his receipt or license and take out a new one, and it provides expressly that this new license or receipt shall be subject to all the provisions of the placer mining regulations whether expressed therein or not.

To my mind all this can have but one meaning and that meaning is to compel submission to the existing regulations of all placer mining. To say that the regulations to which the license or grant is to be subject are to be those of perhaps one or perhaps five or more years previously, is in my opinion to go directly in the face alike of the spirit and of the language of

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the regulations and the license. No injury could possibly accrue to the miner from this construction I have ventured to give of his rights. While his license lasts he has the exclusive right to the products of his claim subject of course to the regulations and when it expires no one could possibly make the necessary affidavit to obtain another grant or license for the same claim over the old licensee's head so long as the latter conformed to the regulations and came forward on the expiration of his license and renewed. If he did not, and suffered in consequence, he would only have himself to blame.

In construing, therefore, the licenses or grants now in controversy, and which were issued expressly subject to "the regulations," I construe these words as meaning the regulations in force on the days the licenses were issued just as much as if these regulations were one and all copied into them. These regulations making the payment of a royalty to the Crown on the gold mined from the claims a condition or term of the license or grant, were admittedly in force when the three licenses or grants in question were issued. But the learned judge of the Exchequer Court concluded that, reading the licenses in the light of the fact that they were renewals of former licenses, he must hold as a matter of construction that the Crown, by the use of the same words in the renewed licenses as it had used in the original license, had intended to incorporate not the existing regulations but the old ones which had been in force when the original license issued in 1896. As I have already said, I cannot concur in such a construction. As a matter of fact the form of license or grant prescribed and in force in December, 1897, recited the "mining regulations for the Yukon River and its tributaries," and not the "Dominion mining regulations" which the learned

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judge held to be those of 1889. These Yukon mining regulations embraced those requiring payment of royalty and it was not possible or legal for any officer by issuing the license six months before the time when it could legally issue or by using a wrong form and misquoting the title of the regulations to alter the legal effect which would properly follow from the proper recital or the legal date of issue. The whole question turns not upon the meaning alone of the phraseology used in the form of license actually issued by the officer but upon the legal rights which the licensee had at the time when his renewal license could properly be issued to him. If he possessed the legal and indefeasible right contended for by the suppliants *cadit quæstio*, the royalty was wrongfully exacted. If he did not, but only had, as I hold, a preferential claim to a renewal on the terms and conditions of then existing legal regulations, the money sought to be recovered back was legally payable and the action must fail.

Another question was raised by the suppliants, as to the legality of the exaction of the royalty. It is said that even assuming the royalty regulation to have been in force and applicable to the licenses when issued, yet that these regulations were cancelled and abrogated before the time when the royalty was payable and the substituted regulations adopted imposing a smaller or reduced royalty could not apply, having been passed subsequently to the issuing, but during the currency of the renewal licenses. But is this so? It is true that by regulations passed by the Governor in Council and which came into force on or about the 12th day of March, 1898, the original regulations of September 11th, 1897, under which a royalty was first imposed, were abrogated or cancelled, and those of March, 1898, substituted for them.

The order-in-council effecting this substitution after reciting that

> it was deemed necessary and expedient that certain amendments and additions should be made to the regulations governing placer mining along the Yukon River then existing,

went on to order

> that the aforesaid regulations made and established by an order in council dated 21st May, 1897, and subsequent orders (*i.e.* the royalty regulations) should be and the same were thereby cancelled and the following regulations substituted in lieu thereof.

Then follow the amended or modified royalty regulations under which the monies now sought to be recovered back were paid. The cancellation and substitution were simultaneous acts. The new orders in council simply reduced and altered the rate and terms on which the royalty should be paid. They practically substituted a smaller royalty for that at first imposed and simply amended those original regulations. The two regulations could not of course continue in force and the original ones were necessarily cancelled and those of March substituted.

I am therefore of opinion that while other and perhaps apter language might have been used, the intention and object sought to be achieved has been done so successfully, and that the true and proper construction of the regulations requires those of September, 1897, and of March, 1898, to be read together. When they are so read and construed those of March, 1898, are simply an amendment of the ones of 1897. If any reasonable doubt as to this being the proper construction of the two sets of regulations still remained, I think it is fully removed by the provisions of the 49th and 52nd sections of the Interpretation Act which apply expressly to such regulations as these and are

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amply sufficient to determine the very question here being discussed.

Appeal in The King v. *Chappelle allowed in part without costs; appeals in The King* v. *Carmack and The King* v. *Tweed allowed with costs.*

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

Solicitors for the respondents: *Lewis & Smellie.*

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*Nov. 8.

*Nov. 17.

G. N. HARTLEY AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

C. A. MATSON AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE TERRITORIAL COURT OF THE YUKON TERRITORY.

Mines and minerals—Placer mining—Hydraulic concessions—Staking claims—Annulment of prior lease—Right of action—Status of adverse claimants—Trespass.

In an action by free-miners, who had "staked" placer mining claims within the limits of a concession granted for purposes of hydraulic mining, to set aside the hydraulic mining lease on the ground that it had been illegally issued and was null and of no effect;

Held, that where there was a hydraulic lease of mineral lands in existence, the mere fact of free-miners "staking" on the lands included within the leased limits did not give them any right or interest in the lands nor did they thereby acquire such status in respect thereto as could entitle them to obtain a judicial declaration in an action for the annulment of the lease.

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*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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APPEAL from the judgment of the Territorial Court of the Yukon Territory sitting as the Court of Appeal constituted by the Ordinance of the Governor-General-in-Council of the 18th of March, 1901, respecting the hearing and decision of disputes in relation to mining lands in the Yukon Territory, which affirmed the decision of the Gold Commissioner dismissing the plaintiffs' action with costs.

In this case the respondents' motion to quash the appeal on the ground of want of jurisdiction was dismissed (1), and the questions in issue on the merits are stated in the judgment of His Lordship Mr. Justice Davies now reported.

Peters K.C. for the appellants.

Latchford K.C. and *J. Lorne McDougall* for the respondents.

TASCHEREAU J.—I entirely agree with Mr. Justice Davies in his conclusions and the reasoning upon which he has reached those conclusions.

SEDGEWICK and GIROUARD JJ. concurred in the judgment dismissing the appeal with costs for the reasons stated in the judgment of His Lordship Mr. Justice Davies.

DAVIES J.—This is an action instituted by the appellants in the Gold Commissioner's Court of the Yukon Territory for the purpose of obtaining a judicial declaration that certain placer mining claims alleged to have been staked by them were not within the boundaries of the defendants' hydraulic mining lease, and that such lease was "null and void," and should be cancelled. This latter is the leading conclusion of the

(1) 32 Can. S. C. R. 575.

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plaintiffs' claim, their other claims being consequential merely and depending upon their right to have the lease cancelled.

The only question argued before us, and on which this appeal must be determined, was whether the plaintiffs had any status entitling them to have such declaration made in this action, or whether they were mere volunteers without interest. This case came before the Territorial Court of Appeal and comes before us practically as if on demurrer, and the appellants have a right to have the statements of fact alleged in their statement of claim assumed as true.

The claim of the plaintiffs, about sixty in number, is based upon the statement, which must be assumed as true, that they are free miners, and that, in 1901, they duly staked certain placer mining claims on the left limit of Bonanza Creek and duly applied at the Gold Commissioner's Office for grants of the same. There is no statement that any such grants were given but on the argument it was common ground on both sides that their applications had all been rejected because of the existence of the respondents' lease. The Gold Commissioner has full jurisdiction under the regulations to

> hear and determine judicially all matters in difference in regard to entries for mining claims under the regulations,

and power to adjudge any patent or lease from the Crown of any mining property void on the ground that it was issued in error or through improvidence or had been obtained by fraud. He has also special power given to him to "grant an order in the nature of mandamus" and generally is invested, so far as such matters are concerned, with all the powers of a territorial judge. In the case at Bar, no application was made for a mandamus to compel the mining recorder or other proper officer to issue to the appellants the

placer mining grants for which they had applied, nor is that officer made a party to this suit. The appellants come into court simply as free miners who had staked out certain claims which were either within or without the boundaries of a certain hydraulic mining lease from the Crown, and for which placer mining claims they had not obtained any grant or license. Their only excuse for bringing the defendants into court at all was that the placer claims they had located were within, or claimed as being within, the boundaries of the defendants' lease which they desired to have cancelled.

If their claims were outside of this lease they could not possibly be entitled to any such declaration as that sought by them. As free miners not having or claiming any grant or claim *within* the boundaries of lands included in a hydraulic mining lease they would not have a vestige of right to attack that lease or ask the court to make any declaration concerning it.

On the other hand if they fell back on their alternative position and claimed that their placer locations were *within* the bounds of the defendants' prior lease and asked for a declaration from the court to have it declared null and void, they surely were bound to allege and prove that they were entitled to some interest legal or equitable in the lands.

I agree substantially with the judgment of the Gold Commissioner, Mr. Senkler. I do not think that the mere fact of the appellants, as free miners, entering upon lands already leased by the Crown and professing to locate claims there gave them any right or interest in the lands, or any status to come into court and ask for any declaration with respect to the validity of a prior lease from the Crown of those very lands.

To attain such a status mere "staking" is not sufficient. They must go further and obtain from

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the mining recorder their placer grants. If for any reasons he refuses to issue such grants then their remedy is by way of mandamus to compel him to do his duty. Until they have obtained such grants they are not in a position to attack the defendants' lease. They have neither title nor colour of title and have no interest legal or equitable in the lands, such as is necessary to enable them to maintain this action. If having obtained their grants they desire to have defendants' lease declared void it was open to them to take the necessary steps.

It was contended on the part of the respondents, that to any such proceedings the Attorney General should be made a party. But it is not necessary for us to determine this point in the view we take of this appeal and we do not therefore express any opinion upon it.

Mr. Peters raised the question as to the power of the Crown to grant hydraulic leases, under the fourth article of the regulations of 1898, until after the lands had been withdrawn from placer mining under the thirteenth article of the same regulations.

It does not appear to me that this article or section bears the construction he sought to have put upon it. The power of the minister to grant leases and the limits, conditions and terms under which he may grant them are defined and complete in the first three sections of the regulations. The thirteenth section has no reference to the granting of such leases and was never intended to create an antecedent condition to their being granted. It had reference to a different thing altogether, namely, the policy of proclaiming or setting apart a large area of country which would not be open to placer mining. Such proclaimed area might, as a matter of policy, be leased afterwards or not, as circumstances determined, or it might after-

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wards be thrown open to placer mining. But the proclamation withdrew it from placer mining in the meantime until it was determined whether hydraulic leases should be given or not.

However a lease granted either under the third or fourth section is not effected, in my opinion, by the fact that the lands leased had not been previously withdrawn from placer mining. Placer miners who had properly located claims before the lease are of course not affected by it.

But whether I am right or not in my construction of these regulations cannot affect the conclusion I have reached that the plaintiffs (appellants) not having obtained their placer grants have no status to enable them to attack an existing Crown lease.

The appeal should be dismissed with costs.

MILLS J.—I have had the perusal of the judgment of my brother Davies in this case. In that judgment I entirely concur. As the law in the case is effectually settled by the decision of their Lordships of the Judicial Committee of the Privy Council in *Osborne* v. *Morgan* (1), I do not feel that I can usefully add anything.

Appeal dismissed with costs.

Solicitors for the appellants: *Woodworth & Black.*

Solicitors for the respondents: *Pattullo & Ridley.*

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(1) 13 App. Cas. 227, at pp. 234, 235.

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*Oct. 20, 21, 22.

*Nov. 18.

JOSEPH D'AVIGNON (PLAINTIFF).....APPELLANT;

AND

W. J. JONES, J. J. RUTLEDGE AND D. W. DAVIS (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Appeal—Concurrent findings of fact—Duty of appellate court.

A judgment based upon concurrent findings of fact in the courts below ought not to be disturbed on appeal to the Supreme Court of Canada if the evidence be contradictory.

APPEAL from the judgment of the Supreme Court of British Columbia affirming the judgment of the Territorial Court of the Yukon Territory.

The action was to set aside a conveyance recorded in the Mining Recorder's Office at Dawson City, in the Yukon Territory, purporting to convey the plaintiff's placer mineral claim, known as No. 13 on Gold Run Creek, to the defendants Rutledge and Davis on the ground that it was practically speaking a forgery. The trial judge (Craig J.) found the facts in favour of the defendants and dismissed the action with costs. On an appeal by the plaintiff to the full court of the Supreme Court of British Columbia, the judgment of the trial court judge was affirmed. The plaintiff then appealed to the Supreme Court of Canada.

Peters K.C. and *Duff K.C.* for the appellant.

Davis K.C. and *Wade K.C.* for the respondents.

The judgment of the court was delivered by

GIROUARD J.—This appeal involves findings of fact by two courts. Both parties charge fraud, forgery and perjury. The two courts below have unanimously

*PRESENT:—Sir Henry Strong C. J. and Sedgewick, Girouard, Davies and Mills JJ.

found in favour of the respondents. It is conceded that the evidence is contradictory. Therefore the appeal should be dismissed with costs.

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Girouard J.

Appeal dismissed with costs.

Solicitors for the appellant: *Smith & Macrae.*

Solicitors for the respondents: *Wade & Aikman.*

PITHER & LEISER (PLAINTIFFS).....APPELLANTS;

AND

JOHN A. MANLEY (DEFENDANT).....RESPONDENT.

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*Oct. 27, 28.
*Nov. 17.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Debtor and creditor — Payment — Accord and satisfaction — Mistake — Principal and agent.

On being pressed for payment of the amount of a promissory note, the defendant offered to convey to the plaintiffs a lot of land, then shown to the plaintiffs' agent, in satisfaction of the debt. The agent, after inspecting the land, made a report to the plaintiffs but gave an erroneous description of the property to be conveyed. On being instructed by the plaintiffs to obtain the conveyance, the plaintiffs' solicitor observed the mistake in the description and took the conveyance of the lot which had actually been pointed out and inspected at the time the offer was made. More than a year afterwards, the plaintiffs sued the defendant on the note and he pleaded accord and satisfaction by conveyance of the land. In their reply the plaintiffs alleged that the property conveyed was not that which had been accepted by them and, at the trial, the plaintiff recovered judgment. The full court reversed the trial court judgment and dismissed the action.

Held, affirming the judgment appealed from (9 B. C. Rep. 257) that the plaintiffs were bound to accept the lot which had been offered to and inspected by their agent in satisfaction of the debt and could not recover on the promissory note.

*PRESENT :—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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PITHER & LEISER v. MANLEY.

APPEAL from the judgment of the Supreme Court of British Columbia, *in banc* (1), reversing the trial court judgment and dismissing the plaintiffs' action with costs.

The facts and questions at issue on this appeal are stated in the above head note and in the judgments reported.

Davis K.C. for the appellants.

Duff K.C. for the respondent,

TASCHEREAU J.—Action by appellants on a promissory note for $985. Plea that the appellants' claim had been paid and satisfied by the price of a certain lot of land, known as lot 2, in block 12, situate at Grand Forks, B.C., conveyed to them by the respondent and which they agreed to take in full satisfaction of the said promissory note. Reply that the lot of land which the appellants agreed to take in satisfaction of their claim was not lot 2, in block 12, but lot 2, in block 1.

At the trial judgment was given against the respondent. But that judgment was reversed by the full court (1) and the action was dismissed, the court holding that it was lot 2, block 12, as contended for by the respondent, that the appellants had agreed to take in satisfaction of their claim. The appellants have failed to convince me that there is error in that judgment of the full court.

The controversy between the parties is entirely upon a question of fact, of identity of the lot agreed upon, for the appellants conceded at bar that they, by their agent, had agreed to take from the respondent a certain lot of land in full payment. Their agent and the respondent had been upon the lot itself, lot 2,

(1) 9 B. C. Rep. 257.

in block 12, and that lot pointed out by the respondent was undoubtedly in the minds of both of them the lot to be conveyed to appellants. The agent wrote to appellants that a lot he had looked over when in Grand Forks was offered to them by respondent, but unfortunately he erroneously described the lot as lot 2, in block 1, instead of lot 2, in block 12, and appellants accordingly instructed their solicitor at Grand Forks to procure a conveyance from respondent of lot 2, in block 1, meaning however no other lot but the one that had been pointed out to their agent by respondent. Now, the solicitor, upon ascertaining, on the ground, that the description given to him by the appellants was an erroneous one, and that it was really lot 2, in block 12, and not at all lot 2, in block 1, that they meant to take from the respondent in satisfaction of their claim, drew up a conveyance of lot 2, in block 12, which, being executed by respondent, he duly registered, notice of which was without delay given to appellants by their agent.

More than a year afterwards, the appellants instituted this action for the amount of the promissory note. Their action was rightly dismissed. They got the lot that was offered to them and accepted by them, the lot that had been shown to their agent by the respondent.

Appeal dismissed with costs.

SEDGEWICK J. concurred in the judgment dismissing the appeal for the reasons stated by His Lordship Mr. Justice Taschereau.

GIROUARD J.—I have some doubts in this case, which involves merely questions of fact found differently by two courts. Both parties agreed on the ground as to a lot of land to be conveyed. They identified that lot to the lawyer charged with the prepara-

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tion of the deed, and understood then that it was lot 2 in block 1. Subsequently the lawyer ascertained that the lot shown to him was lot No. 2, in block 12. The latter has 275 feet in depth by 50, and lot No. 2, in block 1, has only 125 by 50. The evidence is clear that the lot to be conveyed was at least 250 feet deep. True, the correspondence between the purchasers and their agent points to lot No. 2, in block 1, because the agent understood from the vendor that that was the correct number. The lawyer explains that this was a mistake and prepared the deed of conveyance accordingly. There is certainly some evidence in support of that view which was sanctioned by the judgment appealed from. The appeal should be dismissed with costs.

DAVIES and MILLS JJ. concurred in the judgment dismissing the appeal for the reasons stated by His Lordship Mr. Justice Taschereau.

Appeal dismissed with costs.

Solicitors for the appellant: *Higgins & Elliott.*

Solicitors for the respondent: *Cayley & Cochrane.*

HARVEY M. PAULSON (PLAINTIFF).....APPELLANT ; 1902

AND *Oct. 28, 29. *Nov. 17.

JAMES BEAMAN AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mines and minerals—Adverse claim—Form of plan and affidavit—Right of action—Condition precedent—Necessity of actual survey—Blank in jurat—R. S. B. C. (1897) *c.* 135, *s.* 37—61 *V. c.* 33, *s.* 9 (*B.C.*)—*R. S. B. C. c.* 3, *s.* 16—*B. C. Supreme Court Rule* 415 *of* 1890.

The plan required to be filed in an action to adverse a mineral claim under the provisions of section 37 of the "Mineral Act" of British Columbia, as amended by section 9 of the "Mineral Act Amendment Act, 1898" need not be based on an actual survey of the location made by the Provincial Land Surveyor who signs the plan.

The filing of such plan and the affidavit required under the said section, as amended, is not a condition precedent to the right of the adverse claimant to proceed with his adverse action.

The jurat to an affidavit filed pursuant to the section above referred to did not mention the date upon which the affidavit had been sworn.

Held, that the absence of the date was not a fatal defect, and that, even if it could be so considered at common law, such a defect would be cured by the "British Columbia Oaths Act" and the British Columbia Supreme Court Rule 415 of 1890.

Judgment appealed from (9 B. C. Rep. 184) reversed, Taschereau J. dissenting.

APPEAL from the judgment of the Supreme Court of British Columbia, (1), reversing the decision of the trial court, (Martin J.) and dismissing the plaintiff's action with costs.

The facts of the case and questions at issue on this appeal are stated in the judgments now reported.

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*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

(1) 9 B. C. Rep. 184.

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S. S. Taylor K.C. for the appellant.

Davis K.C for the respondents.

TASCHEREAU J. (dissenting).—I am of opinion that the judgment of the full court of British Columbia should be affirmed. The appellant's action was rightly dismissed upon the ground that the map or plan required in an adverse action as a condition precedent by section 37 of the "Mineral Act" of British Columbia as amended in 1898 and 1899 was not filed by the appellant.

The contention that any surveyor can upon his oath of office make a map to be used in a court of justice of any lot of land that he has never seen seems to me untenable. Why would he be required to make a plan at all, if, as Mr. Justice Irving calls it, a picture by one of the parties would have been sufficient to all intents and purposes, if the appellant's contention prevailed. An order from the court to a surveyor to make a plan of certain premises necessarily implies, it seems to me, that the surveyor must make that plan from actual survey or personal inspection of the premises. I would think that this enactment implies the same thing.

I utterly fail to see why the intervention of a surveyor is at all required by the statute, if all that he has to do is to copy one of the parties' sketches and sign it. That sketch would have been as good for the purposes of the statute, without the surveyor's re-copy and signature. When the statute requires a plan made by the surveyor it must mean that the surveyor must make an actual survey. Otherwise his intervention would be futile.

I would dismiss the appeal with costs.

SEDGEWICK J. concurred in the judgment allowing the appeal for the reasons stated by His Lordship Mr. Justice Davies.

GIROUARD J.—This appeal should be allowed with costs for the reasons given by Chief Justice Hunter (1).

DAVIES J.—Two questions only were argued on this appeal and both arise out of the proper construction to be given to the thirty-seventh section of The Mineral Act, ch. 135 R. S. B. C. (1897), as amended by section 9 of ch. 33 of the statutes of 1898.

The respondents, (defendants in the action), contend (1) that under the above section it is necessary for the plaintiff bringing the adverse suit or proceedings to file with the mining recorder a map or plan made by a provincial land surveyor and based upon a prior and actual survey made by him; (2) that the jurat of the adverse affidavit filed with the recorder along with the plan not having been dated makes the affidavit bad and there has therefore been no compliance with the statute.

The learned judges in the courts below were equally divided in opinion, the Chief Justice, who held that a previous personal survey by the land surveyor who made the plan was not necessary and that the absence of a date in the affidavit was not fatal, agreeing with Mr. Justice Martin, who had tried the adverse action, on both points, while Mr. Justice Irving and Mr. Justice Walkem held that a previous personal survey was necessary to make the plan a compliance with the statutory requirements.

I concur in the judgment of the learned Chief Justice and think, for the reasons given by him, that

(1) 9 B. C. Rep. 184, at p. 185.

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this appeal should be allowed. I think it is clear from the wording of the section itself and from the object the Legislature evidently had in view, that no previous actual survey by the land surveyor was contemplated, but only the filing of a plan properly made by one presumably competent to make it, namely, a land surveyor. The filing of the adverse writ and the affidavit and plan proved nothing and settled nothing. They simply showed to the mining recorder the particular claim the plaintiff was making so far as the claim he was adversing or contesting was concerned, and obliged the mining recorder to stay his hand and withhold from the defendants whose claim was being adversed or contested, the certificate of improvements he was demanding under the thirty-sixth section of the same Act.

These papers, then, amounted to nothing more than a caveat which stayed the recorder's hands until judgment in the adverse suit was delivered and filed with him. All this, I think, is quite clear from an examination of the two sections.

It is not necessary to set out the section at length. Its material words, so far as this controversy is concerned, are contained in the amendment of the year 1898. Previous to that amendment, if any person desired to "adverse" or contest a claim being made by any miner for a certificate of improvements, which was practically the equivalent of a Crown Grant and could only be impeached for fraud, he had, within certain prescribed times, to begin an action in the Supreme Court of British Columbia and file a copy of the writ in the action with the mining recorder of the district. The amendment required that he should also

file an affidavit to be made by the person asserting the adverse claim and setting forth the nature, boundaries and extent of such adverse

claim together with a map or plan thereof signed by a provincial land surveyor, and a copy of the writ, etc.

The section says nothing about an actual survey being made, while the previous section, where it was necessary to deal with the question of survey for the purposes of Crown Grants, most clearly requires an actual survey and sets out in detail how it shall be made. The affidavit of the boundaries is not required from the surveyor, but from the adverse claimant himself. To yield to the argument of the respondent, we would require to import into the section language which the Legislature has not used and impute to it an intention which I do not think it had.

With regard to the absence of the date from the jurat, I do not think that defect a fatal one. The test as to whether or not it is an affidavit is whether an indictment for perjury would lie upon it. The authorities are clear that it would and evidence as to the time when it was sworn would be admissible *aliunde*.

Even if the absence of the date were a fatal defect at common law in an affidavit, which I controvert, I think that The British Columbia Oaths Act (1) and rule 415 of the Supreme Court rules of 1890 of British Columbia cure the alleged defect.

The appeal should be allowed with costs in this court and in the court of appeal in British Columbia, and the case should be remitted back to the trial judge to complete the trial of the adverse action.

MILLS J.—This case arose from a controversy in respect to a mining claim in the Province of British Columbia. It is situated in the Ainsworth mining division of the province east of Duncan River and north of Dunn Creek.

(1) R. S. B. C. c. 3, s. 16.

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One John Hastie, on the 15th day of June, 1898, recorded a mineral claim called the "Iron Chief," in the office of the mining recorder at Kaslo. On the 26th day of August, 1898, he transferred to one P. A. Paulson an undivided one-half interest in the said claim, and Paulson by a writing dated the 30th of June, 1899, transferred to the plaintiff this undivided one-half interest in the claim. John Hastie was a free miner of the Province of British Columbia, and so also was P. A. Paulson. On the 22nd of May, 1899, the plaintiff obtained from the mining recorder at Kalso a certificate of work being done in compliance with the provisions of the Mineral Act for the year ending June the 15th of that year; and on the 15th of June, 1900, the plaintiff paid the mining recorder at Kaslo the sum of $100.

The defendants claim to be the owners of 38·68 acres of the lands and minerals comprised within the said claim which they maintain was located by the defendant Hendrix on the 16th of May, 1899, and recorded at Kaslo on the 1st of June following named the "Pearl" claim which embraces 38·68 acres of the mineral claim comprised within the claim known as the "Iron Chief." The plaintiff affirms that they applied for a grant within sixty days after the publication in the British Columbia Gazette of the notice of the defendants that upwards of 38 acres of the said "Iron Chief" mineral claim was comprised in the "Pearl" claim previously located by them.

The plaintiff maintained that the "Pearl" claim has always been an invalid location. It was not marked by two legal posts placed as near as possible on the line of the ledge or vein of mineral; that Hendrix did not blaze or mark the line as required by the Mineral Act; that he did not place a discovery post on the said claim; that he did not furnish the mining recorder

the particulars required to be put on post Nos. 1 and 2; that he did not make affidavit that the legal notices and posts had been put on the claim, nor that the ground applied for was then unoccupied.

The defendants denied the plaintiff's allegations and affirmed that the "Iron Chief" mineral claim was a nullity. They also deny that the plaintiff's statement of claim discloses a cause of action against the defendants.

The case went down for trial before Mr. Justice Martin on the 19th of February last.

It was argued that section 37 of the Mineral Act as amended by the provincial legislature requires that a map or plan made by the Provincial Land Surveyor from a survey and measurement made upon the ground shall be filed with the recorder, and that, in this respect, there has been no sufficient compliance with the statute.

The judges of the British Columbia courts were equally divided upon this question; the Chief Justice and Mr. Justice Martin held that the plan must be prepared by the Provincial Land Surveyor, but he might do this from information supplied by the plaintiff, and it need not be from actual survey and measurements made by a competent land surveyor. Mr. Justice Irving, and Mr. Justice Walkem held the contrary. Mr. Irving in his judgment said:

A map to be made by a Provincial Land Surveyor, in my opinion, must be something more than a picture prepared by a Provincial Land Surveyor from data supplied to him by one of the parties to the action. The filing of such a document is not in my opinion within the spirit or letter of the Act.

The Chief Justice says:

I am of opinion that it is not correct to say either that a plan must be based on a survey by a Provincial Land Surveyor, or that the filing of the affidavit and plan is a *sine qua non* of the right to prosecute the action.

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It is proper to look at the provisions of the statute in controversy. By section 36 of the Mineral Act (1) it is provided that, whenever the lawful holder of a mineral claim shall have complied with the following requirements, to the satisfaction of the Gold Commissioner, he shall be entitled to receive from the Gold Commissioner a certificate of improvements in respect of such claim unless proceedings by the person claiming an adverse right under section 37 of this Act have been taken. The lawful holder is required by sub-section (*b*) to have

> had the claim surveyed by an authorised Provincial Land Surveyor, who shall have made three plans of the claim, and who shall have accurately defined and marked the boundaries of such claim upon the ground, and indicated the corners by placing monuments or legal posts at the angles thereof, and upon such monuments or posts shall be inscribed by him the name and official designation of the claim, and the corner represented thereby, and who shall have on the completion of survey, forwarded at once the original field notes and plan direct to the Lands and Works Department, &c.

Now, under section 37, provision is made in respect to an adverse right, and it provides:

> In case any person shall claim an adverse right of any kind, either to possession of the mineral claim referred to in the application for ceatificate of improvements, or any part thereof, or to the minerals contained therein he shall within sixty days after the publication in the British Columbia Gazette of the notice referred to in section 36 hereof (unless such time shall be extended by the special order of the court upon cause being shewn) commence an action in the Supreme Court of British Columbia to determine the question of the right of possession or otherwise enforce his said claim, and shall file an affidavit to be made by the person asserting the adverse claim, and setting forth the nature, boundaries and extent of such claim, together with a map or plan thereof made and signed by a Provincial Land Surveyor, and a copy of the writ in said action with the Mining Recorder of the district, or mining division in which the said claim is situate within twenty days from the commencement of the said action, &c.

(1) R. S. B. C. (1897) ch. 135, s. 36.

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Now this proceeding is not for the purpose of acquiring any right, but for the purpose of setting out the limits of a mining location already surveyed under section 36, and for the purpose of indicating in what way, and to what extent, it is in conflict with some other claim. If there was no other prior survey under section 36 by one of the parties he could not under section 37 set up a claim adverse to one who had such claim by obtaining a surveyor to make a plan of a plot which had not been surveyed. It could never have been the intention of the legislature to permit one party who had made a plan but no survey to successfully set up a claim under the Mining Act against one who had made both.

The facts in this case not being fully disclosed in the papers before us, I am of opinion that the case should be remitted back to the trial judge to be tried out before him.

Appeal allowed with costs.

Solicitors for the appellant: *Taylor & O'Shea.*

Solicitors for the respondents: *McAnn & Mackay.*

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*Nov. 3, 4.

*Nov. 17.

LAWRENCE W McKELVEY (PLAINTIFF) ..... } APPELLANT;

AND

LE ROI MINING COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Practice—New points on appeal—Jurisdiction—Negligence—Machinery in mine—Defective construction—Proximate cause of injury—Fault of fellow-workman—Defective ways, works and machinery—Verdict—Findings of fact.

Questions of law appearing upon the record but not raised in the courts below may be relied upon for the first time on an appeal to the Supreme Court of Canada where no evidence in rebuttal could have been brought to affect them had they been taken at the trial. *Gray* v. *Richford* (2 Can. S. C. R. 431); and *Scott* v. *Phœnix Assurance Company* (Stu. K. B. 354), followed.

An objection that a judge of the court below had no jurisdiction to render a judgment from which an appeal is asserted is not proper ground on which to question the jurisdiction of the appellate court to entertain the appeal.

An elevator cage was used in defendants' mine for the transportation of workmen and materials through a shaft over eight hundred feet in depth. It was lowered and hoisted by means of a cable which ran over a sheave wheel at the top of the shaft, and, to prevent accidents, guide-rails were placed along the elevator shaft and the cage was fitted with automatic dogs or safety clutches intended to engage upon these guide-rails and hold the cage in the event of the cable breaking. The guide-rails were continued only to a point about twenty feet below the sheave wheel. On one occasion the engineman in charge of the elevator carelessly allowed the cage to ascend higher than the guide-rails and strike the sheave wheel with such force that the cable broke and the safety clutches failing to act, the cage fell a distance of over eight hundred feet, smashed through a bulkhead at the eight hundred

* PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

foot level and injured the plaintiff who was engaged at the work for which he was employed by the defendants about fifty feet lower down in the shaft. In an action to recover damages for the injury sustained, the jury found that the immediate cause of the injury was "the non-continuance of the guide-rails" which, in their opinion, "caused the safety-clutches to fail in their action, and, therefore, allowed the cage to fall."

Held, reversing the judgment appealed from (9 B. C. Rep. 62), that the verdict rendered in favour of the plaintiff ought not to have been disregarded, as there was sufficient evidence to support the finding of fact by the jury.

APPEAL from the judgment of the Supreme Court of British Columbia (1) affirming the judgment of the trial court dismissing the plaintiff's action with costs.

The action was to recover damages for personal injuries sustained by the plaintiff while working in the defendants' mine at Rossland, B.C., known as the Le Roi Mine. The case is stated in the headnote and judgments now reported.

At the trial the following questions were left to the jury: (1) "What was the immediate cause of the injury?" (2) "If the plaintiff is entitled in law to damages, at what amount do you assess the same?"

The jury returned the following answers: (1) "That the approximate cause of the injury was the non-continuance of the guide-rails which, in the opinion of the jury, caused the safety-clutches to fail in their action and, therefore, allowed the cage to fall:" (2) "Three thousand dollars."

Chief Justice McColl, who presided at the trial, did not direct any judgment to be entered, but ordered that the parties should have leave to move before the full court as they might be advised, and a motion and cross-motion were accordingly made by the plaintiff and defendants, respectively.

(1) 9 B. C. Rep. 62.

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After hearing the motions the full court gave judgment (1), declaring that it had no jurisdiction to hear the motions and giving the parties liberty to move before the Chief Justice as they might be advised. Subsequently, on a motion to enter judgment made by the plaintiff, the Chief Justice ordered judgment to be entered dismissing the action with costs. This judgment was affirmed by the decision of the full court now under appeal.

On the appeal being called for hearing,

Daly K.C., for the respondents, moved to quash the appeal on the ground that McColl C. J. had no jurisdiction to hear the case a second time, and also objected that questions of law not raised in the courts below could not now be relied upon for the first time before the Supreme Court of Canada, as apparently intended by the appellants, and taken in their factum. *Ex parte Firth, In re Cowburn* (2) was cited.

The ruling of the court on these objections was announced as follows by

TASCHEREAU J. (oral).- That the Chief Justice of British Columbia had no jurisdiction to hear the case is, upon the face of it, not an objection to our jurisdiction. If the Chief Justice had no jurisdiction, that would be a reason to set aside his judgment in favour of the respondents, but it is not an objection to our jurisdiction to entertain the appeal.

The established practice of this court on the second point is stated by our present Chief Justice in *Gray* v. *Richford* (3), at page 456, and this is also the practice followed in the Privy Council. See also, in the Privy Council, the case of *Scott* v. *The Phœnix Assurance Company* (4). We therefore, on an appeal, cannot

(1) 8 B. C. Rep. 268
(2) 19 Ch. D. 419.
(3) 2 Can. S. C R. 431.
(4) Stu. K. B. 354.

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refuse to entertain questions of law appearing upon the record although they may not have been raised in the court below and are relied upon for the first time here, where no evidence could have been brought to affect them had they been taken at the trial.

Taschereau J.

The motion to quash was dismissed with costs.

The appeal was then heard upon the merits. The questions then at issue are stated in the judgments reported.

Aylesworth K.C. and *A. H. MacNeill K.C.* for the appellant.

Daly K.C. for the respondents.

TASCHEREAU J.—I concur in the judgment allowing the appeal with costs and granting the appellant's motion for judgment with costs for the reasons stated by His Lordship Mr. Justice Davies. The courts of British Columbia were wrong in disregarding the verdict of the jury.

SEDGEWICK J. concurred in the judgment allowing the appeal for the reasons stated by His Lordship Mr. Justice Davies.

GIROUARD J.—I am inclined to allow the appeal. I think there is some evidence in support of the verdict of the jury that the

approximate cause of the injury was the non-continuance of the guide-rails which, in their opinion, caused the safety-clutches to fail in their action, and thereby allowed the cage to fall.

The witness Hughes, one of the miners working on the railway, says:

A. The safeties are arranged that when the rope breaks loose they are supposed to turn to and catch the guide-rails.

Q. When the cage is attached the safeties are open?

A. Yes, and when it breaks loose they close and catch.

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Girouard J.

Q. They turn automatically and catch on the guide-rails?

A. Yes.

Q. So that, when there is no guide-rail at the point at which the rope breaks, what becomes of the safeties?

A. They are useless.

Q. This cage was fitted with safeties?

A. Yes, sir.

Q. But having fallen from a place where there were no guide-rails the safeties would not act?

A. No, sir.

* * *

Q. You say that you think the safeties would probably have acted if the guide-rails had been there?

A. Yes, they would have had more of a chance.

Even the trial judge found that there was no dispute as to the evidence in respect to the guide-rails. I do not feel, therefore, inclined to disturb that verdict, and there being evidence of negligence at common law the company should be held liable and condemned to pay the sum of three thousand dollars, being the amount of the damages assessed by the jury, the whole with interest and costs.

DAVIES J.—This action was brought to recover damages for injuries sustained by the appellant, a workman, while engaged in the defendants' mine. The injuries sustained were serious and the jury assessed the damages at three thousand dollars.

The plaintiff was working in company with other miners at the bottom of a large shaft, referred to as a five compartment or combination shaft, and was engaged in sinking this shaft so that a depth of nine hundred feet should be reached. At the time of the accident the shaft was about forty to forty-six feet below the eight hundred foot level. The mine was operated down to the eight hundred foot level by means of two cages which were in the two westerly compartments of the shaft. There were no cages in the three other

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compartments. Drifts had been opened out from the shaft at the three hundred and fifty, five hundred, six hundred and seven hundred foot levels, both east and west, and from the east at the eight hundred foot level, and ore was being "stoped" and general mining carried on from all these levels. A platform had been placed in the westerly compartment of the shaft over the eight hundred foot level and the place where the plaintiff and others were working was underneath this platform, some forty or fifty feet. The plaintiff was injured by the fall of the iron cage operated in the westerly compartment, from the sheave wheel at the top of the shaft down to the eight hundred foot level where it struck and smashed through the platform constructed there and fell down upon the plaintiff.

At the time of the accident the cage which fell was being used for bringing timber to the six hundred foot level and hoisting waste rock therefrom.

It is not contended that the platform was built or intended as a protection against the fall of so heavy an article as the iron cage. It was only intended to protect the workmen from any ordinary material, such as pieces of rock or ore, falling down the shaft from the sides or from the several tunnels and, in the event of the cage falling from the breaking of the rope which was attached to it and by which it was raised and lowered, unless its fall was prevented by the dogs or safeties with which it was provided seizing and holding the guide-rails, there was no protection of any kind for these workmen at the bottom of the shaft.

At the trial the plaintiff contended, amongst other reasons, that the defendants were liable because they had failed to comply with the provisions of "The Inspection of Metalliferious Mines Act" (1), as

(1) R. S. B. C. ch. 134.

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amended by "The Inspection of Metalliferous Mines Act Amendment Act, 1899" (1).

Section twenty-five of the principal Act, ch. 134, is as follows:

The following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies.

(20) Each shaft, incline, stope, tunnel, level or drift and any working-place in the mine to which this Act applies shall be, when necessary, kept securely timbered or protected to prevent injury to any person from falling material.

By the Act of 1899, ch. 49, sec. 12, it was enacted as follows;

Sub-section 20 of said section 25 is hereby amended by adding thereto the following;

No stope or drift shall be carried on in any shaft which shall have attained a depth of two hundred feet unless suitable provision shall have been made for the protection of workmen engaged therein by the construction of a bulkhead of sufficient strength or by leaving at least fifteen feet of solid ground between said stope or drift and the workmen engaged in the bottom of the shaft.

It was conceded that fifteen feet of solid ground had not been left in the body of the shaft in the nature of a pentice. And also that the bulkhead or platform which had been put in at the eight hundred foot level was insufficient to protect against a falling cage. And also that, had the fifteen feet of solid ground (the pentice), been left, the accident would have been prevented; that the shaft was more than two hundred feet in depth, viz., eight hundred and forty-six feet, and that stoping or drifting was carried on in the shaft.

The learned Chief Justice was of opinion that these statutes did not govern or apply to this case, that the cage of the hoist could not be regarded as "falling material" within the sense of these words as used in section twenty-five above quoted, and that the amend-

(1) 62 Vict. ch. 49.

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ment of 1899, though somewhat indefinite in its language, did not mean that fifteen feet of solid ground or a sufficient bulkhead in lieu thereof should be left or constructed within the shaft itself as a protection to the workmen, but that the proper construction of this section is that, in the event of the owner of a mine wishing to drift or stope ore on any *side of the shaft* that he shall leave for the protection of the workmen in the shaft a solid pillar of rock at least fifteen feet deep, so as to constitute a wall of the shaft, lying between the shaft and the stope or drift, or, in the event of such pillar of rock being ore of a very high grade and his desiring to make use of the same and to recover the precious metal therefrom, that he is then at liberty to replace the same by bulkheads of timber which would form a solid wall for the shaft sufficient to withstand the vibrations caused by the work and blasting necessary for the drifting and stoping; and that the evidence showed compliance on the defendants' part with the section as so construed.

At the close of the plaintiff's case, and again when the evidence was all in, the defendants moved for a nonsuit on the grounds that there was no evidence to go to the jury of any defect in the ways, works or machinery for which they were liable at common law or under the statutes regulating their operations, and that the evidence showed the accident to have been caused by the negligence of a fellow-workman of the plaintiff, the engineer who had the control of the working of the cage, and for which they were not liable.

The learned Chief Justice who tried the case refused to non-suit, holding that the only point open was whether there was negligence on defendants' part in not continuing the guide-rails up to the wheel sheave. He submitted the following question to the jury:—

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What was the immediate cause of the injury?

To which the jury returned answer:

The approximate cause of the injury was the non-continuance of the guide-rails, which, in the opinion of the jury, caused the safety-clutches to fail in their action and, therefore, allowed the cage to fall.

The learned Chief Justice declined to order any judgment to be entered on this verdict and on application being made to the Supreme Court to enter a verdict on the jury's findings for one party or the other, that court decided that it had no jurisdiction to do so and remitted the cause back to the Chief Justice, who, thereupon, directed judgment to be entered dismissing the plaintiff's action. From this judgment an appeal was again taken to the Supreme Court of British Columbia, which affirmed the Chief Justice's judgment, and, from this latter judgment an appeal was taken to this court.

We have not had the advantage of having the reasons for the judgment delivered by the Chief Justice, entering the judgment for the defendants, and those of the full court are very meagre. They turned almost, if not entirely, upon the true construction to be given to the twenty-fifth section of the "Inspection of Metalliferous Mines Act" and the amendment to the twentieth subsection of that section enacted in 1899 Mr. Justice Irving, expressing himself as "not feeling any great degree of confidence in the correctness of the construction placed upon that section by the Chief Justice," but, on the other hand, being "unable to say that he was wrong," and Mr. Justice Martin adhering to the decision that he had given when the case came first before the full court, that neither the twenty-fifth section of the Act above referred to nor its amendment in 1899 applied to the facts of the case.

In the view I take, however, of the whole case it is unnecessary to express any opinion as to what is the true construction of that section or its amendment.

The jury have found that the proximate cause of the injury to the plaintiff was the defective construction and condition of the guide-rails along which the cage ran, in their non-continuance to the sheave-wheel, "which caused the safety-clutches to fail in their action and, therefore, allowed the cage to fall."

If there was any evidence which could properly sustain this finding then it is clear that the defendants are liable at common law, and quite irrespective of the statutes, for the injury sustained by the plaintiff. The substance and meaning of the finding of the jury are that the accident was due to the neglect of the defendants to take proper precautions for the protection of their employees from the possible consequences of a failure to provide machinery and appliances fit and proper for the working of the cage. Such neglect would clearly render them liable at common law for injuries sustained by any of their workmen and of which it was the proximate cause. The exact nature of this neglect is found by the jury to be the non-continuance of the guide-rails up to the sheave-wheel fixed in the timbers set in the shaft about sixty feet above the three-hundred-and-fifty-foot level or tunnel from which the cage was operated and around or through which sheave-wheel the rope attached to and guiding the cage ran. The necessity for such a continuance of the guide-rails was a pure question of fact and especially one proper for the jury to find.

It was admitted, on both sides, that the guide-rails did not run up to the sheave-wheel but stopped about twelve or twenty feet below it. This cage was operated from what was called the three-hundred-and-fifty-foot tunnel or level. The shaft was an inclined

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one, about seventy-four degrees from the horizontal, and the cage ran on rails resting on wall or shaft timbers. In addition to the rails there were what were called guides to assist the rails and, in case of necessity, for the cage-safeties to work upon. These safeties were appliances attached to the cage for the purpose of stopping it in case the rope, which held and guided the cage, and which passed around the sheave-wheel, broke. This sheave-wheel was fastened to timbers in the shaft about sixty or sixty-five feet above the three-hundred-and-fifty-foot tunnel, called by the witnesses the Black Bear Tunnel. These guide-rails ran up above the tunnel and towards the sheave-wheel, a distance variously estimated at from thirty-seven to fifty feet. There remained, therefore, between the place where the guide-rails ended and the sheave-wheel, a space without guide-rails variously estimated at from ten to twenty feet; and if the cage ran up to the sheave-wheel, and the rope broke, there would be nothing for some distance on which the so-called safeties could operate and the cage must necessarily fall. at any rate till it struck the guide-rails.

It was contended on behalf of the plaintiff, that this was just what happened at the time of the accident, and that, owing to the absence of guide-rails, the falling cage, weighing over a ton, obtained such an impetus before it reached the place where the guide-rails began, that the dogs or safeties on the cage were unable to act and were reversed and broken and so the cage fell to the bottom.

The superintendent of the defendants' mine, Mr. Long, in his examination, explaining the methods of operating the cage and the uses of the guide-rails, and dogs or safeties, stated that the guide-rails were continued up within ten or twelve feet of the sheave-wheel, and that they are used for steadying the cage

and for the cage-dogs or safeties to work upon, but that he did not think, if these rails had been continued up to the timbers on which the sheave-wheel was set, it would have prevented the cage or skip from falling.

Other witnesses called for the defence expressed the same opinion and placed the blame for the accident upon the engineer running the cage. Munro, on the other hand, who was one of the stationary engineers of the mine, stated that it was customary to run guide-rails as far up as the skip or cage could run, and that, if it was not done, he did not know of any other appliance in use which could prevent accident in case the rope broke. He stated that, in his opinion, it was necessary they should run to the top in order to be a safeguard. Other witnesses gave similar testimony, stating, what is in fact almost self-evident, that without these guide-rails at any particular point the safeties are useless.

A large mass of testimony pro and con, in support of the rival contentions of the parties, was given and now that the jury have found that the absence of the guide-rails at the top was the proximate cause of the accident, and of the plaintiff's injuries, we are asked to set the finding aside and to sustain the judgment of the court below entering judgment for the defendants.

As I have already remarked, the question as to whether or not the finding of the jury should be set aside does not appear to have been argued in the court below, and no reference is made to this branch of the case in the reasons for their judgment given by the learned judges. The whole case turned upon the application of the sections of the "Inspection of Metalliferous Mines Act" and its amendment to the case, and the court, agreeing with the Chief Justice, held that they were not applicable.

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The more recent authorities on the rule with respect to setting aside the findings of a jury have been considered in a case lately decided in this court and we have determined, in accordance with these authorities, that before doing so the court must be satisfied that the finding is one which the jury, viewing the whole evidence, could not properly find. In such a case only should the finding be interfered with.

I am of opinion, after careful examination of the evidence in this case, and for the reasons hereinbefore stated, that the jury's finding is not one which, under this rule, we ought to interfere with.

That would appear to me to end the case. It is not denied that, as a matter of law, a master who employs a servant in work of a dangerous character, such as in mining at the foot of a shaft eight hundred feet deep, is bound to take all reasonable precautions for the workman's safety. In this case the proximate cause of the accident is found to be the defendants' neglect to do so in an important particular.

The finding standing, the appeal should be allowed with costs in all the courts and judgment entered accordingly,

MILLS J.—In this case the plaintiff was working at the bottom of a mining shaft upwards of 800 feet in depth. The cage which was used for raising the product of the mine and for the ascent and descent of the men employed fell, from the breaking of the cable at the sheave-wheel, upon the timbers in the shaft through which it passed, and seriously injured the plaintiff. There were guide-rails along which it ran which extended to within thirty feet of the sheave-wheel. The engineer in charge had carelessly run up the cage to the sheave-wheel quite above the guide-rails, and this seems to have been done with so much

violence as to break the cable, so that it fell all the way to the bottom of the shaft. It fell several feet before it reached the guide-rails, and had thereby acquired so much momentum that the safeties which were intended to check its downward progress were bent back and no longer served the purpose for which they were intended.

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There are certain provisions of the Act known as the Inspection of Metalliferous Mines Act, which are intended to prevent persons working in the bottom of a shaft from being injured by falling material, and an attempt was made during the argument to show that proper precautions had not been taken in this regard. But it was pointed out by Mr. Daly, the counsel for the company, that the provisions of the Act were in this regard sufficiently complied with. The law requires that the workmen in the shaft shall be protected against falling material; that where mining operations are being carried on away from the shaft there would be danger arising from rock or mineral being blown out and falling down unless there was a protecting wall of solid ground or the construction of a bulkhead above the workmen of sufficient strength to guard against falling material. In this case, from the carelessness of the engineer in running up the cage, which weighed about two tons, much further than was necessary, the cable was broken and the cage precipitated to the bottom of the shaft. The trial judge was of opinion that the accident was wholly due to the carelessness of the engineer, but the jury were of opinion that the company had failed in their duty in not extending the guide-rails as high up as it was possible for the cage to go. There is no doubt that had the guide-rails been so extended the accident might not have happened, and men employed in such dangerous operations as there are in mines are

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entitled to all the protection which can be reasonably given them.

I cannot say that the finding of the jury is not one which the evidence did not warrant and I think, therefore, that the verdict ought not to be disturbed.

Appeal allowed with costs.

Solicitor for the appellant: *W. S. Deacon.*

Solicitor for the respondents: *C. R. Hamilton.*

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THE COLONIST PRINTING AND PUBLISHING COMPANY, JAMES DUNSMUIR, CHARLES EDWARD POOLEY, ALBERT G. SARGISON, J. A. LINDSAY AND H. MAURICE HILLS, (DEFENDANTS) ..... } APPELLANTS;

*Nov. 5, 6.
*Nov. 17.

AND

JOAN OLIVE DUNSMUIR AND FORBES GEORGE VERNON, WHO SUE ON BEHALF OF THEMSELVES AND ALL OTHER HOLDERS SAVE THE INDIVIDUAL DEFENDANTS OF A CERTAIN ALLOTMENT OF SEVENTY-EIGHT PREFERENTIAL SHARES IN THE DEFENDANT COMPANY (PLAINTIFFS)..... ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Company law—"The Companies Act, 1890 "*(B.C.) and amendment—Construction of statute—Memorandum of association—Conditions imposed by statute—Public policy—Preference stock—Election of directors.*

In the memorandum of association of a joint stock company formed under the provisions of the British Columbia "Companies Act, 1890," and its amendment in 1891, there was a clause purporting to give to the holders of a certain block of shares, being a minority of the capital stock issued, the right at each election of the board of directors to elect three of the five directors or trustees for the management of the business of the company, notwithstanding anything contained in the Act.

Held, that the shares to which such privilege was sought to be attached could not be considered preference shares within the meaning of the statute, and that the agreement was *ultra vires* of the powers conferred by the statute, and null and void, being repugnant to the conditions as to elections of trustees and directors imposed by the Act as matters of public policy.

Judgment appealed from (9 B. C. Rep. 275) reversed.

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*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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APPEAL from the judgment of the Supreme Court of British Columbia, (1), affirming an order by Drake J., at the trial, setting aside the election of five directors elected at a general meeting of the company on the 17th of February, 1902.

The company was not represented by counsel and took no part in the appeal which was prosecuted by the other defendants who were the directors elected at the meeting in question by a majority of the votes of all the shareholders present. The judgments now reported contain a statement of the questions of material importance raised on this appeal. The controversy arose in connection with a dispute as to the preference or privileges alleged to have been annexed to a certain block of shares in the capital stock of the company under the following circumstances.

In a written agreement, dated the 5th of September, 1892, entered into between William Harrington Ellis and Albert George Sargison, therein termed "Ellis & Co." of the one part, and James Dunsmuir, of the same place, therein termed "The Promoter" of the other part, respecting the incorporation of "The Colonist Printing & Publishing Company, Limited Liability," the sixth clause was as follows:

"6. It is agreed that the Colonist Printing & Publishing Company, Limited Liability, shall be managed by a board of five directors, of whom, notwithstanding anything to the contrary in the "Companies Act, 1890", the stockholders other than Ellis & Co., or other the owners or persons entitled to the said seventy-five shares to be held by them, or some part thereof, shall when and as from time to time trustees or directors are to be chosen, elect or choose three; and that the other two directors shall be elected or chosen by Ellis & Co., and such five directors, or a

(1) 9 B. C. Rep. 275.

majority of them, shall have all the powers of trustees under the "Companies Act, 1890."

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In the memorandum of association of the company formed, the fourth clause was as follows:

"4. The number of trustees who shall manage the concerns of the company for the first three months shall be five, and their names are William Harrington Ellis, Albert George Sargison, James Dunsmuir, Cuyler A. Holland and Sydney Aspland, and in the election and appointment of directors the company shall be governed by the provisions of said agreement of the fifth day of September, 1892."

C. Robinson K. C. and *Gregory* for the appellants. The effect of secs. 3, 5, 9 and 11 of the "Companies Act of 1890" (B.C.), is that, in electing trustees, each stockholder shall have as many votes as he owns shares, one vote for each share, and that the persons receiving the greatest number of votes shall be trustees.

Neither the defendant company nor the shareholders entered into, acted on, ratified or adopted the agreement of 5th Sept., 1892, which was made before incorporation and is not binding on the company or shareholders. The company was not at that time in existence and could not contract, and even if they did act on it, that did not adopt it. *In re Empress Engineering Co.* (1); *In re Northumberland Avenue Hotel Co.* (2); *North Sydney Investment and Tramway Company* v. *Higgins* (3) at page 271.

As to the contention that the memorandum of association is equivalent to an agreement by the shareholdes, *inter socios*, that the agreement of 5th Sept., 1892 should govern them, and the cases under the English Acts cited in support, the English Acts provide expressly that both the memorandum and articles

(1) 16 Ch. D. 125. (2) 33 Ch. D. 16.
(3) [1899] A. C. 263.

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are to be deemed a covenant, (secs. 11, 16, Imperial Act of 1862,) which is not done in the British Columbia Acts. As to the reference to it in paragraphs 2 and 4 of the memorandum and the contention that thereby it became part of the memorandum, and the stock was created preference stock under the Amending Act of 1891, it is submitted that under sec. 3 of the Act of 1890 everything essential must be stated in the memorandum itself.

The provision in the memorandum as to the election of trustees as directed by the agreement of 5th Sept., 1892, is different from the mode directed by sec. 11 of the Act, and is inconsistent with the company's by-law and the provisions of and conditions imposed by the Act, and, therefore, *ultra vires*. The corporation is subject to the conditions in that Act imposed and to none others. The Act is the Company's Code to the extent, at least, of the provisions and conditions in the Act contained. *Payne* v. *The Cork Company* (1); *Trevor* v. *Whitworth* (2); *In re Railway Time Tables Publishing Company* (3); *Welton* v. *Saffery* (4); *In re Peveril Gold Mines* (5).

The plaintiffs' shares are not preference shares at all and certainly are not so within the amending Act of 1891. They have no preference as to dividends, division of profit, or proceeds of capital. The mere right to vote in respect of a certain class or number of trustees does not constitute that class of shares preference shares.

The cases of *Re Walker and Hacking* (6); *Beatty* v *North-west Transportation Company* (7) and *Andrews* v. *Gas Meter Co.* (8), do not support the contention that shares of the nature of those in question might

(1) [1900] 1 Ch. 308.
(2) 12 App. Cas. 409.
(3) 42 Ch. D. 98.
(4) [1897] A. C. 299.
(5) [1898] 1 Ch. 122.
(6) 57 L. T. 763.
(7) 12 Can. S. C. R. 598.
(8) [1897] 1 Ch. 361.

have been created independently of the authority to issue preference shares conferred by the amending Act of 1891, because shares of that nature deprive some shareholders of their one vote for every share in electing the trustees, a right created in the interest of the public. *Walker* v. *London Tramways Company* (1).

This action is not maintainable on the principle of the rule in *Foss* v. *Harbottle* (2). The contention is as to who can elect the majority of trustees. If that end can be attained by the majority of the shareholders the court will not interfere. *Mozley* v. *Alston* (3); *Macdougall* v. *Gardiner* (4); *Purdom* v. *Ontario Loan and Debenture Co.* (5).

Peters K.C. for the respondents. We contend that all the shareholders in the company are bound by the memorandum of association, and that under its terms the plaintiffs were absolutely entitled to elect three directors, notwithstanding the clause in the original Act and consistently with that clause.

By the amending Act of 1891 the power to create preference stock was given Such a power would exist without any such special legislation. The memorandum of association created two kinds of shares, one, preferred, issued to the public who put up the money, and the other, ordinary, issued to the promoters. It is not necessary that the memorandum should say, in so many words, that there is preferred stock; it is quite sufficient if it contains stipulations which give any particular stock any preference or privilege over other stock. Lindley on Companies (5 ed.) p. 396-7. The holder of such stock may be entitled to some advantage in voting. The appointment of directors is a matter entirely of internal arrangement, and does

(1) 12 Ch. D. 705.
(2) 2 Hare 461.
(3) 1 Ph. 790.
(4) 1 Ch. D. 13.
(5) 22 O. R. 597.

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not affect the company's rights with regard to outsiders; and even although a statute should provide how the directors should be elected, there is nothing to prevent the shareholders agreeing between themselves that some different mode should be adopted. *Andrews* v. *The Gas Metre Co.* (1). The memorandum of association is the charter of the company. *Ashbury Railway Carriage and Iron Co.* v. *Riche* (2), at page 670; *Ashbury* v. *Watson* (3); *In re Barrow Hæmatite Steel Co.* (4), at page 603.

The memorandum, although not using the word "preferred," clearly indicates that certain stock is to be preferred stock by stating what special preference or privilege in voting its holders shall have: Cook on Corporations (4 ed.) pp. 268, 269. Rawlins and Macnaughton on Companies, 120, 496; Lindley on Companies (5 ed.) p. 396; *Re South Durham Brewery Co.* (5).

The cases following *Foss* v. *Harbottle* (6), have no application to the present dispute. This case turns upon the proper construction of the agreement, the memorandum of association, and the statutes of 1890 and 1891.

TASCHEREAU J.—This is an appeal from a judgment of the full court of British Columbia affirming an order made by Drake J. at the trial of the cause by which order the election of the appellants James Dunsmuir, Pooley, Sargison, Lindsay and Hills, as directors of the defendant company, on the seventeenth of February last, was held to have been illegal and set aside as such. These five directors are the present appellants. The company is not a party to the appeal.

(1) [1897] 1 Ch. 361.
(2) L. R. 7 H. L. 653.
(3) 30 Ch. D. 376.
(4) 39 Ch. D. 582.
(5) 31 Ch. D. 261.
(6) 2 Hare, 461.

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At the said election the appellants were so elected directors by a majority of the votes of all the shareholders present, each shareholder casting one vote for each share held by him.

The respondents contend that they have an absolute right to elect three out of five of the directors of the company, though they have the minority of the shares, and that, consequently, the said election at which they were refused that right was illegal.

This contention is based upon an agreement entered into between Ellis & Co. and James Dunsmuir, prior to the incorporation of the company, by which it was agreed that the company, when formed, should be managed by five directors, of whom the stockholders other than Ellis & Co., or the person entitled to the seventy-five shares to be subscribed for by Ellis & Co. should elect three, and the other two directors should be chosen by Ellis & Co., which said agreement, the respondents allege, was incorporated in the memorandum of association and is now binding upon the company.

I may assume, in the view I take of the case, without passing upon it however, that, as contended for by the respondents, it was in fact the company provided for by this agreement that was thereafter formed and that the company did adopt it, or that part of it relating to the election of directors, though that is controverted by the appellants.

The only point, therefore, that is necessary for me to consider is whether or not that agreement is legal, and whether it was in the power of the company to covenant that, as contended for by the respondents, they, as holders of shares other than those issued to Ellis & Co., would have the right always to elect three out of the five directors of the company, whether they had the majority of shares or not.

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I would be of opinion with the learned Chief Justice, who dissented from the judgment appealed from, that such an agreement was illegal and *ultra vires* of the company, as being in direct contravention of both section eleven of the British Columbia Companies Act of 1890 (by which it is expressly decreed that at the election of directors, each stockholder is entitled to as many votes as he owns shares of stock), and section two of the same Act, which enacts that any corporation created under it shall be subject to the conditions in the Act imposed and to *none others*, anything contained in any law notwithstanding. The statute having so prescribed the mode in which the company has to exercise its powers, that mode must be followed and no other.

The respondents' contention that these enactments are merely directory cannot prevail. *Town of Trenton v. Dyer* (1). They are the conditions under which the legislative authority has authorized the creation of the company. These statutory conditions are to be read as if incorporated in express words in the charter or memorandum of association, for the very purpose of restricting the powers that the company or the shareholders might otherwise have in the matter. They cannot be read out of the statute, as the respondents would ask us to do. The statute means what it says, and it says it as being exclusively the law that governs such companies. If not imperative, the enactment would be futile and unnecessary.

Had the Legislature intended that the directors of the companies formed under the Act should be elected in any manner that the company or the shareholders should see fit, it would have modelled the enactment on the Imperial Companies Act or on the Federal Act, R. S. C., ch. 119, sec. 33, instead of decreeing that the

(1) 24 Can. S. C. R. 474.

uniform rule should be one share one vote, as it is decreed, for instance, in the Federal Bank Act, R.S.C., ch. 120, secs. 9 and 10, and in the Railway Act, R. S. C., ch. 100, sec 18. It is expressly, we may well assume, to differentiate on the subject from the said English or the Federal Companies Acts that this legislation of the British Columbia Legislature was passed. It could not be pretended, I presume, that, under the Banking Act or the Railway Act, *ubi supra*, such an agreement as the one contended for by the respondents here would be legal. Now, I cannot see that simply because this company is more of a private character than those authorized by the said Acts, the same enactment would be merely directory as to it, though it is imperative as to the others.

Owing to the great difference on the question between the Imperial statutory law and that which governs this litigation, the cases from England, cited so copiously on both sides, have no practical application to this case. They merely illustrate rules and principles upon which there is no room for controversy.

As to the respondents' contention that the agreement in question is authorized by the Amendment Act of 1891, I do not see that I can usefully add anything to the remarks of the Chief Justice in the British Columbia court. There is no preference stock in this company, as sanctioned by that statute. The Memorandum of Association does not provide for any. Then that statute has no retroactive effect, and the requirements of sections five and six thereof have never been complied with.

I would allow the appeal with costs, set aside the final order made by Mr. Justice Drake and dismiss the action with costs.

SEDGEWICK J. concurred in the judgment allowing the appeal with costs for the reasons stated by their Lordships Justices Taschereau and Girouard.

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GIROUARD J.—I think sections two and eleven of the British Columbia Act dispose of this appeal. Whether the concessions or stipulations in dispute in this matter are considered as merely private or domestic, or as affecting the public, I cannot understand how we can declare them valid and binding, when the statute under which they were made prohibits them in most express terms.

Section two of "The Companies Act, 1890," says:

Corporations for any lawful purpose may be formed according to the provisions of this Act, if the purpose comes within any of the classes of subjects in respect of which the legislature of the province has power of legislation; and any such corporation, the members and stockholders thereof, shall be subject to the conditions and liabilities in this Act imposed, and to none others, anything contained in any law to the contrary notwithstanding.

Then, section eleven provides that

each stockholder shall be entitled to as many votes as he owns shares of stock, and the persons receiving the greatest number of votes shall be trustees.

We are now asked to declare that such persons shall not be such trustees, in pursuance, it is alleged, of the memorandum of association. I look at the clause of the memorandum of association as contrary to the express enactment of the statute and, therefore, null and void.

The English authorities quoted at the argument have no application, as the British Columbia statute is very different from the English Act or Acts.

An attempt has been made to shew that the stock held by the respondents is preferential stock within the meaning of the Amendment Act of 1891. I cannot agree to this proposition, and have come to the conclusion that the appeal must be allowed with costs.

DAVIES J. concurred in the judgment allowing the appeal with costs for the reasons stated by his Lordship Mr. Justice Taschereau.

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MILLS J.—I am of the same opinion. The promoters of the company have endeavoured to form the stockholders into two groups, and to give to the shares of the one group a greater voting power than to those of the other, so that the one group may elect three trustees and the other but two. Under this arrangement the management of the affairs of the company may be controlled by the holders of a minority of the shares. This is contrary to the terms of the statute under which the incorporation of the company has taken place.

By section two of the Companies Act, 1890, any corporation shall be subject to the conditions and liabilities therein imposed, and to none others; and by section eleven, it is enacted that each stockholder, either in person or by proxy, shall be entitled to as many votes as he owns shares of stock, and the persons receiving the greatest number of votes shall be trustees. There is no authority bestowed to vary these conditions by any agreement between the stockholders, either at the time of the organisation of the company, or subsequently.

None of the shares subscribed for here can be regarded as preference shares, and so the provisions of the statute passed in 1891, in respect to preference shares, do not apply.

I think that the order of Mr. Justice Drake should be set aside, the appeal allowed with costs and the action dismissed.

Appeal allowed with costs.

Solicitors for the appellants, other than the appelant Sargison: *Pooley, Luxton & Pooley.*

Solicitors for the appellant Sargison: *Fell & Gregory.*

Solicitors for the respondents: *Tupper, Peters & Griffin.*

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Oct. 31,
Nov. 3.
*Nov. 17.

THE HARVEY VAN NORMAN COMPANY AND BALFOUR & COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

F. R STEWART & COMPANY (DEFENDANTS)..... }

AND

N. F. McNAUGHT (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mines and minerals—Free-miner's certificate—Annual renewals—Special renewals—Vesting of interest in co-owners—Sheriff—Levy under execution—R. S. B. C. c. 135, ss. 2, 3, 9, 34—62 V. c. 45, ss. 2, 3, 4—R. S. B. C. c. 72, ss. 12, 24.

The sheriff seized the interest in mineral locations held by an execution debtor in co-ownership with another free-miner and, prior to sale under the execution, the debtor allowed his free-miner's license to lapse. A special certificate in the debtor's name was subsequently procured by the sheriff under the provisions of the fourth section of the "Mineral Act Amendment Act, 1899," and it was contended that the debtor's interest had thus been revived and re-vested in him subject to the execution.

Held, that upon the lapse of the free-miner's certificate the interest in question had, under the statute, become absolutely vested in the co-owner and could not thereafter be revived and re-vested in the judgment debtor by the issue of a special certificate.

Judgment appealed from (9 B. C. Rep. 131) affirmed, Sedgewick J. dissenting.

APPEAL from the judgment of the Supreme Court of British Columbia, en banc (1), affirming the judgment of Mr. Justice Irving on the trial of an interpleader

*PRESENT :—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

(1) 9 B. C. Rep. 131.

issue declaring that the plaintiff was entitled to the interest in the mineral claims in question as against the defendants.

On the 29th of March, 1901, a seizure was made by the sheriff on executions issued by a number of creditors against a free-miner named McKinnon of an undivided one-fourth interest in the "Hampton Group" of mining locations in the Slocan Mining Division, in British Columbia, held by McKinnon in co-ownership with the plaintiff, also a free-miner. McKinnon's free-miner's certificate lapsed, on failure of renewal, on the 31st of May, 1901, and the plaintiff claimed that, thereupon, McKinnon's interests became absolutely vested in him as the co-owner of the claims under the provisions of the "Mineral Act" as amended by the "Mineral Act Amendment Act, 1899." On the 5th of June, 1899, the defendants, through the sheriff, procured the issue of a special free-miner's license in McKinnon's name and it was claimed on their behalf that, thereby, the interest seized had become revived, under the provisions of section 4 of the Act of 1899, and re-vested in the execution debtor subject to the executions.

On the trial of the interpleader issue the plaintiff was declared to be the owner of the interests in dispute as against the defendants and this appeal is asserted against the judgment of the full court affirming that decision.

The questions raised on the appeal sufficiently appear from the judgments reported.

Peters K.C. and *Lennie* for the appellants.

S. S. Taylor K.C. for the respondent.

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

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Taschereau J.

TASCHEREAU J.—I would dismiss this appeal. It seems to me incontrovertible, first, that McKinnon's certificate lapsed on the thirty-first day of May, 1901; secondly, that thereupon (if section 9 means what it says), his interest in that claim became vested in McNaught, his co-owner, leaving the seizure out of question for the present; and thirdly, that McKinnon had not, thereafter, at any time, the right by taking a special free miner's certificate to re-vest the title in himself.

But, would contend the appellants, though McKinnon had lost all his interest in that claim, yet the previous seizure of it we had caused to be made in execution of our judgment against him had the effect of keeping that interest in him, or of giving us the right to revive it after it had ceased to exist, so that it never passed to McNaught, or, if it passed, it re-vested in us as execution creditors of McKinnon, upon our taking out a special free miner's certificate five days after the lapsing of his certificate. That contention cannot prevail, in my opinion.

Sertion 4 of the Act of 1899 enacts that any one who allows his free miner's certificate to expire may, under certain conditions, obtain a special free miner's certificate which will have the effect of reviving his title to all mineral claims which he previously owned, either wholly or in part, *except such as, under the provisions of the Mineral Act, had become the property of some other person at the time of the issue of such special certificate.*

Now, I entirely fail to see why the exception in that clause does not cover McNaught's case. Whenever any one else but the Crown (for if it applied to the Crown the enactment would be nugatory, a special certificate could never be issued), has by the operation of the statute become the owner of the title, the first

owner has no right to a special certificate and to a revival of his lost ownership. That is what the statute unequivocally says. Now, here, McNaught had, by the operation of the statute, become the owner of McKinnon's interest; consequently, the execution creditors had no more right to a special free miner's certificate than McKinnon himself would have had. They had the right to seize it at the time they did, but that right was a defeasible one, as their debtor's was. Their seizure could not give it more vitality than it had in their debtor's hands nor prolong its duration beyond the period affixed to it by the statute. He could not have given a non-defeasible lien; and the appellants, likewise, cannot have secured a non-defeasible lien by their seizure. Had they renewed the certificate on or before the thirty-first of May, assuming their right to do so, McNaught would have had no right to McKinnon's interest. But they did not do so, and that is not the case before us.

The words "wholly or in part" in section four of the Act of 1899, whatever construction they are susceptible of, cannot be read as defeating the clear, unambiguous enactment of section nine, that, when a co-owner's interest lapses by his failure to keep up his certificate on the thirty-first day of May of each year, his interest is not forfeited to the Crown, nor to be considered as abandoned, but that it shall, *ipso facto*, be and become vested in his co-owners.

The appellants in one branch of their arguments at bar did not seem to controvert the proposition that McKinnon's interest passed to McNaught, but they argued that this interest was then subject to their execution as a lien upon it. That is the same question over again. McKinnon's whole interest came to an end by the operation of the statute on the thirty-first of May. The eventuality provided for by the statute

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upon which his interest passed to McNaught having happened, the appellants who dad seized that interest, knowing then of this possible eventuality, had seized it subject to it. If the sheriff had sold, had it been possible, before the thirty-first of May, would not the purchaser's share, had he failed, as McKinnon did, to renew on the thirty-first of May, have passed to McNaught? Clearly so, it seems to me. Now why? Because the sheriff had sold a defeasible right. Then, how can it be argued that he had seized anything else than a defeasible right?

SEDGEWICK J. (dissenting).—I regret to have to differ from my brothers in this case. In my view the obvious, as often happens, has been overlooked and, as a consequence, the vested interests of the judgment creditors have, by an erroneous interpretation of the Mineral Act and the Execution Acts of British Columbia, been confiscated and transferred to the respondents who have paid nothing for them and who have no more right to them than I have.

I admit that under the Mineral Act no one but a free miner can take or hold an interest in a mineral claim, but I contend that under the Execution Act, a judgment creditor having levied and seized through the instrumentality of a sheriff under execution against the interest of a judgment debtor, (being then a free-miner,) in a mineral claim that creates an interest or ownership in a mineral claim which is not forfeited or destroyed or transferred to co-owners of other interests upon the subsequent loss of the judgment debtor's status by reason of his default in not renewing his free-miners' certificate.

Section nine of the Mineral Act, so far as it relates to this case is as follows:

9. Subject to the proviso hereinafter stated, no person or joint stock company shall be recognized as having any right or interest in or

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to any mineral claim, or any minerals therein, or in or to any water-right, mining ditch, drain, tunnel or flume, unless he or it shall have a free-miner's certificate unexpired. And, on the expiration of a free-miner's certificate, the owner thereof shall absolutely forfeit all his rights or interests in or to any mineral claim, and all or any minerals therein, and in or to any and every water-right, mining ditch, drain, tunnel or flume which may be held or claimed by such owner of such expired free-miner's certificate, unless such owner shall on or before the day following the expiration of such certificate, obtain a new free-miner's certificate;

Provided, nevertheless, should any co-owner fail to keep up his free miner's certificate, such failure shall not cause a forfeiture or act as an abandonment of the claim, but the interest of the co-owner who shall fail to keep up his free miner's certificate, shall, *ipso facto*, be and become vested in his co-owners *pro rata*, according to their former interests;

Provided, nevertheless, that a shareholder in a joint stock company need not be a free miner, and, though not a free miner, shall be entitled to buy, sell, hold or dispose of any shares therein;

And provided, also, that this section shall not apply to minera claims for which the Crown grant has been issued.

And section 12 of the Mineral Act is as follows:

12. Any interest which a free miner has in a mineral claim before the issue of a Crown grant therefor, or in any mining property as defined in the Mineral Act, and any placer claim and mining property, as defined in the Placer Mining Act, may be seized and sold by the sheriff, under and by virtue of an execution against goods and chattels.

The Mineral Act does not give a definition of the word "owner" as many English Acts do, but it provides that the words "mineral claim" shall mean the "personal right of property or interest in any mine."

It does not appear difficult to me to place a reasonable and proper construction upon clause nine of the Mineral Act. It provides for two classes of cases. First, where a free miner having a sole and absolute interest in a mineral claim, no other person, partnership, or company having any title to or any incumbrance, charge or lien on, or other interest in it or any part thereof, allows his certificate to lapse. In that case, his absolute and undivided interest (or owner-

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ship, if you will), is forfeited to the Crown and the area, which theretofore formed the mineral claim, becomes again vacant land of the Crown. And, secondly, inasmuch as the Crown is not solicitous of co-ownership or co-tenancy or co-partnership or co-interests with any of His Majesty's denizens or subjects in a mineral claim, inasmuch as such joint interests might in many possible and even probable cases lead to conflict and litigation between the Sovereign and his people, it was provided that

> should any co-owner fail to keep up his free miner's certificate, such failure shall not cause a forfeiture or act as an abandonment of the claim, but the interest of the co-owner who shall fail to keep up his free miner's certificate, shall *ipso facto* be and become vested in his co-owners *pro ratâ* according to their former interests.

Now what, upon his loss of status—his ceasing to be a free miner—becomes vested in his co-owners? Only the *interest* in the claim which at the time of his loss of status he had—no more, no less.

What was that interest?

He had, previously, at the time of the levy and seizure by the sheriff before referred to, the part interest in the respective mineral claims as set out in the pleadings and evidence. That was the interest which, under section 12 of the Execution Act, the sheriff, by virtue of an execution issued against the goods and chattels of the judgment debtor—then the holder of the interests mentioned—seized and had a right in due course to sell.

(It was on the 29th of March, 1901, that the seizure was made, and on the 31st of May following the judgment debtor's free miner's license expired.)

The effect of the sheriff's seizure was to diminish the interest of the judgment debtor or to charge that interest with the amount of the judgments together with subsequent costs and expenses. The interest of

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the judgment debtor became charged with these sums and if, after this but before his loss of status, he had voluntarily sold his interest, as he might have done, to a free miner, the purchaser could only take subject to the satisfaction of the judgment creditors' claims. So that the value of the judgment debtor's interest, after the seizure, was its value before the seizure minus these claims. And I submit that it was that lesser and diminished interest alone which under the ninth section of the statute passed to the co-owners *pro ratâ* in proportion to their former interests.

Then to whom does the defaulting co-owner's, (the judgment debtor's), interest go? I answer—To all co-owners of any interests in the claim. They may be absolute transferees or mortgagees or holders of any lien or charge on the lapsed interest of the disenfranchised free-miner. They each are owners of his former interest *pro ratâ* according to their former interests, and the judgment creditors will participate accordingly.

It was admitted at the argument that if, before the seizure, McKinnon had absolutely transferred his interest to a free-miner, it made no difference to the latter whether he, McKinnon, renewed or did not renew his certificate. It could I think be admitted, too, that had the sheriff sold to a free-miner before McKinnon lost his status the purchaser would take. Any other contention would be absurd. I, a free-miner, buy from the sheriff or a free-miner the latter's interest in a mineral claim. Am I, in order to hold my claim, obliged to see that the man whose interest I bought continued to be a free-miner for ever?

But it is said that McKinnon did not tranfer to anybody. I think he did. In this respect there is no difference between a voluntary and an involuntary alienation. His submitting to a judgment and execu-

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tion against him and to the sheriff seizing his interest is equivalent to a voluntary charging or hypothecation by him and, as the Execution Act authorises the sheriff to seize and sell his interest, it is just as if he had sold his interest to the sheriff and the sheriff, though not a free-miner, had sold it to one who was.

To conclude, I affirm that no interest which the holder of a mineral claim has, whether voluntarily or involuntarily parted with to another—entitled to receive it—can be deemed or considered, under section nine of the Mineral Act, as other than the interest of that other and, therefore, cannot be confiscated upon the transferee's loss of his status as a free-miner. Sections 32, 34, 43 and 50 of the Mineral Act all throw light on the questions I have here discussed.

Appeal dismissed with costs.

Solicitors for the appellants, The Harvey Van Norman Co.: *Tupper, Peters & Gilmour.*

Solicitors for the appellants, Balfour & Co.: *Elliott & Lennie.*

Solicitors for the respondent: *Taylor & O'Shea.*

JOSEPH OPPENHEIMER (DEFENDANT BY COUNTERCLAIM)..... } APPELLANT;

AND

THE BRACKMAN & KER MILLING COMPANY, LIMITED (PLAINTIFFS BY COUNTERCLAIM)..... } RESPONDENTS.

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*Oct. 29, 30, 31.
*Nov. 17.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Appeal—Special leave—R. S. C. c. 135, s. 42—"Judge of court appealed from"—Construction of statute—Correspondence—Sale of goods—Condition as to acceptance—Post letter—Time limit—Term for delivery—Breach of contract—Damages—Counterclaim—Condition precedent—Right of action.

A judge of the Supreme Court of British Columbia may grant special leave for an appeal to the Supreme Court of Canada although he did not sit as a member constituting the full court which rendered the judgment appealed from.

The appellant, O., wrote a letter, dated 2nd October, 1899, offering to supply the company with thirty-seven car loads of hay at prices mentioned "subject to acceptance in five days, delivery within six months." On 5th Oct. the company wrote and mailed a letter in reply, as follows:—"We would now inform you that we will accept your offer on timothy hay as per your letter to us of the 2nd instant. Please ship as soon as possible the orders you already have in hand and also get off the seven cars as early as possible as our stock is very low. Try and ship us three or four cars so as to catch the next freight here from Northport. We will advise you further as to shipment of the thirty cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in. Do the best you can to get some empty cars at once, as we must have three or four cars by next freight."—This letter was registered and, although it reached O.'s post office within the five days, yet by reason of the registration it was not received by him until the

* PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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following day. On 12th Oct. O.'s agent wrote the company acknowledging the letter and saying that acceptance of the offer arrived too late and that therefore the hay could not be furnished. On 6th Nov. the company replied insisting on delivery of the hay as contracted for by the 15th of that month, and notifying O. that, in case of default, they would replace the order charging him with any extra cost and expenses.

Prior to the expiration of the six months mentioned in O.'s letter, the company, in defence to an action by him against them, counterclaimed for damages for his alleged breach of contract for delivery of the thirty-seven car loads of hay.

Held, that the correspondence did not constitute a binding contract as the parties were never *ad idem* as to all the terms proposed.

Held further, that as the six months limited for making delivery had not expired the company had no right of action for damages, even had there been a contract, and that the filing of the counterclaim was premature.

APPEALS from the judgment of the Supreme Court of British Columbia, pronounced on the 20th of September, 1900, reversing and setting aside the judgment of Martin J. at the trial, on the 18th of April, 1900, and directing a new trial, and the judgment of the said Supreme Court, on the 2nd of May, 1902, affirming the judgment of Irving J. on the new trial, which had ordered judgment to be entered on the verdict of the jury in favour of the plaintiffs by counterclaim for $1270 and costs. Both judgments appealed from were upon the respondents' counterclaim filed in defence to the action brought by the appellant.

The circumstances under which the present litigation arose are stated in the headnote and judgments now reported. The appellant and respondents had prior transactions and, at the time of the alleged breach of contract, respondents were owing appellant $997, for which amount the appellant sued on 21st November, 1899, claiming $1025.14. Respondents, while admitting

receipt of the hay for which the debt was claimed, (on the 19th of December, 1899,) counterclaimed for a small item for shortages and also for damages for the alleged breach of contract by the appellant and the contest on the present appeal was as to this claim for damages solely.

At the first trial Martin J., sitting without a jury, dismissed the counterclaim on the ground that the correspondence did not constitute a valid contract. An appeal from this judgment to the full court was allowed on 30th May, 1900, and the case was referred back for the trial of points not disposed of by the first judgment, the minutes of this judgment, on appeal, being finally settled on the 20th of September, 1900. On the 7th of May, 1902, the appellant, defendant by counterclaim, gave notice of appeal to the Supreme Court of Canada, and, on his application, Mr. Justice Drake, one of the judges of the Supreme Court of British Columbia (but who had not sat as a member of the full court which heard and decided the above mentioned appeal), on the 23rd August, 1902, granted an order that the appellant should have leave to take the appeal to the Supreme Court of Canada notwithstanding that time limited by the statute for doing so had expired.

The new trial took place before Irving J. and a special jury, and resulted in a judgment being entered for the company on their counterclaim for $1,270 and costs. An appeal from this latter judgment was argued in the full court in May, 1901, before McColl C.J. and Irving and Martin JJ. when judgment was reserved and subsequently, the Chief Justice having died in the meantime, and having, before his death handed down a judgment holding that there never was any contract between the parties, the formal judgment of the full court was settled before Martin and Walkem JJ. directing that the judgment at the

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trial should be affirmed and the appeal was dismissed with costs, Walkem J. dissenting. It was urged on the present appeal that the surviving judges disagreed as to what had been decided on the first appeal, the respondents contending that the question of contract had then been determined and was, consequently, not open for argument on the second appeal, and the appellant insisting that the question of rejected evidence was the only point then disposed of.

From the latter judgment the appellant now also appeals.

A MOTION to quash the appeal from the first judgment for want of jurisdiction was made, on behalf of the respondents, on 29th October, 1902, on the following grounds, viz.:

(*a.*) That the judgment was entered on 20th September, 1900, and special leave to appeal was obtained from Drake J. on 8th August, 1902, and not from "the court proposed to be appealed from or a judge thereof."

(*b.*) That the court appealed from is the full court as constituted for the hearing of the appeal, viz., Walkem and Irving JJ., the late Chief Justice having died in January, 1902, and only these judges sat on the appeal.

S. S. Taylor K.C. for the motion. The judges of the Supreme Court of British Columbia by the act of "sitting together" constitute a full court, but when not "sitting together" any one of their number is not of that full court. Hence no leave as required by section 42 of the Supreme and Exchequer Courts Act has been obtained. See section 42 of the Supreme and Exchequer Courts Act and also R. S. B. C., ch. 56, sec. 72.

Notice of appeal was not given after the leave was granted, nor was security deposited thereafter, but the notice was given three months prior to leave given, and the security was deposited prior to the order.

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The order of Drake J. is a ratification of an act of the appellant done without authority. Therefore there is no appeal before this court, or in the alternative the court has no jurisdiction to hear the appeal as entered.

Aylesworth K.C. contra.

The judgment of the court upon the motion to quash was delivered by:

Taschereau J.

TASCHEREAU J.—The respondent moved to quash this appeal upon the ground that it was allowed, under section forty-two of "The Supreme Court Act," by a judge who was not a judge of the court appealed from. There is nothing in this objection. Mr. Justice Drake who granted leave is a member of the Supreme Court of British Columbia and had the right to do so as such under the said section, though he did not form part of the court which gave the judgment appealed from. Motion dismissed with costs.

The appeals were then heard upon the merits.

Aylesworth K.C. and *Lennie* for the appellant. There was no acceptance to correspond with the offer; the parties were never *ad idem* as to terms; they never "struck hands." *Oriental Inland Steam Navigation Company* v. *Briggs* (1); *Cole* v. *Sumner* (2); *Magann* v. *Auger* (3); *Skillings* v. *Royal Insurance Company* (4); *Falck* v. *Williams* (5). See also Benjamin on Sales (7 ed.) p. 48.

The evidence shews the intention that acceptance of the offer, as made, was to be communicated to the appellant at Chewelah within the five days mentioned and that this was not done. *Carlill* v. *Carbolic Smoke Ball Co.* (6) *per* Bowen L. J. at page 269; *Household*

(1) 4 DeG. F. & J. 191.
(2) 30 Can. S. C. R. 379.
(3) 31 Can. S. C. R. 186.
(4) 4 Ont. L. R. 123.
(5) [1900] A. C. 176.
(6) [1893] 1 Q. B. 256.

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Fire and Carriage Accident Insurance Co. v. *Grant* (1); *Henthorn* v. *Fraser* (2).

As there is no proof that the conditions precedent to an action for damages had been complied with and as the time for delivery, six months at least, had not expired the respondents had no right to counterclaim; their demand for damages was premature; *Marshall* v. *Jamieson* (3); *Dalrymple* v. *Scott* (4); *Morton* v. *Lamb* (5); *Michael* v. *Hart & Co.* (6).

S. S. Taylor K.C. for the respondents. The respondent's letter of 5th Oct., 1899, was an absolute and unconditional acceptance of the offer as made. The suggestions made as matters of mutual convenience in regard to deliveries do not amount to variations of the material terms of the proposed contract. See *Bank of New Zealand* v. *Simpson* (7) *per* Davey L. J at pages 188-189.

The letter of acceptance was mailed in time and the mailing is equivalent to delivering of notice of acceptance within the five days. It is proved that the letter reached Chewelah in ample time for delivery within the time limited, although it was not called for at the Post Office till the day after the five days had expired. *Brogden* v. *Metropolitan Railway Co.* (8) *per* Blackburn L. J. at page 691; *Magann* v. *Auger* (9); *Marshall* v. *Jamieson* (3); Anson on Contracts (7 ed.) 291.

The breach of the contract has been proved and found by the jury, the right of action for damages had accrued before the appellant brought his action and the respondents, consequently, were entitled to the counterclaim.

(1) 4 Ex. D. 216.
(2) [1892] 2 Ch. 27.
(3) 42 U. C. Q. B. 115.
(4) 19 Ont. App. R. 477.
(5) 7 T. R. 125.
(6) [1902] 1 K. B. 482.
(7) [1900] A. C. 182.
(8) 2 App. Cas. 666.
(9) 31 Can. S. C. R. 186.

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TASCHEREAU J. — I am inclined to the opinion expressed by Mr. Justice Sedgewick that there was no contract between the parties in this case. However, assuming that there was a contract, I am of opinion, for the reasons given by the learned judge, that this cross-action or counterclaim was premature. The appeal should be allowed with costs, and the counterclaim dismissed with costs.

SEDGEWICK J.—The respondents are wholesale grain dealers carrying on business in British Columbia. Their head office is at Victoria, but they have a branch at Nelson. Frank B. Gibbs is their local manager.

The appellant, Oppenheimer, had sued the respondents for hay sold and has recovered the amount claimed. In the action, however, the respondents set up this counterclaim and it is the judgment of the trial judge upon that counterclaim that is now before us.

The appellant is a grain dealer and carries on business at Chewelah, State of Washington, U.S.A.

On the 2nd of October, 1899, Gibbs, the respondents' local manager, was on a purchasing trip for his firm and on that day called upon Oppenheimer, who, after some conversation, wrote and handed Gibbs at his request and in his presence at Chewelah, Washington, the following letter:

CHEWELAH, Wash., Oct. 2, 1899.

MESSRS. BRACKMAN & KER MILLING CO.,
Nelson, B.C.

GENTLEMEN,—I can offer you 30 cars of timothy hay at $10.50 per ton on cars at Chewelah *subject to acceptance in five days, delivery within six months.*

Yours respectfully,
J. OPPENHEIMER.

P.S.—I also agree to furnish seven cars of timothy hay at $10 per ton if above offer for 30 cars is accepted. J. O.

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On the 5th of October, 1899, Gibbs wrote and posted a letter to Oppenheimer as follows:

NELSON, B.C., Oct. 5, 1899.

MR. J. OPPENHEIMER,
Chewelah, Wash.

DEAR SIR,—We would now inform you that we will accept your offer on timothy hay as per your letter to us of the 2nd inst.

Please ship as soon as possible the orders you already have in hand and also get off the seven cars as early as possible as our stock is very low.

Try and ship us three or four cars so as to catch the next freight here from Northport.

We will advise you further as to shipment of the 30 cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in.

Do the best you can to get some empty cars at once, as we must have three or four cars by next freight.

Yours faithfully,
THE BRACKMAN & KER MILLING CO.,
Limited, Nelson, B.C.

FRANK R. GIBBS, Local Manager.

This letter was registered at Nelson, and by reason of the registration was not received by Oppenheimer within the five days mentioned in the offer. Had it not been registered Oppenheimer would have received it in the ordinary course of post within the five days. As a fact it was not received until the following day.

On the 12th of October, 1899, Oppenheimer's brother wrote the following letter:

CHEWELAH, Wash., Oct. 12, 1899.

BRACKMAN & KER MILLING CO.,
Nelson, B.C.

GENTLEMEN,—Received your letter, but regret to inform you that your acceptance of my offer on hay arrived too late and therefore not able to furnish you the hay.

Yours, very truly,
J. OPPENHEIMER.

which the appellant confirmed upon his return from Spokane on the 17th of October, 1899.

Gibbs thereupon forwarded these letters to his head office, and in reply received a letter which he was diretced to and did deliver to Oppenheimer, at Chewelah, on the 10th November, 1899. This letter was written by the respondents' manager at Victoria, and is as follows:

VICTORIA, B.C., November 6, 1899.

MR. J. OPPENHEIMER,
Chewelah, Wash.

DEAR SIR,—We have been handed by our Nelson branch correspondence which has taken place with you over the question of thirty carloads of hay.

On this day an option was given by you for a certain length of time at a stipulated price. Two days before the option expired a registered letter of acceptance was forwarded to you and which reached your post office in ample time for you to have taken delivery of the same.

On the day on which the option expired you, however, through no fault of ours, failed to sign for the same till the following day, and in consequence now wish to get out of your bargain on this paltry excuse.

We, however, feel satisfied that no court of law would sustain your contention for one moment. We therefore beg to advise you that if the delivery of the hay as contracted for by us does not commence by the fifteen of the month, that we shall commence replacing the order charging you up with whatever expense we may be put to in the premises.

THE BRACKMAN & KER MILLING CO., LTD.,
D. R. KER, *R. General Manager.*

It is alleged that Oppenheimer refused to comply with the terms of this letter but it cannot be disputed that in compliance with the requests contained therein Oppenheimer did load a car of hay No. 11,816 at the station at Chewelah, and on the 20th of November notified the respondents that he had done so.

The respondents did not even inquire whether any attempt had been made to comply with this letter for some days when they ascertained that it was loaded as stated. After it had remained at the station several days the appellant was required by the railway officials to take it away. At this time the respond-

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ents were owing Oppenheimer for hay previously shipped a sum in the neighbourhood of $1,000.

Before the six months limited by the offer within which the hay was to be delivered had expired, viz., on the 19th December, 1899, this counterclaim was set up in an action by the appellant against the respondents for the price of hay previously delivered.

I am of opinion that the two appeals before us should be allowed, and that upon two grounds. First, that there was not an absolute, unconditional, unequivocal acceptance of the offer contained in the appellant's letter of October 2nd, 1899, and therefore there was no *concensus* between the parties. In *Cole* v. *Sumner* (1) this court dealt with the point, and it is not necessary here to further discuss the law upon the question of what is necessary to constitute a valid acceptance of a proposal in order to complete a contract. The offer of October 2nd, if accepted absolutely, would give the appellant six months within which to deliver the goods at Chewelah, and I have no doubt but that the seven cars mentioned in the postcript were to be added to the thirty, and that the only difference between them and the thirty was as to price and not as to delivery. Now it seems very clear to me that there was no such acceptance by the respondents as the law requires by respondents' letter of the 5th October, above set out. Had the first clause of that letter constituted the whole of the letter even then it would be open to criticism, inasmuch as acceptance must be a present acceptance. There was none, however; the words are, "we will accept your offer," not "we accept your offer." This is perhaps very technical and I do not base my opinion upon it nor do I think that the second clause of the letter, was an acceptance as it indicated perhaps a wrong idea of the offer

(1) 30 Can. S. C. R. 379.

of October 2nd, namely, that the appellant was under an obligation to deliver the seven cars according to their wishes and orders, although the appellant had six months under the offer to deliver thirty-seven cars. In other words, that the delivery within the six months was to be from time to time at the option and upon the request of the respondents. If that were so there was never a *concensus* between the parties as to the exact meaning and true construction of the respondents' letter, and therefore there was no contract at all. Here, again, however, I do not place much reliance upon that view. The fourth clause creates the qualification which takes away from the acceptance its validity. I repeat:

> We will advise you further as to shipment of the thirty cars. Should we not be able to take it all in before your roads break up we presume you will have no objection to allowing balance to remain over until farmers can haul it in.

The first sentence here shows conclusively as well as the second clause of the letter that the respondents were under the impression that they had the right to determine at what particular dates the cars contracted for should be shipped, although the offer does not refer to the shipment at all but only to delivery on cars at Chewelah. There is here a clear indication that the parties were not *ad idem* in this regard. But the next clause "should we not, etc.," most unequivocally qualifies the general acceptance contained in the first clause of the letter and shows, I think, that the acceptance referred only to the hay, its price, its delivery on cars and its acceptance in five days, but did not refer to its delivery within six months. But whether this be so or not the qualification is not a mere suggestion or inquiry, it is not a precatory phrase expressing a hope or wish but a new term or stipulation. The respondents evidently knew that

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the roads in the vicinity of Chewelah would break up before the six months expired, namely, April 2nd, 1900. It is also evident that their storage room at Nelson was limited, for the letter says so, and to guard against such contingency they stipulated for a longer period of delivery. They in effect say

> in accepting your offer whereby you agree to deliver the hay within six months, the circumstances may not enable us to pay for it on delivery and we therefore presume that you will refrain from delivering the hay and calling upon us for payment until after the six months and until the farmers can haul the hay in.

It was submitted at the argument that the phrase "we presume" is equivalent to such words as the following:

(*a*) Unless we hear from you to the contrary it is to be agreed; or
(*b*) We take it for granted; or
(*c*) We assume; or
(*d*) We impress upon you the necessity of its being a term; or
(*e*) Our acceptance is given upon the assumption that

Upon these grounds, therefore, I have concluded that the correspondence here in view created no contract between the parties.

Among other contentions of the appellant is the one "that the contract was not rescinded." That "the respondents did not act on, nor assent to and adopt the appellants refusal, but elected to treat it as inoperative and thus kept the contract alive for the benefit of both parties, and thereby became precluded from maintaining any action thereon until the six months had elapsed." Or, in other words, that the counterclaim was premature.

It is not necessary from my point of view to argue this point fully, although I thoroughly concur in that view of the case. There is no doubt, as Sir William Anson says in his book on contracts, 5th ed. p. 298,

> that parties to a contract which is wholly executory have a right to something more than a performance of the contract [when the time

arrives. They have a right to the maintenance of the contractual relation up to that time, as well as to a performance of the contract when due.

But he goes on to state that there are two limitations to this rule—the one affecting this case is:

That if the promisee will not accept the renunciation and continues to insist on the performance of the promise, the contract remains in existence for the benefit and at the risk of both parties, and if anything occur to discharge it from other causes, the promisor may take advantage of such discharge.

That is the case here. The appellant made an offer and for this purpose we will assume the respondents unconditionally accepted it so that there was a binding contract. Almost immediately after its formation the appellant informed the respondents that he would not carry it out. That would of itself give a right to the respondents immediately to bring an action of damages upon that contract. But they refused to accept the appellant's renunciation and continued, as the correspondence above set out clearly indicates, and as the evidence in the case fully corroborates, to insist on the appellant performing his contract and even more than his contract. They having treated the contract as subsisting, notwithstanding the refusal of the appellant to carry it out, their right of action is gone and they can only sue upon it after breach by non-performance of its terms. See cases of *Avery* v. *Bowden* (1), and *Roper* v. *Johnson* (2).

It is not necessary to deal with any other points taken by the appellant. I may add that we are all agreed that this court has jurisdiction in the present case. The point of jurisdiction taken by respondents' counsel was settled at the argument in the appellant's favour.

The appeals will be allowed with costs, the judgment of the first trial judge restored and the appellant will be entitled to all his costs in the courts below.

(1) 6 E. & B. 953.

(2) L. R. 8 C. P. 167 at p. 179.

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GIROUARD J.—I agree that the appeal should be allowed with costs, but only upon the ground that the action is premature.

DAVIES J.—I concur in the judgment allowing this appeal on the ground that the counter-claim was prematurely made.

I have read the judgment prepared by my brother Sedgewick and concur in his reasoning on this point. I express no opinion as to whether or not there was a binding contract made between the parties for the delivery of the hay.

MILLS J.—This is a suit to recover damages for the violation o a contract. The trial judge in the first instance held that there was no contract, and dismissed the action. A second suit was brought, and the judge who heard the case held that there was a contract, and the jury gave damages against the defendant for the sum of $1,270 and costs. The case was then taken to the Supreme Court of British Columbia, in which judgment was entered for the plaintiff company. The Chief Justice of the Supreme Court of British Columbia agreed with Justice Martin in holding that there was no contract, but the majority of the Court were of opinion that the judgment should be in favour of the plaintiff—holding that there was a contract. The correspondence which was held to constitute a contract reads as follows:—

CHEWELAH, WASH., 2nd October, 1899.

Messrs. BRACKMAN & KER MILLING CO.,
Nelson, B.C.

GENTLEMEN,—I can offer you thirty cars of timothy hay at $10.50 per ton on cars at Chewelah, subject to acceptance in five days, delivery within six months.

Yours respectfully,
J. OPPENHEIMER.

P.S.—I also agree to furnish seven cars of timothy hay at $10 per ton if the above thirty cars are accepted. J.O.

This communication was delivered to Mr. Gibbs, who was the agent of the Milling Co., and its local manager at Nelson. To this offer the following reply was sent :—

NELSON, B.C., 5th Oct., 1899.

Mr. J. OPPENHEIMER,
Chewelah, Wash.

DEAR SIR,—We would now inform you that we will accept your offer on timothy hay as per your letter to us of the 2nd inst.

Please ship us as soon as possible the orders you already have in hand, and also get off the seven cars at $10 as early as possible, as our stock is very low.

Try and ship us three or four cars so as to catch the next freight here from Northport.

We will advise you further as to shipment of the thirty cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing the balance to remain over until the farmers can haul it in.

Do the best you can to get some empty cars at once, as we must have three or four by next freight.

Yours truly,
BRACKMAN & KER MILLING CO.

It is maintained on behalf of the plaintiff that this is not an unconditional acceptance. On the 12th of October, Mr. Oppenheimer being away from home, his brother acknowledged the receipt of the letter of 5th of October, as follows :—

GENTLEMEN,—Received your letter, but regret to inform you that your acceptance of my offer on hay arrived too late, and therefore not able to furnish you the hay.

Yours very truly,
J. OPPENHEIMER.

And Mr. Oppenheimer on his return to Chewelah sent to the Milling Company the following letter :—

CHEWELAH, Wash. 17th October, 1899.

BRACKMAN & KER MILLING CO.,
Nelson, B.C.

GENTLEMEN,—I have just returned from the fruit fair, and in looking over things, find your correspondence concerning hay. My brother has already replied to your letter and which reply I have

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again to confirm. I would also say this, that aside from your acceptance for hay reaching me after five days have expired, your house has not treated me fair in this hay proposition, for your Mr. Gibbs as soon as he left my store had employed some farmers in town to buy up the hay which he seemingly had intended to buy from me, and he also went to Addy and done the same thing when I requested him not to do so. While I would not otherwise take advantage of it when your acceptance reached here too late, I am compelled likewise to take advantage of now rejecting the low offer I had made you on hay. Should you be inclined to buy any hay from me it will have to be an entirely new deal, and in which now I would not be able to give you the same deal as before. Kindly acknowledge receipt of three last cars.

Yours truly,
J. OPPENHEIMER.

Mr. Oppenheimer assumed that because the letter sent by the Milling Company had not been received by him within the five days mentioned in his offer there was no contract, but the letter was written and deposited in the post office to his address before the five days had expired. I am of opinion that the law as settled in the case of *Henthorn* v. *Fraser* (1) determines this point against him. There Henthorn, who lived at Birkenhead, called at the office of a Land Society in Liverpool to negotiate a purchase of some houses belonging to them. They gave him an option of purchase for fourteen days at £750. On the following day the secretary posted a withdrawal of the offer to Henthorn between 12 and 1 o'clock which reached Birkenhead after 5 p.m. Henthorn at 3.50 p.m. posted to the secretary ot the society an unconditional acceptance of the offer. This was not received till after the office was closed that day, and was opened by the secretary the following morning. The court held that although the offer was not made by post that as the parties lived in different towns, an acceptance by post must have been within their contemplation; that the

(1) [1892] 2 Ch. 27.

acceptance was completed as soon as it was posted; but that the revocation of an offer is of no effect until it is brought to the mind of the person to whom the offer is made. Here the letter accepting the offer was written after the letter of withdrawal was posted, but it was not received until the other was put in the post office, and so did not prevent its operating to complete the contract. I take it that if the Milling Company's letter had been an unqualified acceptance it was mailed in sufficient time, and that the receipt of it by the appellant after the time he mentioned, within which acceptance was to be made had expired, was still an acceptance within the time limited.

In reply to the appellant's letter the Milling Company said:

VICTORIA, B.C., November 6th, 1899.

MR. J. OPPENHEIMER,

Chewelah, Wash.,

DEAR SIR,—We have been handed by our Nelson branch correspondence which has taken place with you over the question of thirty car loads of hay.

On this hay an option was given by you for a certain length of time at a stipulated price.

Two days before the option expired, a registered letter of acceptance was forwarded to you and which reached your post office in ample time for you to have taken delivery of the same.

On the day on which the option expired you, however, through no fault of ours, failed to sign for the same till the following day, and in consequence now wish to get out of your bargain on this paltry excuse.

We, however, feel satisfied that no course (court) of law would sustain your contention for one moment. * * * We therefore beg to advise you that if the delivery of the hay as contracted for by us does not commence by the 15th of the month, that we shall commence replacing the order, charging you up, with whatever extra expense we may be put to in the premises.

Yours truly,

THE BRACKMAN & KER MILLING CO.

After the receipt of this letter, Mr. Oppenheimer seemed to have wavered in the course which he had

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determined on, and began supplying hay in conformity with his contract, although it had, if valid, nearly five months to run, and through his solicitors at Nelson he addressed to the Brackman & Ker Milling Co., on the 20th of November, 1899, the following letter:

DEAR SIRS,—We beg to advise you on behalf of Mr. J. Oppenheimer, of Chewelah, that car G. N. No. 11816 is now loaded and awaiting your acceptance at Chewelah, and has been loaded for you since the 14th inst. Mr. Oppenheimer is ready to deliver the same on payment of the price as agreed upon.

We shall expect payment of the present account against you at once, viz.: $997, otherwise shall enter suit for the full amount due. Several small items for freight have been deducted by you which should be borne by yourselves instead of Mr. Oppenheimer. Unless acceptance of the above mentioned car be made at once and the price paid, Mr. Oppenheimer will consider the contract off.

Yours truly,
ELLIOTT & LENNIE.

The proposal of Oppenheimer in his offer of the 2nd of October was to deliver hay on board the cars at Chewelah. It is there that the delivery must take place. It is upon delivery there that inspection and payment are to be made. It is certain that a car was loaded at Chewelah in November; that the Milling Company were notified; that they took no notice of the communication, and after the car had been standing upon the track for some days, and after the railway company notified Oppenheimer that it would charge demurrage, the car was sent in another direction, to another purchaser. It can scarcely be doubted that the Milling Company by their conduct had relieved Oppenheimer from his contract, if a contract existed. Their conduct was quite at variance with the terms stated in his offer.

But when we examine the communications with care which passed between the parties, I think it is obvious that there was not such an unconditional acceptance by the Milling Company of the appellant's

offer as to constitute a contract between them; they say

> we would now inform you that we will accept your offer on timothy hay as per your letter to us of the 2nd instant.

Had this been the whole of the communication, I would have regarded it as an unconditional acceptance of the offer. But the letter contains more than this. The second and third paragraphs relate to the purchase of seven cars of timothy hay, which are referred to in the postscript to the appellant's offer, and invite further negotiation with a view to the limitation and qualification of the offer. He proposes if his offer of thirty car loads of timothy hay at $10.50 a ton, to be delivered in six months at Chewelah is accepted, he will furnish seven car loads at $10 a ton. These seven car loads the company ask to have sent as soon as possible. They ask that three or four of them shall be forwarded so as to catch the first freight from Northport. They write:

> Do the best you can to get some empty cars, as we must have three or four cars by next freight.

By the terms of the proposal it was the company's business to accept the delivery of the hay at Chewelah free on board the cars. There was nothing said in respect to the time when the seven car loads, at the cheaper rate, were to be delivered.

With regard to the shipment of the thirty car loads the offer was to deliver within six months. It might be delivered at any time within that period that might suit the convenience of the appellant. It cannot be said that there was an unqualified acceptance of the offer as to these thirty car loads of hay. The Milling Company say: "We will advise you further as to the shipment of the thirty cars." They assume that the convenience of the Milling Company rather than that of the vendor is to be consulted. But this is no part of the offer. If they accept it, they must be ready

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to take the hay at Chewelah whenever loaded on the cars within the six months. But this is not what they say in their acceptance. They say: "Should we not be able to take it all before your roads break up you will have no objection to allow the balance to remain." This is a proposal to modify the offer which had been made; it is but a qualified, not an absolute acceptance. It is a proposal to modify the offer of the appellant, and to restrain that freedom within the period of six months which, by his offer, he had reserved to himself. I do not think that the correspondence formed a binding contract between the parties I do not think they were of one mind as to the place of delivery nor as to the time, although both were stated in Oppenheimer's offer. I hold, therefore, that there was not any contract between them with respect to this sale and purchase of hay which either party could invoke the authority of the Court to enforce on his behalf. In my opinion the judgment of the Court should be reversed with costs as to the counterclaim. Whether the suit, had there been a contract, was prematurely brought or not I need not consider. Had there been a valid contract it would have been necessary to determine that point; but, in my opinion, there was not. In *Leigh* v. *Paterson* (1) the defendant had agreed to sell to the plaintiff a certain quantity of tallow to be delivered in December. On the 1st of October the defendant notified the plaintiff that the goods were sold to another, and that he would not execute the contract. The market price was then 71s. per cwt. On the 31st of December it was 81s. per cwt. It was held the price which was to regulate the plaintiff's damages was the price on the 31st of December. Here, there never was an unreserved acceptance of

(1) 8 Taunt. 540.

the offer. The subject is fully discussed in *Hochster* v. *De La Tour* (1), where all the authorities are cited.

Appeal allowed with costs.

Solicitors for the appellant: *Elliot & Lennie.*

Solicitors for the respondents: *Taylor & O'Shea.*

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ADAMS & BURNS *v.* THE BANK OF MONTREAL.

1900

*May 18, 19, 21.

1901

*Feb. 19.

Debtor and creditor—Preference—Collusion—Pressure—R. S. B. C. (1897) *cc.* 86, 87—*Statute of Elizabeth—The Bank Act, s.* 80—*Company law —Mortgage by directors—Ratification—B. C. Companies Acts,* 1890, 1892 *&* 1894.

Judgment appeal from (8 B. C. Rep. 314) affirmed, Gwynne J. taking no part.

APPEAL from the judgment of the Supreme Court of British Columbia, (2) affirming the judgment of the trial court (Martin J.) dismissing the plaintiffs' action with costs.

The action was to set aside a mortgage by the Kootenay Brewing, Malting and Distilling Company to the bank, an assignment of book debts by the company to the bank and a judgment recovered by the bank against the company, on the grounds that (1) the mortgage was voluntary, fraudulent and void under the Statute of Elizabeth; (2) that it was void as a fraudulent preference; (3) that it had not been executed in accordance with the provisions of the Companies Act; (4) that the assignment of debts was void for the

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and Girouard JJ.

(1) 2 E. & B. 678.

(2) 8 B. C. Rep. 314.

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same reasons, and also as being in contravention of the Bank Act; (5) that the judgment was voluntary, fraudulent and void under the Statute of Elizabeth; and it was contended that the moneys received by the bank on sale of the assets and collections of the book debts were exigible under the executions of the plaintiffs. An order was claimed against the bank for the payment of the amount to be levied under the executions.

The courts below held that as there was good consideration for the mortgage and, as it was given under pressure, that it should not be set aside, although it comprised the whole of the debtor's property and was given at a time that the mortgagor was in insolvent circumstances to the knowledge of the mortgagee and that the mortgage had the effect of depriving other creditors of their remedy. It was also held that the mortgage, which had been made by the directors without proper authority, had been legally ratified by a subsequent resolution of the shareholders of the company. The plaintiffs appealed.

After hearing counsel for the parties the court reserved judgment and on a subsequent day dismissed the appeal with costs. His Lordship Mr. Justice Gwynne took no part in the judgment.

Appeal dismissed with costs (1).

A. C. Galt for the appellants.

C. R. Hamilton for the respondent.

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(1) Leave to appeal to the Privy Council was refused, (8 B. C. Rep. at p. 337).

FAWCETT *et al. v.* THE CANADIAN PACIFIC RAILWAY COMPANY.

1902

*Mar. 10.

*May 15.

Railways—Operation—Defective machinery—Disobeying orders—Contributory negligence.

Judgment appealed from (8 B. C. Rep. 393) affirmed.

APPEAL from the judgment of the Supreme Court of British Columbia, (1), affirming the judgment of Irving J. at the trial, ordering that the plaintiff should be non-suited and dismissing the action with costs.

The action was by the personal representatives of an employee of the company to recover damages for his death which occurred while he was performing his duty as a conductor on their railway. Deceased was using a defective brake on a passenger car of his train while it was in motion. The want of a nut on the head of the brake-mast allowed the brake-wheel to fly off and, in consequence, deceased was thrown off the platform of the car and, falling under the wheels, he was run over and killed. The defence was that deceased was obliged, as part of his duty, to examine all the cars and see that they were in good order before starting his train and that by neglecting to see that the nut was in place before leaving the station he had disobeyed the running rules, and been the cause of his own death. At the trial the case was withdrawn from the jury by Irvine J., who ordered judgment to be entered for the defendant for reasons stated at page 394 of the report in the court below and, on appeal to the full court his judgment was

*PRESENT:—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills JJ.

(1) 8 B. C. Rep. 393.

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FAWCETT v. CANADIAN RWAY. CO.

affirmed. The plaintiffs then appealed to the Supreme Court of Canada.

After hearing counsel for the parties the court reserved judgment and, on a subsequent day, dismissed the appeal with costs for the reasons given in the court below.

Appeal dismissed with costs.

Garrow K.C. for the appellants.

Davis K.C. and *Macdonald K.C.* for the respondents.

TUCKER *v.* THE KING.

1902

*May 14.

*May 29.

Crown—Contract—Right of action — Public officer — Solicitor and client— R. S. C. cc. 114, 115 — Inquiry as to public matters — Remuneration of Commissioner—Quantum meruit.

Judgment appealed from (7 Ex. C. R. 351) affirmed, the Chief Justice and Girouard J. dissenting.

APPEAL from the judgment of the Exchequer Court of Canada (1) by which a demurrer to the suppliant's petition of right was maintained and the petition of right dismissed with costs.

The suppliant, an advocate of the Province of Quebec, claimed by his petition of right the payment of $800 for services rendered by him as a commissioner appointed under the Revised Statutes of Canada, chs. 114 and 115, to make inquiry and report upon misconduct of a servant or officer of the Crown, alleged to have been of a judicial as well as inquisitorial character, the duty he performed requiring a

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, Girouard and Davies JJ.

(1) 7 Ex. C. R. 351.

knowledge of law and the rules of evidence. The suppliant claimed that his remuneration should be calculated and taxed according to the scale of fees allowed in similar matters for professional services by counsel or solicitors to clients.

The Crown demurred on the grounds that the petition of right did not allege, nor did the facts set out disclose, any contract between the suppliant and the Crown, either express or implied, or any other matter giving rise to any obligation or right of action against the Crown. The appeal was asserted by the suppliant against the judgment of the Exchequer Court (1), maintaining the demurrer and dismissing the petition of right with costs.

After hearing counsel for the parties the court reserved judgment and, on a subsequent day, the appeal was dismissed with costs, His Lordship the Chief Justice and Mr. Justice Girouard dissenting. There were no written notes of the reasons for the judgment of the majority of the court delivered. The following notes for his dissenting judgment were delivered by:

GIROUARD J.—I think that the decision of the Privy Council in *The Queen* v. *Doutre* (1) is in point.

The appellant was not a public officer, he was an advocate of the Province of Quebec specially retained and commissioned to perform certain temporary duties in that province on behalf of the Crown which his professional attainments specially qualified him to discharge. Can it be pretended that he would not be entitled to the *quantum meruit* of his services, if they had been rendered to a subject? Undoubtedly an action would lie in such a case. An advocate requested by a subject to make an inquiry into a matter in which

(1) 7 Ex. C. R. 351. (1) 9 App. Cas. 745.

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he may be interested, requiring professional skill and experience, has a right of action for the value of the work accomplished by him, whether in or out of a court of justice. I cannot see how a distinction can be made when the Crown is the client. The Privy Council has held that none exists and I am not prepared to make one. In my opinion the appeal should be allowed with costs.

Appeal dismissed with costs.

Leet K.C. for the appellant.

Newcombe K.C. for the respondent.

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