REPORTS

OF THE

SUPREME COURT

OF

CANADA

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. Sir Charles Fitzpatrick C.J., G.C.M.G.
" " Sir Louis Henry Davies C.J., K.C.M.G.
" John Idington J.
" " Lyman Poore Duff J.
" Francis Alexander Anglin J.
" Louis Philippe Brodeur J.
" Pierre Basile Mignault J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Charles Joseph Doherty K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Hugh Guthrie K.C.

APPEAL FROM JUDGMENT OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NOTED SINCE THE ISSUE OF VOL. 57 OF THE SUPREME COURT REPORTS.

The Canadian Pacific Railway Company v. *Walker* (57 Can. S.C.R. 493). Leave to appeal refused, May 29, 1919.

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CASES

DETERMINED BY THE

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ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

DUSSAULT AND PAGEAU (PLAINTIFFS) ..... } APPELLANTS;

AND

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

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*Nov. 6.
*Nov. 28.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Default—Completion at a saving—Security—Recovery.

A contractor, who abandons the execution of his contract, which is completed at a saving, cannot claim the difference between his contract price and the final cost of the works.

When a separate contract stipulates that money deposited by the contractor as security should be returned upon the full performance of the works or, in case of the contractor's default, might be employed for its completion, such money must nevertheless be paid back to the defaulting contractor if the work is completed under a second contract for a less sum than the original contract price. Fitzpatrick C.J. dissenting.

Per Fitzpatrick C.J. (dissenting):—As the respondent has paid for the completion of the contract a larger sum than the amount of the security, the appellant is not entitled to its recovery.

Judgment of the Exchequer Court of Canada (16 Ex. C.R. 228; 39 D.L.R. 76), affirmed.

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

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APPEAL from the decision of the Exchequer Court of Canada (1), maintaining in part the petition of right of the plaintiffs.

The material facts of the case are fully stated in the judgments now reported.

Belleau K.C. and *Marchand K.C.* for the appellants.
Drouin K.C. for the respondent.

THE CHIEF JUSTICE (dissenting on the cross-appeal)—The pleadings in a case are meant to bring out clearly the issues presented for the decision of the court. It would be very difficult to gather these from the petition of right in this case and we need not try because the appellants' counsel in their factum say:—

> At the trial many of the allegations of the petitions of right were abandoned and on behalf of the appellants we submitted that they were entitled to recover a sum of $5,168.41 for the following reasons;

They proceed to set out certain amounts and values which they allege the respondent received from them and which, after deducting certain credits, leave a balance of the mentioned sum.

It is necessary to set out briefly the facts of the case in order to see what is really the claim now advanced.

The appellants entered into a contract with the respondent for the construction of a wharf for the sum of $33,775, and they deposited security to the amount of $3,600. Before the wharf was nearly complete, the appellants, in breach of their contract, as found at the trial, abandoned the works which were thereafter completed by another contractor, one O. Poliquin. When the appellants threw up their contract they had received from the respondent the sum of $15,300, the total payments made to them on account, and they

(1) 16 Ex. C.R. 228; 39 D.L.R. 76.

left on the premises materials to the value of $10,183.30. These, however, to the value of $4,949.89 were unpaid for and the respondent subsequently paid this amount, the value of the appellants' materials which the respondent took over under the terms of the contract being thus only $5,233.41.

The contract between Poliquin and the respondent provided that the contractor should take over and utilise in the completion of the wharf all the materials on the site at the valuation of $10,183.30, this being set-off against the total price payable of $22,490. It may be noted that this sum of $22,490 included a small extra of $350.

It thus appears that the total cost of the bridge, not including the $350 extra, was:—

Cash paid appellants		$15,300.00
Value of material handed over to Poliquin and put into the bridge	$10,183.30	
Cash paid Poliquin	11,956.70	22,140.00
Total		$37,440.00
The original contract price was		33,775.00
An excess of		$3,665.00

The appellants admit their liability for this excess but claim to set against it

The value of their materials taken over by the respondents	$5,233.41	
Their deposit	3,600.00	$8,833.41
Deduct the above excess		3,665.00
leaving a balance, which is the amount of their claim, of		$5,168.41

The Assistant Judge of the Exchequer Court has held that under the contract the appellants are not

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entitled to recover any part of the value of their materials, but inasmuch as such value exceeded the excess cost to the respondent over the original contract price they are entitled to recover their deposit.

The appellants, therefore, are appealing for the difference between the above sum of.... .$5,168.41
and the deposit allowed them..... 3,600.00

That is..... $1,568.41

The respondent cross-appeals against the judgment to return the deposit.

The fallacy underlying the claim and partly adopted in the judgment appealed from consists in treating the case as if it were an action by the respondent for breach of the contract. The case is, however, quite different and the question of damage sustained does not enter into it at all. In an action for breach of contract the plaintiff must, of course, prove his damages and cannot recover if it is shewn that he has sustained none. It is, however, useless for the appellants to shew that the respondent suffered no damage, unless they can shew that this fact gives them a claim on the respondent. This is not done and the appellants can only claim, if at all, under the terms of the contract. They can only succeed if they are able to prove a claim regardless of whether or not the respondent suffered any loss by the breach of the contract. This appears to have occurred to the learned judge but he has not borne it clearly in mind, because he refuses the claim as regards the materials on the ground that the contract provides as

security to the building owner, for the performance of the works,

that all the materials provided by the contractor shall be the property of the Crown if the builder fails to complete his works, but he allows, though

not without some hesitation,

the claim for the deposit made as security, although the contract provides that

if the said contractor should make default under the said contract His Majesty may dispose of said security for the carrying out of the construction and completion of the work of the contract.

Under this provision the appellants might be entitled to recover any part of the deposit which the Crown had not paid for the completion of the work. If, for instance, the Crown had only paid $3,000 for such completion, the appellants might be entitled to recover $600, the balance not so employed. Here, however, the Crown has paid $16,906.39 for the completion of the work and must be entitled, under the terms of the contract, to utilise the deposit towards payment of this sum.

A possible view would perhaps be that the materials having become the property of the Crown the appellants cannot claim any credit in respect of them and that consequently they are liable, as the assistant judge suggests they might be, for the excess cost over the contract price, that is $3,665, an amount exceeding the deposit, which is only $3,600. As to this, however, I express no opinion. It is sufficient to say that the appellants, having proved no claim against the Crown, the appeal should be dismissed and the cross-appeal allowed with costs. But the majority are of a different opinion.

DAVIES J.—The appellants were contractors with the Crown for the construction of a pier or wharf under written contract. After they had entered upon their contract work, and partly performed it, they, as found by Audette J,

threw up their contract and abandoned its completion.

The Crown thereupon entered into another contract with other parties for the completion of the work

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and it was completed by these other contractors. The cost to the Crown was somewhat less than the suppliants (appellants) — the original contractors — had agreed to complete the work for and the first claim made by them in this petition of right is that, although they had abandoned their contract work and left it unfinished, nevertheless, as the Crown was enabled through other contractors to finish the work for a less sum than the appellants had originally contracted to complete and finish it for, they were entitled to recover the difference or saving to the Crown between their tender price and the actual cost of the work.

The learned judge found as a fact that this apparent saving to the Crown amounted to $1,568.41, but he very properly and rightly, in my opinion, dismissed this claim of the defaulting contractors as one which could not be allowed.

A second claim made by the appellants was with respect to the sum of $3,600 delivered by them to His Majesty on their entering into their contract as security for its "due performance." Their contention was that this $3,600 had been deposited by them merely as security for the performance of their contract and had not

been disposed of by the Crown in carrying out the contract work

after the work had been abandoned by them but was still in the Crown's hands, and that the work having been completed for a less sum than their contract provided for, and no evidence whatever having been given of any part of the deposit having been disposed of in carrying out the contract, they were entitled to its return.

The contract between the appellants and the Crown with reference to this $3,600 deposit was a

separate one from the contract for the carrying out of the work contracted for, and the respective rights of the appellants and the Crown must be determined by the terms of this subsidiary contract.

It stated in its first clause that

> the said security ($3,600) had been delivered to His Majesty and was to be held by him as such for the due performance and fulfilment by the contractors of the said contract.

After providing in its third clause that the contractors

> should be entitled to receive back the value of said security with interest upon the full performance and fulfilment of the said contract,

it went on in its fourth clause to provide for the contingency of their defaulting under the contract.

In that event it provided that

> His Majesty may dispose of said security and of the interest for the carrying out of the construction and completion of the work of the contract and for paying any salary or wages that may be left unpaid by the said contractors.

Nothing whatever is said in this subsidiary contract as to a forfeiture of this $3,600. It provides for the two contingencies of completion and non-completion of the contract by the contractors. In the former case it provides for the return of the security moneys to the contractors and in the latter for the right of His Majesty to dispose of the security moneys in carrying out the contract which the contractors had failed to do.

The $3,600 was, therefore, a mere security for the performance of the contract. If the contract had been duly performed the money would, of course, have been repaid to the contractors. If, as the fact was, the contractors defaulted, the Crown might have

> disposed of the security in carrying the contract out.

But, as the result proved, they were not called upon so to dispose of it because the work was completed

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under the new contract entered into by the Crown for a less sum than the appellants had originally contracted to complete it for.

The Crown gave no evidence whatever that any such disposition of the $3,600 security as the subsidiary contract provided for had been resorted to.

The facts shew that no such disposition became necessary and the security moneys now remain in the Crown's hands.

Under these circumstances, it seems to me the learned judge's disposition of this branch of the claim declaring the suppliants to be entitled to a return of this $3,600 security was also right. I think, however, that whatever interest that sum has earned in the hands of the Crown up to the date of the demand and thereafter at the rate of 5% should also be allowed, the amount to be settled by the registrar.

I would, therefore, dismiss the appeal of the suppliants without costs and the cross-appeal of the Crown with costs.

IDINGTON J.—The appellants contracted with the respondent to execute a work for $33,775 and were paid directly $15,300, and indirectly $4,949.89, making a total of $20,249.89. They abandoned their contract which meant by the terms thereof the abandonment of material on the ground as well as in the work.

The respondent re-let the work, transferring all such material on the ground, estimated to be worth $10,183.30, to the contractor who had tendered to complete the work, including an extra of $350, for $22,490, and thereby became only entitled to get a balance of $11,956.70 in cash applicable to the appellants' contract price when due credit was given for said extra and for said material. Respondent paid that balance

of cash in addition to the cash paid to and for the appellants as above set forth; and as I read the story had thus $1,568.41 left to meet the incidental expenses caused by the default of appellants.

I fail to see any alleged profit therein. I surmise it would probably, on examination, be needed to cover immediate expenses and possibly a year's interest on the advance caused by appellants' many delays.

Moreover, it cannot be recovered in face of the express terms of the contract.

Hence I think the appeal should be dismissed save as to the items of interest on the security deposit as hereinafter mentioned. But I think there should be no costs of the appeal.

The cross-appeal arises out of and depends upon another contract, though of same date as that I have disposed of and by the express terms thereof presumably executed after that other and is itself a distinct contract or suretyship for the due performance thereof.

This contract must be construed by its own express terms and the necessary implications therein having due regard to its obvious purpose.

The cross-appellant having entered into a contract letting to cross-respondents certain work to be constructed by them for him, it became important to ensure the due execution of the work received from them for that purpose certain securities and moneys, valued in the whole at the sum of $3,600.

The agreement, in its operative part, declared first that the said security had been delivered to the cross-appellant to be held by him for the due performance and fulfilment by cross-respondents of the said contract and of all the covenants, agreements, provisions and conditions therein mentioned, by them to be performed and fulfilled; next that His Majesty was

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not to be held responsible for the payment of interest on the security so deposited; and then upon the full performance and fulfilment by cross-respondents of the said contract, and of all the covenants, agreements, provisions and conditions as aforesaid, the cross-respondents should be entitled to receive back the value of said security together with the interest, if any, which might have accrued out of the deposit whilst in the hands of the Finance Department.

Such is the tenor of the agreement followed by a provision that the cross-respondents assumed the risk of loss of the security through insolvency of any bank on which any cheque had been drawn or in which any deposit had been made in connection with the security.

Then follows clause 4 of the agreement which is as follows:—

> 4. But if at any time the said contractors should make default under the said contract, or if His Majesty acting under the powers reserved in the said contract, shall determine that the said works, or any portion thereof remaining to be done, should be taken out of the hands of the contractors, and be completed in any other manner or way whatsoever than by the contractors, His Majesty may dispose of said security and of the interest which may have accrued thereon for the carrying out of the construction and completion of the work of the contract and for paying any salaries and wages that may be left unpaid by the said contractors.

It is upon the construction of this clause, when read in light of the entire scope and purpose of the agreement, that the claim of the cross-respondents which has been allowed by the learned trial judge below must rest.

The contract for which the deposit was made by way of surety for its performance was, after a great part of the work had been performed, abandoned by cross-respondents and thereupon the cross-appellant, as entitled by the terms of the contract, took possession thereof and of the material on the ground and re-let the

execution of the work to another contractor who finished same at less expense than the balance of the original contract price when due credit was given for the material abandoned by the cross-respondents and taken over by the cross-appellant.

No part of the security was ever needed to be resorted to, or was in fact resorted to, for the carrying out of the construction and completion of the work to be done under the contract, or for paying any salaries and wages left unpaid by the said contractors.

It is only by an unjustifiable confusion of two entirely separate contracts and juggling of two sets of figures that have really nothing to do with each other that the semblance of argument is made in support of the cross-appeal.

So far has this been carried that the cross-appellant's factum presents one statement alleging the second contractor had been paid by cross-appellant $17,256.59, when in truth he was only paid $12,306.70.

The difference was made up by use of the material the cross-respondents had abandoned, and which the second contractor was bound to use and make allowance for.

The specifications in the original contract, if the parties had chosen to abide thereby, might require consideration but they are not incorporated with this suretyship contract, or referred to therein, and as I view it have nothing to do with it.

It might well have been, as sometimes happens, that a third party, such as a guarantee company, might have given its bond expressed in substance with conditions such as set out in this second agreement for the like purpose.

What would have been said had the Crown sought

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to recover under the circumstances existent here upon such a bond?

I need not pursue the matter further except to say that on the facts I think the security is only the property of a subject, detained by the respondent, when it ought to have been returned the moment that events had so developed that the work was complete and that without loss to the Crown.

And I observe that the judgment fails to give interest which, I think, ought to be added from the date when the security should have been returned.

Any interest earned by the deposit whilst rightfully in respondent's hands should also be allowed.

If the parties cannot agree as to the date when the deposit was returnable the matter should go back to the learned trial judge to fix it. That can be done if not by virtue of this cross-appeal then by virtue of the main appeal.

The cross-appeal should be dismissed with costs.

DUFF J.—I am of the opinion that the appeal and the cross-appeal should be dismissed with costs.

ANGLIN J.—I concur with my brother Davies J.

Appeal dismissed without costs; cross-appeal dismissed with costs.

Solicitors for the appellants: *Belleau, Baillargeon & Belleau.*

Solicitors for the respondent: *Drouin & Amyot.*

EDWARD GRIERSON (PLAINTIFF). APPELLANT;

AND

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

1917
*Feb. 19.
*May 2.

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

Appeal—Jurisdiction—Assessment and taxation—"Grossly" excessive—Statutory tribunals—"Supreme Court Act," R.S.C. 1906, s. 41—(Alta.) 3 Geo. V. c. 23.

Upon evidence that an assessment is "grossly" excessive it should be varied by the Supreme Court of Canada, to which an appeal lies from the judgment of the final tribunal created under the charter of the city respondent.

Pearce v. *Calgary*, 54 Can. S.C.R. 1; 9 W.W.R. 668, followed.

Judgment of the District Court of the District of Edmonton reversed.

APPEAL from the decision of Taylor J., of the District Court of the District of Edmonton, in the Province of Alberta, maintaining, with a slight reduction in valuation, the assessment, for taxation purposes, of land belonging to the appellant.

The material facts of the case are fully stated in the judgments now reported.

G. F. Henderson K.C. for the appellant.
Eug. Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—I adhere to the opinion expressed in *Pearce* v. *Calgary* (1), with respect to appeals in assessment cases.

Speaking generally, the intrinsic value of a piece of property must necessarily be the price which it will

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

(1) 54 Can. S.C.R. 1; 9 W.W.R., 668.

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command in the open market and the local judge sitting in appeal with his knowledge and experience in ascertaining the price of real estate within his jurisdiction would, under normal conditions, be in a better position to judge of the value of such property than I can assume to be. But when, as in this case, the property has, by reason of exceptional conditions of a temporary nature, no marketable value and the judge has, misconstruing the statute, proceeded on a wrong basis in fixing the value for assessment purposes, then it is for us to endeavour, applying the statute to the evidence, to ascertain the fair actual value for assessment purposes as distinguished from the intrinsic value. It is important to bear in mind that the statute provides that, in estimating its value, regard may be had to the situation of the land, the purposes for which it is used or could or would be used if sold in the next succeeding twelve months. So that it is not the absolute value of the land that is to be ascertained, and the assessment being only for the current year, the limitation of the statute is a very proper one. The question, therefore, is, having regard to their location, present productive qualities and the uses to which they may be put within the next twelve months, what is the fair actual value for assessment purposes of the two parcels of land in question in the condition in which they were?

If the true value is, having regard to the considerations I have just mentioned, that given by the appellant's witnesses, then the difference between that value and the assessed value is certainly gross, if that word has any meaning. The county judge, in my opinion, proceeded upon a false basis when, in the absence of proof of any intention to subdivide, he assessed the value on the assumption that, if subdivided, the

property would be saleable within the next twelve months at the figure he fixes. The judge also erred in applying the principle of equalisation having regard to the Swift and Burns properties, both of which are exceptional by reason of their situation and the uses to which their owners were in a position to put them. My attention was not drawn to anything in the statute which justifies the refusal to accept evidence of values on the basis of farm lands, that being the only use to which, at the present time, the appellant's properties could reasonably be put.

I can find nothing in the evidence that justifies the assessment of the lands in question at a higher figure than that given by the appellant's witnesses. I am, therefore, of the opinion that the land comprised in Roll No. 2081 should be assessed at $475 an acre, $75,525, and that comprised in Roll No. 1503 at $625 per acre, $95,317.50. There is no evidence of the general selling price of property in the appellant's neighbourhood at the time the assessment was made and there is no evidence that, if subdivided, they would realise more in the then condition of the real estate market or within the next twelve months than the appellant's witnesses would allow.

I would allow the appeal with costs.

DAVIES J.—I think the learned judge erred in adopting as the sole standard by which he should determine the amount for which the appellant's lands should be assessed, the amount for which other lands in the city, whether in the immediate vicinity of those in question or not, were assessed at. The value at which the lands in the *immediate vicinity* of those in question had been assessed was, no doubt, under the statute an important factor to be considered when

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Davies J.

determining the assessment value in question. But that does not apply in cases where the lands in question have been grossly overvalued by the assessors. The object and purpose of introducing this factor of equalisation in the assessments as a guide was as far as possible to obtain uniformity in the valuation. But that equalisation rule cannot be resorted to as the proper test or standard where there has been in the assessment a gross overvaluation in fact of particular lands beyond their "fair actual value."

Section 321 of the charter of the city of Edmonton is as follows:—

> Land shall be assessed at its fair actual value. In estimating its value regard shall be had to its situation and the purpose for which it is used or if sold by the present owner it could and would probably be used in the next succeeding twelve months. In case the value at which any specified land has been assessed appears to be more or less than its true value the amount of the assessment shall nevertheless not be varied on appeal, unless the difference be gross, if the value at which it is assessed bears a fair and just proportion to the value at which lands in the immediate vicinity of the land in question are assessed.

The question then before us is reduced to the simple one whether there has been such a gross overvaluation, looking to the situation of the land and the purpose for which it is used or, if sold by the present "owner, it could and would probably be used in the next succeeding twelve months."

After careful consideration of the evidence, I cannot, acting on the rules the statute lays down for determining the fair actual value, resist the conclusion that the land has not been assessed at its fair actual value, but that it has been grossly overvalued.

The question difficult of solution on our part is, assuming

a gross overvaluation in the assessment value,

what is the

fair actual value

of the lands? We have to be guided by the opinions of the witnesses, of course. Applying the statutory rules as above stated, these opinions, as might be expected, greatly differ. Had we the power to refer the case back to the judge who heard the appeal from the assessors in order that he might determine on proper principles the valuation at which the lands should be assessed, I would gladly do so. Not having that power, I have carefully considered the different valuations made by the witnesses called on both sides and have reached the conclusion that the fair actual acreage valuation of the learned judge should be reduced one-half, that is, the lands south of the Grand Trunk Pacific Railway to $1,000 per acre, and those north of the track to $575 per acre. Costs must follow the result.

IDINGTON J.—I think the respective assessments appealed against of the lands in question are, even as reduced by the local courts, still grossly in excess of the actual values thereof, and should be reduced as follows:

The assessment of the land comprised in Roll No. 2081 should be reduced to $475 an acre and fixed at $75,525, and the assessment of the land comprised in Roll No. 1503 should be reduced to $625 per acre and fixed at $95,317.50.

I retain the views I expressed in the somewhat analogous case of *Pearce* v. *Calgary* (1).

The appeal should be allowed accordingly with costs.

DUFF J.—The learned judge seems to have proceeded upon an erroneous principle. His reading of

(1) 54 Can. S.C.R. 1; 9 W.W.R. 668.

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the statute apparently led him to the conclusion that in applying the Act the governing consideration is supplied by the ratio generally prevailing (as regards the assessment roll for the particular year) between the assessed value and the actual value of assessed properties in Edmonton. This, I think, is a misconception due seemingly to the neglect of the condition upon which the comparison of ratios is to be considered, namely: that the departure in the assessed value from the actual value in the case arising for decision shall not, in the language of the statute, be "gross." The evidence conclusively shews that this condition is not satisfied in the present case where the difference, in my view, is equivalent to considerably more than 100% of the actual value of the property assessed.

The cardinal error in the valuation appealed from arises from a failure to observe the fundamental principle that where prospects of future sales or future profitable exploitations are considered in estimating value it is the present value of such prospects only that are to be taken into account. (See judgment of the Judicial Committee in *Fraser* v. *Fraserville* (1)). I should reduce the assessment to an amount arrived at by valuing 152.5 acres at $625 an acre and 159 acres at $475 an acre.

ANGLIN J.—The dominant provision for the assessment of land made by the charter of the city of Edmonton is that

> land shall be assessed at its fair actual value.

In cases, however, where the difference between the assessed value and the fair actual value is not "gross," the assessment is not to be varied on appeal if it bears

(1) [1917] A.C. 187; 34 D.L.R. 211.

a fair and just proportion to the value at which lands in the vicinity of the land in question are assessed.

The charter further provides in regard to the assessment of land that

> in estimating its value regard *may* be had to its situation and the purpose for which it is used or if sold by the present owner it could and would probably be used in the next succeeding twelve months.

The word *may* was substituted by amendment for the word *shall*, which appeared in the original section. I do not regard this change as entitling the assessor to take into account any prospective use which might be made of the land after twelve months had expired. He was formerly obliged to take into account its prospective use during the next succeeding twelve months. He is now not obliged but permitted to do so. The fair, if not the necessary, implication is that he may not take into account possibilities beyond the period so limited.

The judgment of the learned district judge makes it reasonably clear that in dealing with the assessment of the appellant's lands he did not take into consideration their fair actual value based on their situation, their present use and any prospective use to which they might be put within the next succeeding twelve months, or whether the difference between the fair actual value and the assessed value was gross or slight. Assigning as his reasons that

> the evidence given here is that the value of this land is almost the same as the lots surrounding it after making provision for subdivision

and

> there has also been no evidence to shew that this land is assessed higher in proportion to its situation than any other part of the city,

the learned judge dismissed the owner's appeal, subject to making a slight reduction as to a portion of the lands in question.

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Anglin J.

On the evidence in the record it is abundantly clear that there was no likelihood whatever—indeed it may be said that there was no possibility—of the land here in question being used for anything else than farm or market garden purposes during the twelve months succeeding the assessment. Yet the assessment was obviously based upon the prospective value of the land for purposes of subdivision into building lots, and all the evidence offered in support of it was based on the assumption that it was properly so treated. The only evidence in the record as to the value of the property viewed as farm lands or as available for market garden purposes was that given on behalf of the appellant. In my opinion the assessment was grossly excessive and should be reduced to the maximum figures deposed to by the appellant's witnesses—$500 an acre for the land north of the right-of-way and $700 an acre for the land south of the right-of-way. These are the prices given by the witness Kenwood, who appears to have viewed the matter sensibly and equitably.

The appellant is entitled to his costs of the appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Hyndman, Milner & Matheson.*

Solicitor for the respondent: *John C. F. Bown.*

1917
*May 28.
*June 22.

THE SHIVES LUMBER COMPANY (DEFENDANT) ..... APPELLANT;

AND

PRICE BROTHERS AND COMPANY (PLAINTIFF) ..... RESPONDENT.

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

Appeal—Jurisdiction—Amount in controversy—Retraxit.

An action was brought to recover $3,616.35 as the value of timber cut on limits, of which boundaries were in dispute; and at the trial the claim was reduced by consent to $1,367.45.

Held, Fitzpatrick C.J. and Idington J. dissenting, that there was jurisdiction in the Supreme Court of Canada to entertain an appeal.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Rimouski, and maintaining the plaintiff's action for the sum of $1,367.45, after deduction, from the amount of the *demande*, of $1,248.90, by consent of the parties at the trial and before *enquête*.

The action was for $3,616.35, the value of timber which the plaintiff alleges was cut in trespass on its timber limits. The defendant denied the trespass and alleged title to the trees as having been cut on its own limits.

Belcourt K.C. for the motion.

Hall Kelly K.C. contra.

THE CHIEF JUSTICE.—This is a motion to quash for want of jurisdiction.

The action was brought to recover the sum of $3,615.35 *as damages* representing the value of timber

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which the plaintiff alleges was cut in trespass on its timber limits. The defendants, by their plea, denied the trespass and alleged title in themselves to the trees. At the trial and before *enquête* the amount of the claim for damages was reduced by consent to the sum of $1,369.45.

On those facts I am of opinion that we are without jurisdiction to hear this appeal. As has already been said in many cases, in determining the sum or value in dispute the proper course is to look at the conclusions of the declaration. There is no question of title involved; the plaintiffs brought their action in a form which imposed upon them the obligation to prove that they were injured as alleged. This they could not do if there was any doubt about their title. *Béliveau* v. *Church* (1). Here the only claim is for damages the amount of which was by consent before trial reduced below the appealable limit. *Town of Outremont* v. *Joyce* (2); *Dufresne* v. *Fee* (3). As was said in *Toussignant* v. *Nicolet* (4), 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. The only thing to be considered is the matter directly in controversy and necessary to be determined to dispose of the rights of the parties in the particular case. As to the effect of *retraxit*, see Cameron, 267.

Motion granted; appeal quashed with costs.

DAVIES J.—I am of the opinion to dismiss this motion with costs on the ground that the title to the lands in question is involved.

(1) Q.R. 2 Q.B., 545, at p. 546.
(2) 43 Can. S.C.R. 611.
(3) 35 Can. S.C.R. 8.
(4) 32 Can. S.C.R. 353.

IDINGTON J. (dissenting)—It is quite clear that there cannot be any matter in controversy in this appeal which involves an amount of the

sum or value of two thousand dollars

as stated in section 46, subsection (*c*) of the "Supreme Court Act" to be the limit of jurisdiction for Quebec appeals, when the amount demanded had before judgment expressly been fixed by the agreement of the parties at a sum much below that.

Therefore I cannot find the amount so involved a basis for our jurisdiction.

The facts in *Dufresne* v. *Fee* (1), relied upon render it distinguishable, and I do not think the decision therein affirms any principle of action which we must abide by herein.

Nor do I find any actual dispute of title involved. And, according to the judicial system in Quebec, as I am advised, this dispute of boundaries within which the timber in question was cut cannot test anything relative to title.

The motion to quash should prevail with costs.

DUFF J.—It is very clear, I think, that the proceedings out of which the appeal arises involve a controversy regarding a title to lands and that the appeal is consequently not excluded by section 46. It is not disputed that in other respects the conditions of jurisdiction under section 37 are fulfilled.

ANGLIN J.—I think this case is indistinguishable in principle from *Dufresne* v. *Fee* (1), and would, therefore, dismiss the motion to quash.

Motion dismissed with costs.

(1) 35 Can. S.C.R. 8.

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*Nov. 14.
*Dec. 23.

MARIA BISAILLON (PLAINTIFF).... APPELLANT;

AND

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

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

Expropriation—Error in notice—Right to desist—Articles 275 and 1437 C.P. (Que.)—2 Geo. V. c. 56, s. 33—R.S.Q. (1909) articles 7581 et seq.

Held, Idington J. dissenting, that the party expropriating has the right to desist from expropriation proceedings or to amend same, if a serious error is found in the notice of expropriation, such error being a cause of nullity as to the substance of the object of the expropriation.

Per Davies C.J.—Under the special terms of 2 Geo. V. ch. 56, sec. 33, it was *ultra vires* of the city respondent to expropriate more lands than required for the extension of the mentioned street, and, therefore, the city had not only the right but the duty to desist from the expropriation of lands not necessary for such extension.

Per Idington J. (dissenting)—A landowner, served with a notice to treat by any legal entity upon which the legislature has conferred the right of expropriation, can apply for a mandamus, and it is his only proper remedy, to compel that party so asserting its power to proceed, by the appointed means given, to determine the amount of compensation the landowner may be entitled to.

Per Brodeur and Mignault JJ.—As the general law governing expropriations in Quebec (R.S.Q. (1909) Articles 7581 *et seq.*,) referred to in the special statute governing the present proceedings, is designated as a "*Matter relating to the Code of Civil Procedure*" (R.S.Q. (1909) Title XII.,) in the absence of any provision in the said general law regarding discontinuance of expropriations, reference may be made to the Code of Civil Procedure; and under the terms of Articles 275 and 1437 C.P., the respondent had the right to discontinue its expropriation proceedings.

Judgment of the Court of King's Bench (Q.R. 26 K.B. 1), affirmed, Idington J. dissenting.

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

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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

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

On the 30th June, 1913, the city respondent served a notice to the appellant that, according to 2 Geo. V. ch. 56, sec. 33, it was decided to expropriate lots 509 to 517 and 526 to 528 marked on a certain plan, being subdivisions 3, 4, 5, 6, 7, 8, 11, 12 of lot No. 168. Arbitrators were named and sworn. It was then ascertained by the respondent that, upon the part of the property not necessary for the extension of the street, there was situated an extensive building which did not appear upon the expropriation plan. Thereupon, the respondent served upon the appellant a discontinuance of the expropriation proceedings already commenced and at the same time served a new notice of expropriation for the lots 513, 515, 517 and 528 only, being part of subdivisions 3, 5, 6, 7, of lot No. 168 specially required for the widening of the street. On the 24 January, 1914, the appellant served a petition for an interlocutory injunction to enjoin the respondent from conducting any proceedings under the second notice of expropriation.

Proceedings, by way of mandamus, to force the respondent to proceed under the first notice of expropriation, were also instituted; but, by consent of the parties and to avoid costs, they were left in abeyance until a final decision in the present action would be rendered.

The judgment of the Superior Court, Guerin J. maintained the injunction, upon the ground solely that the notice of expropriation and the proceedings thereunder had not been given or undertaken within the twelve months mentioned in 2 Geo. V. ch. 56, sec. 33.

Aime Geoffrion K.C. and *Paul St. Germain K.C.* for the appellant.

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A. W. Atwater K.C. and *J. A. Jarry K.C.* for the respondent.

THE CHIEF JUSTICE.—The controversy in this appeal relates to expropriation proceedings taken by the City of Montreal for the extension of Palace street (St. Joseph boulevard) in St. Denis ward from north-eastern boundary of Laurier ward to Papineau avenue.

The authority for such extension was first granted by the legislature in 1911 and was permissive only and not compulsory.

In 1912, however, the legislature amended the enactment of 1911 and made the expropriation of the lands necessary for the extension of the boulevard compulsory upon the city either by mutual agreement with the owner or by expropriation within twelve months from the sanctioning of that Act. This latter Act came into force on April 3rd, 1912. The necessary resolution for the extension of the boulevard passed the city council in March, 1913, which approved of the Barlow plan of January, 1913. The appellant was notified by the city of its intention to expropriate a certain part of her property described in the notice as lots bearing the following numbers shewn on the plan prepared by John R. Barlow, Nos. 509, 511, 513, 514, 515, 516, 517, 526, 527 and 528.

As a fact the only lots of those specified as shewn upon the plan necessary for the extension of the boulevard were lots Nos. 513, 515, 517, and 528. The other lots were not necessary for the extension of the boulevard and the four which were so necessary were of a depth back from the boulevard of seven feet which was all of the appellant's land required for the extension. The remaining lots in the rear of the four lots mentioned and which ran back one hundred feet further were not so required.

The parties not having been able to come to a mutual agreement as to compensation to be paid appellant, arbitrators were appointed when, after two or three meetings had been held, it was discovered that the plan of January, 1913, which the council had approved of, did not shew a large apartment house facing on Drolet street which had been built by appellant on some of her lots embraced within the expropriation notice in the rear of those actually required for the proposed extension of the boulevard. The proceedings of the arbitrators were then adjourned *sine die* in consequence of the declaration of the owner's attorneys that there was an error in the plan.

The city authorities came to the conclusion that a plan should be prepared according to which the expropriation should be limited to the part of appellant's lands actually required for the widening of the boulevard. A notice to that effect was served upon the appellant and notice given to her that the city desisted from its first notice of expropriation and confined such notice to such part of her lands as laid within the street or boulevard area.

Proceedings were then instituted by the appellant in the Superior Court asking for a declaration that the resolution of the city council which directed the change in the expropriation proceedings and limited them to the strip of appellant's lands lying within the street area and the notice given by the city to her that the city desisted from its first notice of expropriation and confined itself to the four lots actually required for the street extension were one and all illegal and *ultra vires*. After a hearing, the Superior Court decided against the city and the Court of King's Bench on appeal (1), reversed that judgment holding that under

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

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the circumstances and in view of the errors shewn to exist in the notice of expropriation the city was within its right in desisting, as it did, and in confining its expropriation proceedings to those lots of the appellant shewn upon the plan as actually necessary for the proposed extension of the street, namely, seven feet in depth and comprising lots 515, 513, 517, and 528 as shewn upon the plan.

The points argued before this court were mainly whether the city had power to desist from an expropriation proceeding already commenced because of an alleged serious mistake or error in the notice of expropriation given by it to the owner and the plan on which the notice was based.

Mr. Geoffrion contended that once the notice of expropriation is given and the sum offered as compensation is refused the right to desist from expropriation is gone and much more so when arbitrators are appointed to assess or decide the compensation to be paid. He further contended that this rule or conclusion applied as well to public municipalities as to private corporations.

In the view, however, which I take of the proper construction of the statute authorizing this expropriation, I do not think it necessary to discuss at length Mr. Geoffrion's general proposition. Suffice it to say that I agree with the judgment appealed from and with that part of my brother Brodeur's reasons in this court to the effect that grave and serious error when shewn in the notice of expropriation would be open to amendment and that to that extent at least the expropriator would have power to desist and amend.

The grounds, however, on which I base my judgment are that the statute which governs in this case being a special one imperatively requiring the city to expropri-

ate or amicably purchase certain lands within a limited time for the special purpose of extending a particular boulevard from one specified point to another, and expressly limiting the extent of the lands to be taken to those necessary for the extension, and further enacting that if recourse is had to the expropriation power it shall be taken under articles 7851 and following of the Revised Statutes of 1909, thus excluding the general charter powers, must be strictly followed; that the city had no power to go beyond the limited powers given them by this Act, and that any attempt to expropriate more or other lands than those defined as necessary in the statute to carry out its object and purpose was *ultra vires*.

The statute in question reads as follows:—

32.—Section 32 of the Act 1 Geo. V. (2nd session), chapter 60, is amended by striking out paragraph b.

33.—The city shall acquire by mutual agreement or expropriate under articles 7581 and following of the Revised Statutes, 1909, within twelve months from the sanctioning of this Act, for the purpose of extending Palace street (St. Joseph boulevard) in St. Denis ward from the northeastern boundary of Laurier ward to Papineau avenue, all the immovables it may need for such purpose with the exception however of convents, schools, churches and parsonages; and sell by auction, in whole or in part, the lands thus acquired by mutual agreement or by expropriation, on either side of the said boulevard, the whole according to the plan prepared by John R. Barlow on February 25th, 1911, and a copy of which shall be deposited in the office of the city clerk, or according to any other plan approved by the city.

No one shall erect any buildings on the lines comprised within the lines given on said plan within twelve months from the sanctioning of this Act, unless the City of Montreal, having become proprietor of the whole or of part of the said Palace street (St. Joseph boulevard), allows it.

The amount required to pay the cost of such improvement sha ll be charged to the loan fund which the city has at its disposal and the proceeds of the sale of such lots and of the materials of the demolished buildings shall be applied to the repayment of the same amount to the loan fund.

Now it does seem clear to me that in this statute compelling the city to open up and extend the street or boulevard within twelve months from the sanction-

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ing of the Act, the legislature definitely fixed a limitation upon the powers given to the city, and that limitation was that the city should acquire

> for the purpose of extending Palace street (St. Joseph boulevard) in St. Denis ward from the northeastern boundary of Laurier ward to Papineau avenue all the immovables it may need for such purpose.

Now surely that language is plain, clear and unequivocal. It is the controlling language of the statute. It gives power to acquire such immovables as may be needed for the extension but no more. The subsequent language of the section authorizing

> the sale by auction in whole or in part of the lands thus acquired on either side of the said boulevard

must be rejected as being altogether inapplicable and without any meaning. They were doubtless inserted by the draftsman under the impression that the general powers of the city under its charter when opening or extending streets or boulevards to purchase or expropriate more lands on each side of the street or boulevard than were required for the street or boulevard extended to the expropriation provided for in this special Act.

But these general powers were clearly not intended to be given and were not given in this special Act enacted for a single and special purpose and being compulsory on the city and not optional.

If doubt could exist on the point arising out of the city's charter, I would call attention to the fact that the powers in the special statute given were not to be exercised under the city's charter which gives these special powers of expropriating lands on each side of any street being opened or extended, but are expressly given to be exercised under articles 7581 and following of the Revised Statutes, 1909, which do not give such powers.

I am of the opinion, therefore, that the powers of the

city in this case to expropriate were expressly limited to the

immovables needed for the purpose of extending Palace street to Papineau avenue,

and that the attempt under the special statute here in question and the general powers of expropriation under article 7581 of the Revised Statutes, which is read into the special statute, to expropriate more land than was required for the purpose of the street extension were so far as such an attempt was made *ultra vires* of the city. I think when this fact was discovered it became not only the right but the duty of the city to desist and to confine the proceedings of the arbitrators to those lands which the statute authorized them to expropriate.

I would dismiss the appeal with costs.

IDINGTON J. (dissenting)—A long line of authorities beginning with *The King* v. *The Commissioners for improving Market Street, Manchester*, reported in a note to *The King* v. *Hungerford Market Company* (1), and the judgment in that case, clearly establishes the right of a landowner served with a notice to treat by any legal entity upon which the legislature has conferred the right of expropriation, to apply for a mandamus to compel that party so asserting its power to proceed, by the appointed means given, to determine the amount of compensation the landowner may be entitled to.

In *Morgan* v. *Metropolitan Railway Co.* (2), Kelly C.B. delivering the judgment of the Appellate Court (then known as that of the Exchequer Chamber), said:—

Ever since the case of *Rex* v. *Hungerford Market Company* (1) it has uniformly been held that wherever a company is entitled to take

(1) 4 B. & Ad. 327.

(2) L.R. 4 C.P. 97, at page 105

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land compulsorily under the powers of an Act of Parliament, if they give notice of their intention to take the land, that is an exercise of their option from which they cannot recede, and the notice operates as a contract or an undertaking by them to become the purchasers. That case was decided in the year 1832, and it has never yet been questioned.

That of course is only a comprehensive declaration of English law upon the subject. I am, however, unable to find that the law of Quebec differs therefrom in the slightest degree.

Counsel for the appellant told us in argument that the pursuit by her of that remedy was merely held in abeyance pending this appeal.

I am entirely at a loss to understand this circuitous way of proceeding when the direct method of asserting her right (if any) was open to her.

Indeed, I have come to the conclusion that it should not be tolerated.

I have the gravest suspicion that the judgment appealed from is founded upon reasons which are not maintainable; but I do not think a definite opinion thereupon ought to be expressed further than incidentally necessary to present the reasons for the conclusion I have reached, lest by doing so we add to the confusion of thought this peculiarly circuitous method appellant has taken by way of asserting her right has evidently produced.

Let us take the suggestion in Mr. Justice Cross' judgment that there is to be made a distinction between the effect of expropriating powers given a railway company and the service of the like power by a municipal corporation, and see if it is well founded in light of the decisions I have referred to.

It happens that of these very decisions to which I have referred, the first named and *Steele* v. *The Mayor of Liverpool* (1), and *Birch* v. *St. Marylebone Vestry* (2),

(1) 14 W.R. 311 ; 7 B. & S. 261. (2) 20 L.T. 697.

relate to the identical subject matter of expropriation for purposes of opening new streets with which the case in hand is concerned.

There is, leaving aside expropriation for the Crown, only one case that I have been able to find which has the semblance of maintaining such a distinction as sought to be made. That is the case of *Reg.* v. *Commissioners of Woods and Forests* (1), in which, having regard to the funds at the disposal of the commission and the limited purposes of the Act there in question, the court could easily see its way to hold the defendants entitled to withdraw the notice. To have refused to so hold would have resulted in the court forcing a public body to do that which was *ultra vires*, or at all events have been improper.

When that case was relied upon in the two which I have cited immediately preceding my citation of it, the respective courts concerned shewed how very limited an application the decision was capable of.

Moreover, the course of legislation relative to municipalities in many jurisdictions has been to provide expressly against such like contingencies as arise in the proceedings in question herein.

I express no opinion upon the question of whether or not such like implication may be found in the legislation relevant to anything involved in the rights of the parties hereto. I am only concerned in demonstrating that the appropriate remedy, and indeed the only proper remedy, the appellant has, if any, is by way of mandamus, and that there is grave reason to suppose that there is, or may be, error in the judgment appealed from, and none the less so when the unsuitable injunction method of procedure is allowed as possibly right. Of course, if it were quite clear that she had nothing to

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(1) 15 Q.B. 761.

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complain of we perhaps should refrain from any interference no matter how objectionable the form of procedure as such might be.

The case presented is far from that both as to law and facts and it is important no such precedent should be made.

I think she should be given an opportunity, if so advised, to try that out and to do so freed from any prejudice founded upon anything that has transpired.

I may point out that in *Lind* v. *The Isle of Wight Ferry Company* (1), and in *Adams* v. *London & Blackwall Railway Co.* (2), the Court of Chancery in England refused to exercise any of its powers to aid a plaintiff situated similarly to the appellant.

These decisions were given at a time when that court had at least as ample powers to enforce by injunction the observance of a party's rights as it seems to me can fall within the provisions of the Code of Civil Procedure in Quebec providing for injunction. And they are decisions by a court of which the tradition exists that it was inclined to extend its jurisdiction when it found it necessary in order to do justice.

When we find it in such cases as these, so closely analogous in principle to that now at bar, refusing to assert its supposed power and referring the litigant to the need to seek his relief in the remedy of mandamus alone, I feel we may well follow such precedents.

The appellant may have the right to enjoin temporarily the respondent from proceeding under its new notice until she has had an opportunity of trying out the questions involved by way of an application for a mandamus.

I would therefore allow the appeal without costs

(1) 7 L.T. 416 ; 1 N.R. 13. (2) 2 Mac. & G. 118.

and modify the judgment accordingly and substitute for the reservation by the judgment of the Superior Court of her right to proceed for damages, the right to proceed for a writ of mandamus, if so advised, without prejudice arising from the proceedings had herein.

There does not seem, considering the leisurely way things were done by those concerned, much reason to fear that the city would, in face of a proceeding for a writ or order of mandamus, which I hold to be the proper course in such a case, insist upon proceeding immediately under its new notice. But lest it might be likely to do so, an interlocutory injunction could have been had, no doubt. In allowing the appeal I would grant such interlocutory judgment until the proceedings for mandamus terminate, or such reasonable time as should enable the appellant to terminate same.

ANGLIN J.—I have had the advantage of reading the opinion of my brother Brodeur, in which I believe my brother Mignault concurs. While in accord with the conclusion reached I hesitate to commit myself unreservedly to the ground on which my learned brother rests his judgment because of its very far reaching effect. As I understand it, he imports the rules of the code of procedure in matters not expressly provided for by the general law of the province governing expropriations (R.S.Q. arts. 7581, *et seq.*) into all proceedings had under it, merely because such expropriations are grouped with some other subjects in the Quebec statutes under the heading "Matters Relating to the Code of Civil Procedure." I am satisfied, however, that in the present instance on the ground of error in the substance of the object of the expropriation the respondent would be entitled to the relief which the judgment in appeal accords to it. Any amendment

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necessary to sustain the judgment on that ground could and should be made. "Supreme Court Act," section 54.

BRODEUR J.—En 1911 la législature de Québec a autorisé la ville de Montréal à exproprier dans l'espace de deux ans les terrains requis pour prolonger le Boulevard St-Joseph du quartier Laurier à l'Avenue Papineau, suivant un plan préparé par John R. Barlow le 25 février 1911.

En 1912 la législature a amendé la législation de 1911 et a déclaré que la ville *devrait* acquérir ou exproprier, non pas d'aprés les dispositions de sa charte, mais d'après les articles 7581 et suivants des Statuts Refondus de Québec, tous les immeubles dont elle aurait besoin pour ce prolongement du Boulevard suivant le plan Barlow ou suivant tout autre plan approuvé par la ville. Ce qui était en 1911 une autorisation d'exproprier devenait donc par la loi de 1912 une obligation formelle imposée à la ville de prolonger ce boulevard jusqu'à la rue Papineau. Cependant l'expropriation, au lieu de se faire suivant le plan Barlow, pouvait se faire suivant tout autre plan que la ville adopterait et l'expropriation, au lieu d'être faite suivant les dispositions de la charte de la cité, serait faite suivant la loi générale des expropriations.

L'appelante, Maria Bisaillon, était propriétaire de quatre lots de terre ayant front sur le boulevard projeté. Ces quatre lots de terre portaient respectivement les numéros 3, 5, 6 et 7 du numéro 168 du cadastre du village de la Côte St-Louis. Elle était également propriétaire des lots 8 et 11 du même numéro 168. Ces derniers lots étaient situés à l'arrière des premiers lots: et ils avaient front sur une rue transversale, appelée rue Drolet. La Cité n'avait besoin pour le

Boulevard St-Joseph que de sept pieds de large, au front des lots 3, 5, 6 et 7.

En vertu des dispositions générales de sa charte (art. 425), dispositions qui paraissent avoir été implicitement reconnues dans la loi de 1912, la cité de Montréal est autorisée à exproprier non-seulement les lisières de terrain dont elle a besoin pour l'ouverture et l'élargissement d'une rue: mais elle est autorisée à exproprier plus que ce qu'il lui faut pour l'ouvrage projeté. Dans ce dernier cas, elle doit revendre le terrain qu'elle a exproprié mais qu'elle n'utilise pas. Ce système peut être, dans certains cas, très avantageux: parce que parfois l'expropriation du front d'un lot peut occasionner la démolition d'un bâtiment et alors donner lieu à des réclamations très élevées. Dans ce cas, il devient plus avantageux d'acquérir tout le terrain pour revendre ensuite la partie dont la ville n'aurait pas besoin.

Au sujet de l'élargissement du Boulevard St-Joseph, l'ingénieur Barlow avait, le 25 février 1911, préparé un plan par lequel l'assiette du Boulevard serait de cent pieds de large: et, en outre de cela, il indiquait que cent pieds de terrain de chaque côté du boulevard projeté devait être exproprié. C'est ce plan qui était devant la législature et auquel il est référé dans la législation.

Le 27 janvier 1913, un nouveau plan fut préparé et là encore, du moins en tant que les propriétés de l'appelante sont concernées, l'expropriation projetée couvrait non-seulement le terrain nécessaire pour l'assiette du Boulevard lui-même mais encore cent pieds de plus. Ce plan fut approuvé par le conseil de ville le 10 mars 1913 et une résolution a été adoptée autorisant l'expropriation de tous les terrains néces-

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saires pour élargir et prolonger la rue suivant ce plan du 27 janvier 1913.

Le 30 juin 1913, avis d'expropriation fut donné par la Cité de Montréal à l'appelante non-seulement pour les lots de terre qui avaient front sur le boulevard projeté, c'est-à-dire les numéros 3, 5, 6 & 7 du numéro 168: mais aussi des terrains qui se trouvaient en arrière de ces lots-là et qui étaient subdivisés de manière à avoir front sur la rue Drolet.

L'avis d'expropriation pour les lots ayant front sur la rue Drolet était évidemment erroné. Par exemple, en décrivant une partie du No. 168-11, on donnait les tenants et aboutissants et on déclarait entr'autres choses que cette partie du numéro 168-11 que l'on voulait exproprier était bornée au nord-ouest par le numéro du cadastre 168-11. Comment une partie du lot 168-11 pouvait-elle être bornée par tout le lot 168-11?

Il en est de même de la lisière de terrain en premier lieu décrite dans l'avis d'expropriation, que l'on déclare faire partie du cadastre sous le numéro 168-4. Or, si on examine le plan qui est devant nous, il est évident que ce numéro 168-4 que l'on décrivait faisait partie, au contraire, du numéro 168-11.

Il y avait donc dans cet avis d'expropriation erreur évidente et palpable: erreur dans la description des lots et erreur quant à l'acquisition des terrains que la ville désirait faire. Je comprends parfaitement que la ville eût voulu exproprier tous les lots ayant front sur la rue projetée: mais vouloir acquérir des lots qui se trouvaient en arrière de ceux-ci, et qui se trouvaient avoir front sur une autre rue, ne devait pas, suivant moi, entrer dans les intentions de la ville.

La ville dans son avis faisait une offre de $17,500 pour le terrain qu'elle désirait acheter de l'appelante.

L'appelante a répondu qu'elle refusait cette offre et a déclaré que la valeur des propriétés qu'on voulait exproprier était de $98,000. Différence notable, comme on le voit, et qui démontre évidemment qu'il devait y avoir erreur quant aux terrains qu'on entendait de part et d'autre acheter et vendre.

Les arbitres commencèrent leurs procédures pour déterminer la valeur du terrain.

On avait déjà tenu deux ou trois séances, quand, tout-à-coup, il fut découvert que le plan du 27 janvier 1913 ne montrait pas une maison de rapport qui avait été érigée par Maria Bisaillon sur ses lots ayant face sur la rue Drolet, mais qui, par l'expropriation projetée se trouvait être partiellement prise. Alors les procédures furent ajournées *sine die* par les procureurs, vu la déclaration faite par les procureurs de la propriétaire qu'il y avait erreur au plan. En effet, il ne pouvait pas être présumé que la Cité de Montréal, en instituant ces procédures et en demandant à exproprier cent pieds de plus que ce qui était nécessaire pour le Boulevard, eût l'intention de prendre une partie de la maison seulement: et il est à présumer également que la demanderesse appelante ne tenait nullement à voir sa maison éventrée et démolie en partie lorsqu'il était si facile de confiner l'expropriation à une portion moindre de terrain.

Je comprends que s'il se fût agi de l'ouverture de la rue proprement dite, il aurait pu devenir nécessaire de démolir une maison pour partie: mais vu que la ville voulait exproprier non-seulement la partie de terrain nécessaire pour l'assiette de la rue mais aussi des terrains riverains, il n'était pas à présumer que l'on eût l'intention de démolir une grande maison: car autrement la cité aurait été obligée de payer tous les dommages résultant de cette démolition partielle et

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qui auraient représenté pratiquement la valeur de toute la maison.

Cette erreur ayant été découverte, il me semble que, même si nous acceptons la prétention de l'appelante que ces procédures constituent un contrat liant les deux parties, il y a eu évidemment une erreur qui est une cause de nullité quant à la substance de la chose qui faisait l'objet du contrat. Je ne crois pas, vu la conclusion à laquelle j'en suis venu sur un autre point, qu'il soit nécessaire pour moi de décider si l'avis d'expropriation, suivi de la nomination de son arbitre par la partie expropriée, constitue un contrat. Je serais enclin à croire, au contraire, que cet avis d'expropriation est de la nature d'une instance judiciaire, ainsi que je le démontrerai plus loin.

Les autorités de la ville ont alors considéré la situation et en sont arrivées à la conclusion de préparer un nouveau plan par lequel elles limiteraient leur expropriation à la partie spécialement requise pour l'élargissement de la rue: et elles ont fait signifier à l'appelante, Maria Bisaillon, un avis à cet effet déclarant que la cité se désistait de son premier avis d'expropriation et qu'elle n'exproprierait que le terrain nécessaire pour la rue elle-même.

On prétend maintenant par la présente action que la ville n'avait pas le droit de se désister de ces procédures et qu'ayant produit son plan du 27 janvier 1913 elle était liée et qu'il ne lui était pas permis de produire un autre plan ou de réduire la quantité de terrain qu'elle désirait exproprier.

La cité pouvait-elle se désister?

Je soumets que sans nul doute elle pouvait le faire en vertu des dispositions de notre loi en la matière.

L'expropriation du terrain en question, comme on l'a vu, ne devait pas être faite suivant les dispositions

ordinaires de la charte de la cité, mais suivant l'acte général d'expropriation de la province, qui se trouve aux articles 7581 et suivants des Statuts Refondus de la province de Québec.

Ce serait une erreur de croire que cet acte d'expropriation contient toute la procédure qui doit être suivie en la matière. Nous retrouvons cet acte au chapitre second du titre XII des statuts refondus de la province de Québec qui est intitulé *Des matières en rapport avec le code de procédure civile.* La section 9 de ce chapitre contient les dispositions de la loi d'expropriation proprement dite.

Au cours de l'argument, j'ai suggéré que nos articles 1431 et suivants du Code de Procédure Civile pouvaient s'appliquer à l'expropriation actuelle et à l'expropriation faite en vertu de la loi générale de la province. Mais cette suggestion ne m'a pas paru avoir été acceptée par aucune des parties.

Cependant il me semble qu'il n'y a aucun doute que là où la loi générale des expropriations ne contient pas de clause particulière sur le sujet on doit s'en rapporter au Code de Procédure Civile pour déterminer respectivement les droits et les obligations des parties et la procédure qui doit être suivie. Ainsi, il n'est pas dit, par exemple, dans l'acte des expropriations si une partie peut révoquer ou abandonner la procédure qui a été faite. Alors du moment qu'il n'y a pas de dispositions dans l'acte général nous pouvons donc référer au Code de Procédure: et là nous trouvons l'article 1437 C.P. qui dit que

> pendant les délais du compromis, les arbitres ne peuvent être révoqués que du consentement de toutes les parties. Si le délai est indéfini, il est libre à chacune des parties de révoquer le compromis, lorsqu'il lui plait.

C'est d'ailleurs une règle générale de notre pro-

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cédure que nous trouvons à l'article 275, C.P. qui dit que

> Une partie peut, en tout temps avant jugement, se désister de sa demande ou procédure, à la condition de payer les frais.

Appliquant, par conséquent, les articles 1437 et 275 du Code de Procédure Civile à la cause actuelle, je dis: La cité avait le droit de se désister de son avis d'expropriation parce que d'abord il n'y avait pas de délai fixé pendant lequel les arbitres devaient faire leur rapport: et ensuite parce qu'elle pouvait, en vertu de l'article 275 du code de procédure civile exercer tout droit qu'une partie possède d'abandonner sa procédure, pourvu qu'elle paie les frais.

L'appelante nous a cité certaines décisions qui ont été rendues en Angleterre à l'effet que les corporations municipales ne pouvaient pas se désister d'un avis d'expropriation.

Nous n'avons pas à juger cette cause-ci d'après la loi qui régit les expropriations en Angleterre mais d'après la loi qui régit les expropriations dans la province de Québec. Or, je trouve dans les statuts refondus, ainsi que dans notre code de procédure civile les éléments nécessaires pour déclarer qu'une partie peut se désister de sa procédure en expropriation.

Pour ces raisons, l'appel institué par Maria Bisaillon devrait être renvoyé avec dépens.

MIGNAULT J.—Je partage l'opinion de M. le Juge Brodeur.

Appeal dismissed with costs.

Solicitors for the appellant: *St. Germain, Guerin & Raymond.*

Solicitors for the respondent: *Laurendeau, Archambault, Damphousse, Jarry, Butler & St. Pierre.*

ISRAEL SCHAEFER.....APPELLANT; 1919 *Feb. 18.

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Procedure—Motion—Special leave to inscribe—Supreme Court Rule 37.

A motion for special leave to inscribe an appeal made necessary by the appellant's default should not be granted, if, in the opinion of the court, the judgment appealed from is so clearly right that an appeal from it would be hopeless.

MOTION before a judge in chambers for leave to inscribe an appeal from the Court of King's Bench, appeal side, Province of Quebec (1).

The material facts of the case are stated in the judgment now reported.

R. Stanley Weir K.C. for appellant.
Jos. Walsh K.C. for respondent.

ANGLIN J.—The defendant moves for leave to inscribe an appeal from the Court of King's Bench (Quebec) on the list for the current term. He was convicted on the 20th of June, 1916, upon an indictment charging him with having committed treason. The "overt acts" alleged, and to which evidence was directed, were the sale of tickets, after war was declared in 1914, to certain subjects of Austria-Hungary to enable them to leave Canada en route to Austria-Hungary for the purpose of assisting the Government of that country, a public enemy, and furnishing them for the same purpose with other documents to further

*PRESENT:—Anglin J. in chambers.

(1) Q. R. 27 K.B. 233.

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their transportation to Austria-Hungary, and counselling them to falsely assume the character of Roumanians. Having been refused a reserved case by the trial judge on the ground that the verdict was against the weight of evidence, the defendant applied to the Court of King's Bench (appeal side) for leave to appeal. His application was dismissed on the 4th of December, 1917, and from that judgment no appeal was taken. When called up for sentence on the 9th of April, 1918, the defendant moved in arrest of judgment on the ground that the indictment did not charge any indictable offence—did not charge him with assisting a public enemy at war with His Majesty, and did not aver overt acts as required by sect. 847 of the Criminal Code—and also that the trial judge had misdirected the jury by instructing them that the accused had assisted the Empire of Austria-Hungary in three ways, whereas the accused was not so charged. By his motion the defendant also asked for a reserved case on these points. That having been refused, he applied to the Court of King's Bench (appeal side) for leave to appeal and for an order directing that a case should be stated submitting these points. His application was dismissed by that court on the 21st of June, 1918, Lavergne J. dissenting. The alleged misdirection is not noticed in any of the judgments delivered. Indeed, the appeal on that ground was manifestly frivolous, the charge of the learned trial judge having been not merely scrupulously fair, but distinctly favourable to the accused. The majority of the Court of King's Bench dealt with the motion as depending solely on the sufficiency of the indictment, and the dissent of Mr. Justice Lavergne was based on the ground that the acts charged as "overt acts" are insufficient because they failed to "disclose any

hostile intention or action" on the part of the accused. He construed the indictment as charging the purpose of assisting the enemy against the ticket purchasers and not against the defendant. With deference, I think the learned judge was hypercritical. The statement of the purpose of aiding the enemy in the indictment immediately follows the statement that war was and is being prosecuted and carried on between Great Britain and Austria-Hungary "as the said Israel Schaefer then and there well knew." It is in my opinion reasonably clear that the purpose was charged as that of Schaefer, and not that of the ten ticket purchasers. That the evidence was sufficient to support the finding of the existence of that purpose involved in the verdict of "guilty" is *res adjudicata* under the unappealed judgment of the Court of King's Bench of the 4th of December, 1917. When the learned dissenting judge adds that:

> To assist persons who are not proved to have assisted the enemy in any way cannot surely be regarded as an offence,

I venture to think he misapprehends the essential elements of the crime of which the defendant has been convicted. That the rendering of actual assistance to the enemy was prevented by the timely intervention of the Canadian authorities is no answer to the charge.

I am, with respect, unable to appreciate the force of the learned dissenting judge's objection to the sufficiency of the indictment. "Overt acts" and a treasonable purpose in committing them are in my opinion charged by it.

The appellant is admittedly in gross default in the prosecution of his appeal to this court. No sufficient reason has been shewn for his omission to inscribe it for the October sittings. His failure to inscribe it for

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the present sittings is still less excusable. While counsel for the Crown does not actively oppose, he declines to consent to indulgence being extended. Under these circumstances, I think the motion before me should be disposed of on considerations similar to those which determine the granting or withholding of special leave to appeal to this court. Such leave is not granted where in the opinion of the court the judgment against which it is sought to appeal is clearly right. Being of the opinion that the judgment of the Court of King's Bench in the present case is so clearly right that an appeal from it would be hopeless, it would appear to be my duty to refuse the defendant's motion.

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*Oct. 29, 30
Dec. 9.

A. S. MATTHEW (DEFENDANT).....APPELLANT;

AND

GUARDIAN ASSURANCE COMPANY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Constitutional law—Statute—Retrospective legislation—Insurance—Fire—Dominion and provincial licenses—Action against agent—"Dominion Insurance Act," 7 & 8 Geo. V. c. 29, ss. 4, 6, 11—"British Columbia Fire Insurance Act," R.S.B.C. c. 113, ss. 4, 6, 7, 10, 11.

The appellant, being appointed to act as attorney of the Guardian Fire Insurance Company of Utah in the event of its obtaining a licence under the "British Columbia Fire Insurance Act," made application to the provincial authorities for such licence. The respondent took proceedings, by way of injunction, to restrain him from doing so, and his action was dismissed. Between the date of the trial and the hearing in appeal, the "Dominion Insurance Act" was amended by 7 & 8 Geo. V. c. 29, and sections 4 and 11 provided that a foreign insurance company could not carry on its business in Canada unless and until it has obtained a licence from the Minister of Finance for the Dominion of Canada.

Held, that the Court of Appeal should have taken judicial notice of the amendments to the "Dominion Insurance Act;" and, if so, the Guardian Fire Insurance Company of Utah not being able through the issuing of a provincial licence to transact any business in British Columbia before having obtained a Dominion licence, the proceedings by way of injunction taken by the respondent were premature. *Boulevard Heights* v. *Veilleux* (52 Can. S.C.R. 185; 26 D.L.R. 333), distinguished.

Per Idington, Anglin and Cassels JJ.—An application for injunction should not be entertained against the agent of an insurance company to restrain him from applying for the issuance of a license to the company, without the latter being made a party to the proceedings.

Per Davies C.J. and Brodeur J.—The absence of the principal as a party to this action, though not absolutely fatal, must necessarily lessen and narrow the measure of relief to which the respondent claims to be entitled.

Judgment of the Court of Appeal, (40 D.L.R. 455; [1918] 2 W.W.R. 405), reversed.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin and Brodeur JJ. and Cassels J. *ad hoc.*

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APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Clement J. at the trial, and maintaining the plaintiff's action.

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

Geo. F. Henderson K.C. and *Cameron* for the appellant.

Lafleur K.C. and *Atwater K.C.* for the respondent.

THE CHIEF JUSTICE—As to the point taken by my brother, Sir Walter Cassels, on the argument that the Guardian Fire Insurance Company of Salt Lake City, Utah, the real defendant in this case, was a necessary party to the action brought to restrain its agent Matthew, the appellant, from applying to the Superintendent of Insurance in British Columbia for a provincial licence to that company to do business in that province, I am not at present ready to pronounce the objection a fatal one. I agree that the company is a proper party to be joined as defendant, and I think the court of the province would have been well advised not to proceed in the hearing of the cause unless and until it had been added as a defendant.

But, as a matter of fact, Matthew, its general agent in British Columbia, made the application to the Superintendent of Insurance as the authorized agent of the company in that behalf and while the absence of the company may not be absolutely fatal, it must necessarily lessen and narrow the measure of relief to which the plaintiff company claims to be entitled.

The main and substantial question before us is the meaning and effect of the "Dominion Insurance Act,"

(1) 40 D.L.R. 455; [1918] 2 W.W.R. 405, *sub. nom. Guardian Assur. Co.* v. *Garrett.*

1917, which came into force 20th September, 1917. The appeal from the trial judge to the Court of Appeal of British Columbia was argued November, 1917, and the Act was therefore in force at that time.

It should, in my judgment, have been taken judicial notice of by the Court of Appeal and, if it had been, it would have appeared, which was common ground on the argument at bar, that no foreign insurance company can carry on its activities in the business it is authorised to deal in anywhere in Canada unless and until it first obtains the licence from the Dominion Minister provided for in section 4 of the statute.

The obtaining of a provincial licence such as that applied for in British Columbia by the appellant, Matthew, to the Superintendent of Insurance in British Columbia would not operate to permit of the company carrying on any of its activities in that province. It would not affect the prohibitions prescribed in section 11 of the Dominion Act against the company doing any kind of insurance business unless and until it has first obtained a Dominion licence. The provincial licence was, therefore, useless, innocuous and impotent in itself in any way to injure, hurt or damage the plaintiff company.

The result would be that this application was in any event premature. I agree that the official charged with the issuing of provincial licences would be well advised to do so only to companies which had first obtained a Dominion licence. But I do not see anything in either the Dominion or provincial statutes which prevents him granting a provincial licence, useless as it may be, to enable the licencee to carry on any business until after the Dominion licence has been obtained.

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Upon this ground alone I would allow the appeal, but under the circumstances without costs in this court and in the courts below. For fear that in thus allowing the appeal I might mistakenly be supposed to have done so on the merits, I desire to add that nothing could be further from my intention.

The power to determine whether under circumstances and facts as disclosed in this case, or whether in any case such a licence should be granted to any company, is now vested in the Minister of Finance, and neither this court nor any other court, I take it, can interfere with the exercise of his statutory discretion. At the same time I desire not to leave it open to be said that I had in any way, directly or obliquely, reversed or thrown doubt upon the judgment of the Court of Appeal in this case so far as the merits were concerned.

IDINGTON J.—It seems to me there has existed from the outset a fundamental misconception of the actual legal situation in which the respective parties concerned were placed, otherwise I imagine we should have been presented with some other evidence than submitted and argument thereupon helpful to solve, what I venture to look upon as an entirely novel claim.

The appellant happened to be named as attorney, to act for the Guardian Fire Insurance Company, in the event of its obtaining a licence under the "British Columbia Fire Insurance Act" and amending Acts. And I assume he consented in such event to so act and may have taken a part in filing with the provincial authorities part of the necessary material for obtaining such a licence.

Both the respondent and the Guardian Fire Insurance Company in question were foreign corporations.

The respondent was created such in Great Britain, and the other in Utah, one of the United States of America. Neither had any right to do any business in Canada against the will of the Parliament of Canada.

That Parliament, as early as 1868, passed an Insurance Act which prohibited the carrying on of such business in Canada by any foreign companies or persons unless and until duly licensed under said Act, and then subject to the conditions laid down therein.

That Act was amended from time to time and, by an early amendment, required the licence to be renewed from year to year. The respondent had been, under another name, it is said, duly licensed under said Act. That name was changed more than once, and in 1902 took the form now appearing herein. It also had obtained a licence under, and pursuant to, the provisions of the "British Columbia Insurance Act" to do business in British Columbia.

That Act, passed for purposes of revenue and other good reasons, rendered registration there necessary and provided for the issuing of a licence as evidence thereof.

Each insurance company of those concerned saw fit and was possibly required thereby to describe itself as of its place of origin or creation.

So far as appears in this case the Guardian Fire Insurance Company had never applied to the Dominion authorities. Until it had done so and obtained a licence or at least had made an application therefor, I think this action was premature. There was nothing to be feared from the merely preparatory and formal application made in British Columbia.

Whatever might be said for an action such as this had it been taken against the company, I think it cannot properly be maintained as against a mere agent

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doing no more than appellant had done, apparently in good faith and depending, no doubt, upon his principal duly proceeding to obtain, and duly obtaining, a Dominion licence before doing anything in the way of carrying on business.

The respondent had, until that done, presumably nothing to fear. Unfortunately, from the misconception I have adverted to, this objection never seems to have been considered by those concerned until my brother Sir Walter Cassels, on argument, called attention to the failure to make said company a party, and hence we are without argument on the question.

So far as I have been enabled to discover, the nearest approach to an agent in an analogous case being held thus liable to be attacked and enjoined, without his principal being made a party, is the case of those handling goods of a principal who was infringing some trade mark as, for example, in the case of *Upmann* v. *Elkan* (1), and other analogous cases cited in Kerr on Injunctions, 4th ed., pp. 342 *et seq.*

In such like cases the agent was clearly doing that which was in itself illegal and hence responsible in an action for an injunction. Here, presumably, there was nothing of that kind. The purpose certainly was neither, nor pretended to have been, that of proceeding to carry on the business without obtaining a Dominion licence. If another purpose was had in view it ought to have been established by evidence, which is not attempted.

It is true that as early as 1910, before the Utah company was created, sections 4 and 70 of the "Dominion Insurance Act" of 1910 had been called in question as being *ultra vires* the Dominion Parliament

(1) 7 Ch. App. 130.

by reason of the infringement thereby of provincial rights.

In consequence of such question being raised, a case was submitted to this court. That submission, although directed by order-in-council in 1910, was, for some reason or other, not proceeded with to argument until 1912, and not decided here till the following year.

An appeal was taken from the judgment of this court (1), to the Judicial Committee of the Privy Council, which was argued in December, 1915, and judgment given there in the following February (2).

I hardly think any one ever supposed that if the said section had been framed to deal only with foreign corporations, that there could be a question of the power of the Dominion Parliament in that regard.

For my part I felt bound to so limit the effect of my answer to the second question submitted, as to avoid all appearance of questioning that power so far as regards the foreign insurance companies.

The Judicial Committee, in giving an affirmative answer, seemed to feel bound to express clearly its opinion that as regards foreign corporations the Dominion Parliament had the power if expressed in "properly framed legislation."

If it, in fact, was ever supposed by respondent to have been part of the purpose of the Guardian Fire Insurance Company, created in Utah, pending this litigation, to deny the power of the Dominion Parliament and insist upon a right to operate in British Columbia by virtue only of a licence under the "British Columbia Insurance Act," I think it should have so alleged and proved such an allegation.

(1) 48 Can. S.C.R. 260; 15 D.L.R. 251.

(2) [1916] 1 A.C. 588; 26 D.L.R. 288.

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The surmise comes too late after it has obtained an injunction by the court below recognising the unquestioned validity of the Act of 1917, which contained in other respects identical provisions I am about to deal with.

In other words, when the appeal seeking for an injunction was argued, and the injunction now in question was granted by the court below, there was no longer, if ever, the slightest reason to seek for such relief.

That brings me to a consideration of the situation presented by the application of section 6 of the "Dominion Insurance Act," 1910, and its repetition in the Act of 1917, which enacts as follows:—

> 6. Before issuing a licence to a company the Minister must be satisfied that the corporate name of the company is not that of any other known company incorporated or unincorporated, or any name liable to be confounded therewith or otherwise on public grounds objectionable,

which had been brought into and remained part of the Act since 1894.

It may be arguable, as I suggested on the argument herein, that the whole situation of the legal relation of the parties concerned is not and cannot be affected by anything contained therein. And hence it may be further arguable that an agent or clerk of any kind can be attacked alone and restrained upon the basis of what we might hold to be the right interpretation and construction of this section.

Even assuming that such a claim might be arguable as against appellant's principal, I cannot see how such a case can be maintainable against the agent alone.

The appellant, it is true, has, by his pleading and his conduct of the defence, gone beyond that, but his foolishly doing so cannot determine the actual legal rights and liabilities existent between such parties and

bind us to hold that the granting or withholding of an injunction must be governed thereby.

The offence to be considered, and for repetition or continuation of which he is sought to be enjoined, is not that of pleading such a defence but an alleged offence anterior thereto.

I might rest my opinion here, but the claim, even if to be considered in light of the possible presence of the principal, is one of such a remarkable character that I feel it desirable to point out briefly the actual situation and need of pausing before, in such a case as is presented, laying down as law, in the absence of the Minister and without having his ruling, that he must not entertain for a moment the consideration of such an application.

And when we find that in Canada there actually are carrying on business no less than three or four different sets (and possibly many more) of foreign insurance companies possessing such similar names as "The Phœnix of London, England;" "The Phœnix of Hartford, Connecticut;" "The Phœnix of Paris," and, it is said, "The Phœnix of Brooklyn," we should I submit, infer that such a condition of things is the result of a considered and settled policy in the administration of the Act.

Indeed there is the case amongst others of the Guardians (one of which is a branch of that at Utah) competing with respondent in the accident line of insurance, from which it is fairly inferable that the respondent company or its parent company had for many years assented to such an interpretation and construction of the section as being correct.

Confronted with such a situation it seems to require some boldness on the part of respondent, well knowing all, to ask us to declare it all done illegally and in

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violation of the section I have just quoted. For my part I cannot assent to the creation of such inevitable confusion as would result from our so declaring in a case launched, as this has been, and steered, as far as possible, clear of an investigation of the actual facts.

We are asked to do that on the strength of a decision in which, as I read the case, there was ample ground for suspecting unfair dealing and a conscious purpose of doing wrong.

True, the court put it on another ground—as many of its kind were politely put when in fact reading between the lines there existed grave ground for suspecting intentional wrong-doing or a determination to attempt it.

Case law, however helpful, is often a blind guide to follow. I do not think that line of cases applicable herein or that they should govern the decision of this.

I think we should become possessed of a full realisation, or as full a realisation as we can, of the actual legal and commercial situations respectively, and observe an understanding of what men, even when incorporated, are about, and then ask ourselves if there is in truth that exact resemblance between the respective situations which each of the lines of cases presented, and that which confronted the Minister (or succession of Ministers) asked to administer the law as enacted in the "Dominion Insurance Act."

Let us never forget that the foreign corporation has no rights save in a recognised comity liable to be set aside absolutely or conditionally.

Let us further bear in mind that each of the foreign corporations now in question herein was created in a different country, conformably to the respective laws thereof, without, so far as we can see, any thought of coming into Canada.

And again let us bear in mind that respondent has never attempted to do business in the United States. The incorporation of the Utah company no doubt used what had become an apt word to catch the ear of him desiring to be insured, and could hardly have dreamed of rivalling or invading any property of respondent. Moreover, the literature used by it in business does not suggest such a purpose, but the contrary purpose of avoiding the possible evil complained of.

It seems to me that the presentation of each of such foreign companies so created and named respectively, of a claim to be licensed in Canada, ought rather to be allowed to stand on the like footing and be considered from the like point of view on which the court (and if I might be permitted to say so a very capable court) proceeded in the case of *Burgess* v. *Burgess* (1), and which was followed by another strong court thirty-six years later in *Turton* v. *Turton* (2).

The measure of prosperity that tempts a corporate creature to wander from its place of birth to do business in foreign lands surely has the like attendant inconveniences facing it when asked to change its name, as the son of his father might have to face in taking over the latter's business, if forced to abandon his name, and the like consideration, I submit, ought to be extended to it.

Indeed, it may be competent for the Minister to deal with such a difficulty in a practical manner as the court did in the case of *The Guardian Fire and Life Assur. Co.* v. *The Guardian & General Ins. Co.* (3).

Moreover, the names here in question are not identical, but if they had been the section in question might be held to constitute an imperative prohibition.

(1) 3 De Gex, M. & G. 896. (2) 42 Ch. D. 128.
(3) 43 L.T. 791.

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In regard to the alternative of either bearing names liable to be confused with others, can either claim a licence?

There is no priority given by reason of seniority or otherwise in the section.

Nor is there anything else in the statute very helpful. These licences only last for a year and are renewable, but

subject, however, to any qualification or limitation which is considered expedient.

Who is to determine the matter of expediency? Is it not the Minister? Can he not provide in such a case for a mark of distinction that will suffice unless in the case of customers exceptionally stupid or unintelligent?

And the mistake liable to occur from such causes would be reciprocal and the only inconvenience worth a moment's consideration would be from the competition created by adding another insurer, or two others, as one reads the section, to those already on the roll.

That is, of course, the real grievance, but it enures to the benefit of the public.

The monopolistic tendencies of commercial life increase with prosperity and courts as well as legislators should, I submit, be astute to see that when it is the administration of a great Department of State that is in question, as in truth it is herein, the specious and plausible resemblance, of its problems to be solved, to a decided case is not carried too far.

I forbear expressing any decided opinion upon what the section of the statute may mean in several of these features I point out, beyond the decided opinion that no injunction should be granted in entire disregard of its consideration which has been avoided heretofore in the progress of the case.

I have not overlooked the fact that the "Companies Act" in England contains a somewhat analogous section enabling the registrar to refuse in cases of conflict of names, and that courts have passed upon the result. One grave question, however, is that the relative positions of the Minister of Finance here and and Registrar of Companies there, are hardly the same, and in any event the section here in question clearly imposes a duty to discharge, possibly decisively, and the other merely enables, knowing that the court can rectify.

Can the court here rectify? We know the court can advise if asked.

There may be another arguable side of the question of the Minister's power.

It was attempted, unsuccessfully, it is true, in *Steele* v. *North Metropolitan Railway Co.* (1), to enjoin the defendant from petitioning Parliament for relief. In dismissing the application Lord Chelmsford L.C. remarked that judges of great eminence had said the court had power to enjoin an application to Parliament but they had all declined to define the occasion which would justify such interference.

On the other hand, in *The Queen* v. *The Registrar of Friendly Societies* (2), the court, while declining to interfere with the ruling of a registrar, did not seem to doubt such a jurisdiction existed in a proper case. *Grand Junction Waterworks Co.* v. *Hampton Urban District Council* (3), was another of similar character not denying power, but only to be exercised in an extreme case. Another shade of opinion, as it were, arising out of a different set of circumstances, it is true, but in relation to the proper exercise of the power of injunction

(1) 2 Ch. 237.
(2) L.R. 7 Q.B. 741.
(3) [1898] 2 Ch. 331.

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is there presented, when a specific remedy had been furnished by statute. The judgment of Stirling J. is well worth reading. It seems to furnish food for thought before resorting to an injunction in such a case as this where the Minister seems, impliedly at least, to have been given more power.

Many of the cases cited by Stirling J. in his judgment should be well considered before interference in such a case as this.

Norton v. *Nichols* (1), is one of the cases in which the question of letting plaintiff resort to an action at law instead of granting injunction is dealt with and is valuable as containing, though on an interlocutory motion, the expressions of opinion of eminent equity judges.

I need not continue on the lines of thought I indicate. I am clear the judgment of the learned trial judge should not have been reversed and an injunction granted in light of the clear enactment existing when the judgment appealed from was pronounced.

I think the appeal should be allowed and the judgment of the learned trial judge be restored with costs, but without prejudice to the rights of respondent, if any, as events develop, and if the purpose is continued on the part of the Utah company of applying for a Dominion licence.

At most the result should be no higher than in the cases when application for injunction failed and the plaintiff was relegated to a court of law to claim damages.

ANGLIN J.—For the reasons stated by Mr. Justice Cassels I doubt whether this action is properly con-

(1) 4 K. & J. 475.

stituted in the absence of the Guardian Fire Insurance Company (of Utah). The purpose of the plaintiff is to restrain projected activities of this Utah company in British Columbia. It is, I think, quite clear that the defendant Matthew does not represent it for the purpose of this action. His capacity to sue and be sued on its behalf under the power of attorney in evidence would arise only upon the licence sought being granted. It is for the conduct in matters therein specified, of the affairs of the company when so licensed that the power of attorney is furnished as required by the statute. R.S.B.C. 1911, ch. 113, sec. 10 (*g*). If not a necessary party—as I incline to think it was—the Guardian Fire Insurance Company (of Utah) would certainly have been a proper party; and I think judicial discretion would have been soundly exercised by declining to entertain this action until it had been added as a defendant. Where the injunction sought will injuriously affect the rights of a person or body not before the court it will not ordinarily, and without special circumstances, be granted. *Hartlepool Gas & Water Co.* v. *West Hartlepool Railway Co.* (1). I prefer, however, not to rest a judgment of dismissal of the action on this ground, but rather on another which a little more closely touches the merits of the issue, having regard to the nature of the relief sought —an injunction *quia timet.*

In *Attorney-General* v. *Corporation of Manchester* (2), Chitty J. says:—

> The principle which I think may be properly and safely extracted from the *quia timet* authorities is that the plaintiff must shew a strong case of probability that the apprehended mischief will in fact arise.

Whatever ground the decision of the Judicial Committee (3) (see, however, *Farmer's Mutual Hail*

(1) 12 L.T. 366. (2) [1893] 2 Ch. 87, at p. 92.
(3) [1916] 1 A.C. 588, at p. 597.

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Insurance Association v. *Whittaker* (1),) in regard to the validity of sec. 4 (*et seq.*) of the "Dominion Insurance Act," 1910, ch. 32, may have given the present plaintiff to apprehend injury from the granting of a British Columbia licence to the Utah company, since the enactment of the new "Dominion Insurance Act" of 1917 (ch. 29, ss. 4-11) it seems abundantly clear that the granting of a provincial licence (assuming the legislation providing for it to be within the ambit of provincial legislative jurisdiction as defined in *John Deere Plow Co.* v. *Wharton* (2), would not enable the Utah company to solicit or transact any business in British Columbia until it should obtain a licence from the Dominion authorities. So essential is the Dominion licence that without it the transaction of any business by the company is prohibited (7 & 8 Geo. V. (D.), ch. 29, sec. 11), and upon its being granted the right to a provincial licence or payment of the prescribed fee is indisputable (R.S.B.C. 1911, ch. 113, sec. 7). The granting of the British Columbia licence will, therefore, not entail the mischief to avoid which the desired injunction is sought.

Under these circumstances the British Columbia registrar might be well advised to refrain from granting the provincial licence until the applicant company has obtained its federal licence. Should the latter licence be refused, or should it be granted to the company under a different or modified name, as is not improbable, a British Columbia licence obtained under the present name might be entirely useless. But I know of no ground for holding that applications for both licences may not be made concurrently or that that for the provincial licence may not precede that for the Dominion licence. For aught that appears it was the Utah

(1) 37 D.L.R. 705; [1917] 3 W.W.R. 750.

(2) [1915] A.C. 330; 18 D.L.R. 353.

company's intention to apply for the necessary Domin-Dominion licence before undertaking to carry on business in British Columbia. It may already have done so. The defendant Matthew, in making the application complained of, has not done anything illegal.

The Dominion Act of 1917 was in force when this case was heard by the British Columbia Court of Appeal and should have been taken account of by that court. Since, therefore, in view of that legislation a British Columbia licence, if granted to the Utah company, would be impotent to enable it to transact any business to the prejudice of the plaintiff, I am, with respect, of the opinion that when this action came before the Court of Appeal a case for the granting of the injunction asked did not exist and that it should have been refused. Our statutory duty is to pronounce the judgment which that court should have rendered. *Boulevard Heights* v. *Veilleux* (1). This ground suffices for the disposition of the appeal without considering the other questions dealt with at bar.

I agree with my brother Cassels that the injunction should also be dissolved as to the defendant Garrett, although he did not appeal against it.

BRODEUR J.—I concur in the opinion of the Chief Justice.

CASSELS J.—An appeal from the Court of Appeal of British Columbia. The plaintiff, the Guardian Assurance Company, Limited, commenced this action by writ issued on the 27th March, 1917, and the case came on for trial before Mr. Justice Clement. Judgment was rendered on the 26th June, 1917, dismissing

(1) 52 Can. S.C.R. 185; 26 D.L.R. 333.

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the action with costs to be paid by the plaintiff to the defendant Matthew.

The plaintiff's statement of claim alleges that the plaintiff is a company duly authorised to carry on business in the Dominion of Canada. It alleges that a company called the Guardian Fire Insurance Company, incorporated in Utah, and with power (on obtaining a proper licence) to carry on business in British Columbia, had made application to the defendant Garrett for the issue of a licence under the "British Columbia Fire Insurance Act."

The statement of claim further alleges that the Guardian Fire Insurance Company proposes and intends to carry on the business of fire insurance in the Province of British Columbia under the name of the Guardian Fire Insurance Company.

The statement of claim asks for an injunction to restrain the defendant Matthew, the agent of the Utah company, from making any application for the licensing of the Utah company and to restrain the defendant Garrett from issuing any licence.

The Utah company, namely, the Guardian Fire Insurance Company, were not made defendants to the action.

It will be noticed that there is no allegation in the statement of claim that the defendant Garrett intended to issue such a licence as had been applied for. The defendant Garrett filed no defence to the action.

A mass of evidence was adduced at the trial, a considerable portion of which was inadmissible if the decisions of the House of Lords in trade-mark cases are assumed to be binding upon our courts. For reasons which I give hereafter I do not see that the action could have been properly tried in the absence of the parties who were interested. The

action having been dismissed, and, as I think, rightly dismissed by the trial judge, the question does not become one of very great moment were it not for the decision of the Court of Appeal now before this court.

The appeal before the Court of Appeal of British Columbia (1), was heard on the 16th and 19th days of November, 1917, and the order of the Court of Appeal bears date the 2nd April, 1918. The formal judgment of the 2nd April, 1918, is beyond what was evidently contemplated by the learned judges. It provides as follows:—

> And this court doth further order and adjudge that the respondent Matthew be, and he is, hereby perpetually restrained from applying to the Superintendent of Insurance of the Province of British Columbia, and the respondent the Superintendent of Insurance be, and he is, hereby perpetually restrained from granting any application for the licensing under the "British Columbia Fire Insurance Act" of any company under the name of the Guardian Insurance Company or any other name likely to mislead or deceive the public into the belief that the company being licensed as aforesaid is the same as the Guardian Assurance Company, Limited.

This seems to me to be rather a sweeping injunction if the judgment were otherwise correct. It not merely restrains the Superintendent of Insurance from granting a licence to the Utah company, the company whose agent the defendant Matthew is, and a company as I have mentioned not a party to the action unless the action against Matthew, the agent, means an action against them, but it restrains the issuing of a licence to any other company that may apply whether the Utah company or not.

The defendant Garrett did not appear on the appeal and the judgment of the Court of Appeal orders and adjudges that the appellant's costs of the said action and of this appeal be taxed and paid by the respondent Matthew.

(1) 40 D.L.R. 455; [1918] 2 W.W.R. 405.

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The statute of British Columbia, the one in question, is ch. 113, of the Revised Statutes of British Columbia, 1911. It provides by section 4 as follows:—

No company shall undertake or solicit, or agree or offer to undertake, any contract within the intent of section 2 of this Act, whether the contract be original or renewed, or accept or agree or negotiate for any premium or other consideration for the contract, or prosecute or maintain any action or proceeding in resepct of the contract, except such actions or proceedings as arise in winding up the affairs of the company, without in each such case having first obtained from the Superintendent and holding a licence under this Act.

Section 6 provides as follows:—

6. So soon as a company applying for a licence has deposited with the Superintendent the security hereinafter mentioned, and has otherwise conformed to the requirements of this Act, the Superintendent may issue the licence.

By section 10 it is provided that

Before the issue of a licence to a company other than a provincial company, such company shall file in the office of the Superintendent.

certain documents which are set out.

Sub-section (*d*) provides for filing:—

Notice of the place where the head office without the province is situate.

Sub-section (*g*) provides:—

A duly executed power of attorney under its common seal, empowering some person therein named and residing in the city or place where the head office of the company in the province is situate, verified in manner satisfactory to the Superintendent, to act as its attorney and to sue and be sued, plead or be impleaded, in any court, and generally on behalf of such company, and within the province, to accept service of process and to receive all lawful notices, and to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney and of the company to give to its attorney; provided that whenever the company has by power of attorney under the seal of the company appointed a general agent for Canada, and has thereby authorised such general agent to appoint other agents in the various provinces of Canada, then, after filing with the Superintendent a copy of said power duly certified by a notary public to be a true copy thereof, other powers of attorney executed by the said general agent for Canada, under his seal, in the presence of a witness, verified in manner satisfactory to the Superintendent, shall be deemed sufficiently executed by the company for all the purposes of this Act.

Section 11 of the Act is as follows:—

11. Such power of attorney shall declare at what place in the province the chief agency, head office, or office of the attorney of the company is or is to be established, and shall expressly authorise the attorney to receive service of process in all actions, suits and proceedings against the company in the province in respect of any liabilities incurred by the company therein; and shall declare that service of process for or in respect of such liabilities thereat, or on the attorney, or any adult person in the employ of the company at the said office, shall be legal and binding on the company to all intents and purposes whatsoever.

I do not think that, on the proper construction of this statute, it was sufficient to have made the defendant Matthew the sole party. He is constituted the agent of the company for the purposes set out in the Act, but that does not, to my mind, get rid of the necessity in an action of this nature of having the company before the court.

It has been argued that an injunction may be applied for against an agent of the company, and for this proposition, Kerr on Injunctions (5th ed., p. 377), and the case of *Upmann* v. *Elkan* (1), are cited. This case was an action based upon a trade mark, and against a fraudulent mark on cigars, viz., the trade mark of the plaintiff, a resident of Cuba. Even in that case it will be noticed that the consignees to whom the cigars were consigned were, on their names being disclosed, added as parties to the action.

In Bowstead's Laws of Agency (5th ed., pages 445 & 446) will be found a number of cases, the nearest of which is the case of *Nireaha Tamaki* v. *Baker* (2), but in that case it is expressly stated that the defendant was not the agent for the Crown.

In cases of tort the plaintiff can, of course, sue an agent who is a joint tort feasor, but that is not the case

(1) 7 Ch. App. 130. (2) [1901] A.C. 561; 70 L.J.P.C. 66.

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in question in this action. There is no suggestion of any fraud on the part of Matthew or in fact on the part of the Utah company.

I fail to see by what process of reasoning an incorporated company with a status to carry on business can be restrained from applying for a licence; and I also fail to see how the registrar can be restrained from entertaining such an application. If he were of opinion that the licence should not be granted he would probably have refused it.

The case which seems to be greatly relied upon, viz., *Hendriks* v. *Montague* (1), is a case of a different character. In that case the company was not incorporated, and the facts were different.

I think the remarks of Mr. Henderson K.C. in his argument before this court, that the facts in the *Sun Life Case*, viz., *Saunders* v. *Sun Life Assur. Co. of Canada* (2), are applicable and should be followed, are well founded. In that case the effect of *Hendricks* v. *Montague* (1), is discussed. The appellants in the *Hendriks Case* (1) were represented by Mr. Chitty Q.C. and Mr. H. W. Horn. Mr. Chitty, it is needless to remark, was an eminent counsel—and on page 643 will be found his remarks as follows:—

> The Master of the Rolls was under a misapprehension in thinking that our motion was founded on the 20th section of the "Companies Act," 1862. That is not the case. We only referred to the section as a statutory embodiment of the law on the subject. If we were applying under the Act, it would not be necessary to come to this court, as the registrar would take care of us.

It seems to me the case should have been left to the registrar to deal with, and I utterly fail to understand how jurisdiction can exist to restrain a company duly incorporated with power to carry on business in British Columbia from applying for a licence.

(1) 17 Ch. D. 638. (2) [1894] 1 Ch. D. 537.

On the question of suing an agent in place of the principal, reference is made to *Archibald* v. *The King* (1), recently decided by this court. This case does not, to my mind, maintain the proposition. That case proceeded upon the ground that the municipal council not having chosen to pass a by-law in regard to the issuance of a licence, the clerk was bound to issue the licence. The Chief Justice, at page 51, so treats it, Mr. Justice Idington, at page 52, and Mr. Justice Anglin, at page 53. It is no authority for the proposition that in a case of the nature of the one in appeal an agent can be sued alone.

On the question of what is necessary to prove in the so-called passing off cases, the case in the Privy Council of the *Standard Ideal Co.* v. *The Standard Sanitary Mfg. Co.* (2), may be looked at.

I am of opinion that the appeal in this case should be allowed and the judgment of the trial judge restored. Having come to this conclusion the case might rest there, but I think there is another reason why the Court of Appeal in British Columbia should not have granted the injunction.

In the case of the *Boulevard Heights, Limited* v. *Veilleux* (3), the question arose as to the effect of a curative statute on the right of the appellant. It is material in the case before us to keep in mind the dates.

As I have pointed out, the case was not argued in the Court of Appeal for British Columbia prior to the 16th November, 1917, and the order in appeal is dated the 2nd April, 1918. Between the date of the trial judgment and the hearing in appeal, the law affecting the rights of the Utah company was changed.

(1) 56 S.C.R. 48; 39 D.L.R. 166. (2) [1911] A.C. 78, at p. 85.
(3) 52 Can. S.C.R. 185; 26 D.L.R. 333.

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This is by the "Insurance Act" (ch. 29 of 7 & 8 Geo. V.), which was assented to on the 20th September, 1917. In considering whether or not the court should not have taken cognizance of this statute, it will be seen that the facts in the *Boulevard Heights Case* (1) are dissimilar. At page 188 of the report, Mr. Justice Idington refers to the fact:—

> The Act was amended after judgment was given herein by the Court of Appeal, and the amendment, it is urged, does away with his right therein. Whatever might be said in the case of such an amendment as appears, enacted before the hearing in appeal, cannot, I think, help the appellant now.
>
> That judgment was right when given. We can only give the judgment which the court below appealed from should have given. To go further would be to exceed our jurisdiction.

Mr. Justice Duff, at pages 191 and 192, quoting *Quilter* v. *Mapleson* (2) puts it as follows:—

> If we are governed by these amendments in the decision of this appeal, then the respondent must fail in so far as his case rests upon the illegality of the agreement of sale.
>
> There can be no doubt, I think, that if these amendments had been enacted before the hearing of the appeal by the Appellate Division of Alberta, that court would have been governed by them in the disposition of the appeal.

Mr. Justice Anglin, at page 193, puts it:—

> The amending statute of 1915, although made applicable to pending litigation, is not declaratory of the law as it stood at the time of the contract in question or at any subsequent period anterior to its enactment. It became law only after the judgment of the Appellate Division in this case had been delivered. This court is bound by statute to render the judgment which the court appealed from should have given—of course upon the law as it was when that court delivered judgment, etc.

Mr. Justice Brodeur, at page 196, states:—

> At the time the court below was considering this case, the statute now invoked had not been passed. It could not be then acted upon by that court. Our duty is to render the judgment which the court below should have rendered.

(1) 52 Can. S.C.R. 185; 26 D.L.R. 333. (2) 9 Q.B.D. 672.

In this case, as I have stated, the "Dominion Insurance Act" came into force prior to the hearing of the appeal in British Columbia.

In the case of *Attorney-General for the Dominion of Canada* v. *Attorney General of Alberta* (1), which was decided by the Board of the Privy Council, Lord Haldane, who delivered the judgment of the Board, states:—

> The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a licence from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province. To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens.

The Dominion statute relating to insurance referred to, namely, ch. 29, 7 & 8 Geo. V., was enacted, and by the interpretation "Minister" means the Minister of Finance. "Company" includes any foreign company for the purpose of carrying on the business of insurance. "Foreign company" means a company incorporated under the laws of any foreign country for the purpose of carrying on the business of insurance, and having the faculty or capacity under its Act or other instrument of incorporation to carry on such business throughout Canada.

By the admissions in the present case the Utah company has power to carry on business in British Columbia, and I think that it should be assumed that they also have the faculty or capacity to carry on business throughout Canada.

By the statute, section 4, it is provided that it

> shall be competent to the Minister to grant to any company which shall have complied with the requirements of this Act preliminary to the

(1) [1916] 1 A.C. 588, at p. 597; 26 D.L.R. 288, at p. 292.

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granting of a licence, a licence authorising the company to carry on its business of insurance or any specified part thereof, subject to the provisions of this Act and to the terms of the licence.

Sub-sec. (*b*) provides that

in the case of any other company, throughout Canada or in any part of Canada, comprising more than one province which may be specified in the licence.

Section 6 provides:—

Before issuing a licence to a company, the Minister must be satisfied that the corporate name of the company is not that of any other known company incorporated or unincorporated, or any name liable to be confounded therewith or otherwise on public grounds objectionable.

There is a prohibition preventing a company doing business without this licence. Section 11 legislates as to this.

The effect of the licence is provided for by sub-sec. 2 of sec. 4, which reads as follows:—

2. Any company other than a Canadian company which may obtain from the Minister a licence or a renewal of a licence shall thereupon and thereby become and be deemed to be a company incorporated under the laws of Canada with power to carry on throughout Canada, or in such part or parts of Canada as may be specified in the licence, the various branches or kinds of insurance which the licence may authorise.

This is a wide provision.

At the time the appeal was taken to the Court of Appeal in British Columbia the Utah company had not obtained a licence under the British Columbia Act. The licence has to be obtained from the Dominion. Had the Minister of Finance issued the licence no legislation in British Columbia preventing them from carrying on business would have been valid. See *John Deere Plough Case* (1).

It seems to me that the Court of Appeal should have been guided by the fact that when the appeal was heard the law was changed. The requirement on the part of the Utah company to obtain a licence from the

(1) [1915] A.C. 330; 18 D.L.R. 353.

registrar in British Columbia ceased to exist. The forum to determine the question whether a licence should be granted or not was the Minister of Finance for the Dominion, and I fail to see what jurisdiction the courts would have for interfering with the express statutory power which is given to him to grant or refuse.

I think the appeal should be allowed with costs, payable to the defendant Matthew by the plaintiff and the judgment of the trial judge restored.

The defendant Garrett did not appear on the appeal, and a curious result would happen if the judgment were held to be in force as against him, while the decision of the court is that the action should be dismissed on the grounds stated. The nearest authority I can find is *Smith* v. *Cropper* (1), in which a case of an analogous character came up before the House of Lords. It was a patent action. The patent had been declared valid. One or other of the defendants failed to appeal. The appellants succeeded and the patent was declared void. The Lords decided that it would be an anomaly to have a judgment declaring the patent valid as against one defendant, and invalid against the other defendant, and the rest of the world.

I think, in this case, the judgment of the Appellate Court must be set aside in toto both as regards Matthew and Garrett.

Garrett is not entitled to costs as he did not appear in the Court of Appeal or in this court.

Appeal allowed without costs.

Solicitors for the appellant: *Cameron & Cameron.*
Solicitors for the respondent: *Bodwell & Lawson.*

(1) 10 App. Cas. 249, at p. 253.

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*Nov. 26.
*Dec. 23.

JOHN MORROW SCREW AND NUT COMPANY (DEFENDANT)..... APPELLANT;

AND

FRANCIS HANKIN (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC, SITTING IN REVIEW.

Contract—Memorandum in writing—Conditions missing—Parol evidence—Relation of documents—Statute of Frauds—Usage of trade—Option—Provincial laws in Canada—Judicial notice—Art. 1235 C.C.

The respondent agreed by contract in the form of a letter to appellant' and "approved" by him, to purchase steel drills, without mentioning any "prices" but merely quoting the sizes and a rate of discount. It was stipulated that "the value of this contract" would "be from $25,000 to $35,000," and that "our shipping instructions, invoicing instructions, etc., given on July 10th, 1915," would "hold good." The letter of July 10th, 1915, contained an express reference to a standard drill price list, in use by the whole drill trade of North America.

Held, that the respondent had the right to establish by parol evidence that the discount mentioned in his letter meant, according to the usage of trade, discount off the standard drill prices and so to prove that the contract in writing contained all essential terms.

Held also, that, according to the terms of the agreement, the respondent was bound to purchase goods to an amount of $25,000, with the right to order an additional amount of $10,000 which the appellant could not refuse to supply, the option being entirely with the respondent.

Per Davies C.J. and Anglin, Brodeur and Mignault JJ.—The written agreement between the parties was intended not to be a mere option revocable until acted upon, but an actual agreement entailing mutual obligations.

Per Anglin, Brodeur and Mignault JJ.—While the proof of a contract, within Art. 1235 C.C., must as a matter of procedure be made according to the *lex fori*, its validity depends upon the *lex loci contractus*.

Per Anglin, Brodeur and Mignault JJ.—The laws of the Province of Ontario and those of the Province of Quebec as to the requirement of writing in the case of contracts such as in this case differ in their effect.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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Per Anglin, Brodeur and Mignault JJ.—The Supreme Court takes judicial notice of the statutory or other laws prevailing in Provinces of Canada other than that in which the action or proceeding under appeal to it has been instituted. *Logan* v. *Lee*, (39 Can. S.C.R. 311), *followed*.

Judgment of the Court of Review [Q.R. 54 S.C. 208], affirmed.

APPEAL from the judgment of the Superior Court of the Province of Quebec, sitting in review at Montreal (1), affirming the judgment of the trial court and maintaining the plaintiff's action with costs.

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

W. N. Tilley K.C. for the appellant.

Eug. Lafleur K.C. and *Weldon* for the respondent.

THE CHIEF JUSTICE.—This action was one brought in the Superior Court of the Province of Quebec by the plaintiff, respondent, Francis Hankin, against the defendant, appellant, to recover damages alleged to have been sustained by him owing to the refusal of the defendant to carry out an alleged contract made by him with plaintiff to manufacture and deliver to plaintiff a stipulated quantity of "twist drills of cast steel."

The Superior Court sustained the plaintiff's action and awarded the plaintiff $10,032.31 as damages, which judgment was confirmed "in all things" by the Court of Review and from which latter judgment this appeal is taken.

From the evidence at the trial, it appeared that the appellant, defendant, issued to the trade periodically a catalogue accompanied by a standard twist drill price list which is a list in use by all manufacturers of twist drills in the United States and Canada. On this

(1) Q.R. 54 S.C. 208.

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list the gross prices remain unchanged from year to year. As net prices are constantly fluctuating, they are quoted by way of discounts of greater or less amount from these standard gross prices. This manner of quoting, the plaintiff contended and the trial judge found, was well established in the trade so that dealers, when buying or selling, quote merely the kinds or sizes of the drills referred to and the rate or rates of discount which is understood as referring to the standard list and thus establish the prices agreed on.

Plaintiff, through his manager Hill, had, several times before the contract in question here, entered into contracts with defendant for the purchase of drills, the negotiations being made and concluded either with Coulter, the president, or with Horton, who styled himself variously as "assistant to the president" or the "manager," or as "acting for the president."

One of these earlier contracts was still in force and partially completed in August, 1915, when the contract now in question was made.

On August 21st, 1915, plaintiff's manager, Mr. Hill, went to Ingersoll and entered into negotiations with Mr. Horton for the purchase of cast steel twist drills of the net value of from $25,000 to $35,000. The negotiations were closed at the same meeting and a written contract was at once prepared in the form of a letter from plaintiff to defendant signed by Mr. Hill for plaintiff, marked "accepted" at the foot and signed by the defendant company per Mr. Horton. This contract is the basis of plaintiff's suit and is in the following terms:—

Ingersoll, Ontario, Aug. 21, 1915.

The John Morrow Screw & Nut Coy. Ltd.
Ingersoll, Ont.

Gentlemen:

As per my conversation with your Mr. Horton this morning you will enter our contract as follows:

Best quality Cast Steel Twist Drills, neither Drills, Packages or Cases to bear any other mark excepting size.

The value of this contract to be from twenty-five thousand ($25,000) to thirty-five thousand dollars ($35,000) net. Specifications to commence about three weeks hence and shipment of the whole lot is to be made before the end of March, 1916.

Discounts as follows:

Straight Shank Jobbers Drills, inch sizes	80, 10, 3½%
Taper Shank Jobbers Drills, inch sizes	80, 10, 3½%
Straight Shank Taper Length Drills, inch sizes	80, 10, 3½%
Drills ½" Shanks (both right and left hand Twist)	80, 10, 3½%
Drills ⅝" Shanks (both right and left hand Twist)	80, 10, 3½%
Bit Stock Drills	80, 10, 3½%
Number Sizes	80, 10, 3½%
Letter Sizes	80, 10, 3½%
Taper Square Shanks (both right and left hand Twist)	76%

Delivery F.O.B. Montreal.

Terms of Payment—Spot cash against invoice with original Inland Bill of Lading attached.

Our Shipping instructions, Invoicing instructions, &c., given on July 10th, 1915, to hold good unless modified by us later.

Yours truly,
FRANCIS HANKIN & Co.

Accepted Per A. H. Hill.
JOHN MORROW SCREW & NUT CO. LIMITED,
Horton,
For President and Manager.

The letter of July 10th, 1915, referred to at the close of the above letter or contract, embodied the terms of one of the earlier contracts between the parties for the purchase and sale of drills and contained with the shipping and invoicing instructions an express reference to the standard twist drill price list on which all discounts are placed.

After plaintiff sent in his first order or specifications within the stipulated three weeks, defendant began expressing its fears that it would not be able to "live up" to the contract and asking plaintiff to consent to cancel it, which plaintiff refused to do, whereupon, defendant, by its letter of October 15th, formally declared it would not carry the contract out.

Plaintiff thereupon invited tenders from other manufacturers, for the same quantities and kinds of

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drills, and eventually closed a contract with the Cleveland Twist Drill Company for the kinds and quantities the defendant had undertaken to supply. The defendant was kept advised of the calls for tenders and of the Cleveland company's quotations and was formally put in default again by the plaintiff before closing with this latter company.

The amount paid by plaintiff to the Cleveland company for the kind and quantity of drills the plaintiff had contracted to supply was $10,032.31 above that which the contract, if binding, with the defendant provided for and this amount is the damages claimed by him and adjudged by the court.

Mr. Tilley for the appellant contended first that the alleged contract was an offer or option merely and was withdrawn, but I really do not think that such a construction is at all reasonable if it is once held that the contract is in other respects valid.

He further submitted that Horton had no authority to enter into the contract, but I am also of opinion that under the evidence there is no reasonable doubt of his authority to do so. It may be observed that Horton himself was not called as a witness and the only evidence given on defendant's part was that of the president himself which fell far short in the face of the proved facts of shewing want of authority on Horton's part. I think it clearly shewed that the company always recognized Horton, at any rate in the president's absence, and held him out as having full authority to transact such business as was involved in the entering into of such contracts as the one in question.

There remained his main contention that the contract was one required by the Statute of Frauds to be in writing and that oral evidence of the bargain to supply what was wanting in the written instrument could not be given.

Both parties, he said, agreed that there was no substantial difference between the law of Quebec and that of Ontario on the subject. The "prices" to be paid under the alleged contract were not stated in it nor was there any reference in it to the "standard list of prices" from which the prices of each class of articles stipulated for in the contract could be ascertained.

But I do not think such absence is necessarily fatal provided it can be supplied either by another document to which direct reference is made in the contract so that the two can be read together and so constitute a complete memorandum, or in the absence of direct reference in one to the other, if the two documents can be connected together by reasonable inference.

In the case of *Doran* v. *McKinnon* (1), I had to examine fully the authorities on the point and to express my conclusion from them and it was as above stated.

Applying this rule to the case before us we have the following facts proved: That in the twist drill trade there is only one price list on the whole North American continent; when either buyers or sellers quote discounts on drills in their orders or acceptances of orders, they have this price list in their minds and both parties understand that, when they refer to discounts on prices, they mean discounts on the gross prices given in the standard drill price list—necessarily in use by all manufacturers of twist drills and all dealers in the same. This is made abundantly clear by this uncontradicted evidence of Mr. Hill.

The discounts quoted in the contract above set out manifestly refer to some amounts or prices. The letter of July 10th, 1915, referred to in the last paragraph of

(1) 53 Can. S.C.R. 609 ; 31 D.L.R. 307.

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the contract, does mention the standard list along with the prices on which the discounts were to be made. The result is that the standard list of prices from which the discounts mentioned in the contract are to be deducted should and must be connected together by reasonable inference as having necessarily been in the mind of both parties to the contract when entered into and could not possibly have reference to anything else and that being so it is sufficient under the authorities to satisfy the statute.

As to the contention with respect to the meaning of the words "inch sizes" which I remark were not "inch size" merely, I think in the connection in which they were used they were trade terms known and well understood in and by the trade and that the weight of testimony as to their meaning was strongly in favour of the contention that "inch sizes" included drills in fractions of an inch or more than an inch. In the respondent's factum it is stated and was not challenged on the argument that

> of the three kinds of drills described in the contract as of "inch sizes" the first two were known as jobbers drills.

The price list shews and Mr. Young, a witness called by appellant, swore that jobbers drills were only listed in "fractional" sizes and run up to only half an inch in diameter. If, therefore, appellant's interpretation of the meaning of the term is the correct one he was offering and agreeing to sell jobbers drills of one inch in diameter, a thing which it did not manufacture and which did not exist in the trade.

It must be remembered that this objection was never raised until the trial, when the defendant applied to amend his plea so as to cover it. I think the learned trial judge correctly found the trade usage of the words to be that they covered fractional sizes.

Mr. Tilley contended with respect to the damages that in any event they could only be estimated on the failure of the defendant to deliver the $25,000 value of the goods up to which the plaintiff bound himself to order; and did not cover the other ten thousand in value which was only an option given to the plaintiff; a minimum and a maximum figure was stated. The plaintiff was bound to order $25,000. He had the right to order another $10,000, but there was no right on the vendor's part to refuse to supply the $35,000 value if ordered, the option was one entirely with the purchaser.

The defendant repudiated the contract absolutely on the 16th October and in a letter of that date suggested that plaintiff purchase the drills in the United States. The plaintiff replied on the 19th saying that in order to protect his interests he would proceed to purchase the drills elsewhere, charging the difference to defendant.

He called for tenders for from $25,000 to $35,000 in value of drills and notified the defendant of the result of the tenders in letter of 27th October.

Later, on 16th November, he again wrote defendant as follows:—

> In reference to our letter of 27th October, we find that in covering for only $25,000 to $35,000 of drills with Cleveland Twist Drill Company, on account of the increased price which we have had to pay this will not enable us to purchase the same quantity of drills as would be the case against your contract. We have therefore covered for an extra ten thousand to fifteen thousand and desire you to be notified of the fact.

In other words, plaintiff substantially notified the defendant that he had exercised his option up to the $35,000 and that as the defendant had definitely and absolutely repudiated the contract he would go into the market and purchase up to that figure for the best price he could and hold the defendant responsible for any loss he would sustain.

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Under these circumstances I think the assessment of the plaintiff's damages was made on a correct basis and the appeal should be dismissed with costs.

IDINGTON J.—When the terms used in the alleged contract have been, as they were, duly and correctly interpreted, we ought, I submit, to find it quite intelligible and answering all the requirements of the Statute of Frauds.

But if it is attempted to so extend that as to incorporate something which is not obviously intended to be incorporated therewith, a difficulty arises in the way of him making the attempt, but not in our finding a contract.

There is a contracting letter of a date anterior to this contract which is referred to in the last sentence thereof. So far as same can, clearly and reasonably, be held to have been indicated thereby as the subject of incorporation, I see no difficulty in doing so. I refer to the "shipping instructions," "invoicing instructions," &c.

The "&c.", may, not unreasonably, be taken to mean the like kind of terms and thereby include the sentence in the letter referred to, and that falling therein under the heading "Re invoicing" "Drills to be billed at 80, 10, 3½ of your standard lists," and thus make clear that it was the appellant's standard lists of all sorts of inch sizes whether single or multiples or fractions thereof, which were had in view in contracting.

When that is done appellant says confusion is produced thereby of such a nature that you cannot find a definite contract, or at least one such as necessary to find in order to cover or lay a foundation for assessing a great part of the damages in question.

The sizes of the drills named in the contract falling

under the phrase "inch sizes" being of doubtful import led to the introduction of evidence of experts and I cannot say there is error in doing so or in that accepted by the learned trial judge. Indeed, if that evidence is admissible, which did not seem to be seriously questioned, I should say it is quite unnecessary to raise such issues as started upon the question of inch sizes unless to lead the court into the wilderness of confusion and succeed thereby.

For my own part I incline to think that the question so raised is of no consequence when we find in law that the measure of damages is the difference between the price or prices agreed upon and the market price at the time when the buyer was entitled to get delivery, and that seems to have been the same proportionate rise, or so nearly the same, in all the classes of tools in question, that the result of the breach of contract would be the same if measured by any selection the respondent saw fit to make.

It is not his buying or bargain that is the measure of damages, though that may be some evidence of market price and in some circumstances he may be bound to avert or minimize loss.

His power of selection under such a contract as this of course gives, or is liable to give, rise to confusion of thought, and had there been in fact a substantial deviation of the percentage of rise in the respective market values of the different classes of goods in the list from which the respondent was entitled to select, a difficult question might have arisen. But in regard to drills up to an inch and a half sizes at least, there would seem to have been no difference of percentage of rise in any class and respondent bought quite enough below that margin to fulfil his right to damages on the $35,000 limit of his bargain, without coming into the

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field of variation of percentages of rise and thus is eliminated any question turning upon the multiple of inches.

There was a contract definitely binding respondent to buy at least up to $25,000 worth, and the appellant to sell not only that much but also up to $35,000 worth if respondent should so select.

It seems at first blush that it is unfair to have the seller bound to such an extent when the buyer is not.

If the market accidentally goes one way there is a possibility of the one party to a contract suffering thereby, having to bear a heavier load than the other party might have to bear in case of the market going the other way.

That, however, is the result which the parties agreed to observe and in the light of which they must be held to have deliberately bargained to meet the consequences. The vendor in consideration of a supposed certainty of anticipated profit, coupled with a wider profitable possibility, saw fit to bind itself and so end all question.

There are numerous cases to be found in Blackburn on Sales, at pages 236-244, illustrating incidentally the law on the subject.

As to the alleged want of authority on the part of Horton, I should have hardly thought it arguable in light of all that had transpired between the parties thereto before and after the making of the alleged contract so clearly recognizing his ostensible authority.

The questions of a contract, and of the measure of damages being determined against the appellant, there seems, therefore, no alternative but a dismissal of the appeal with costs.

ANGLIN J.—The defendants appeal from a judgment of the Court of Review affirming a judgment of the

Superior Court holding them liable in damages to the extent of $10,032.31 for breach of contract. The grounds of appeal are that the alleged contract was not such in fact but a mere revocable option; that it was not "good" because of the omission from the writing evidencing it of the element of prices; that, although the plaintiff is claiming damages for failure to supply goods of sizes of fractional parts of an inch, "inch sizes" only are specified in the letter of August 21st, and they do not include sizes of fractional parts of an inch, and the price list relied upon and put in evidence contains no prices for sizes of an inch or multiple thereof; and that the agent of the defendants, who signed the document relied on, exceeded his authority.

Upon the whole evidence I have no doubt that the plaintiff's letter of the 21st of August, 1915, with the defendant's acceptance upon it, was intended by the parties not to be a mere option revocable until acted upon, but to be an actual agreement entailing mutual obligations. Those obligations were that the plaintiff on the one hand would order not less than $25,000 worth of goods of the descriptions therein set forth and that the defendants on the other would supply goods so to be ordered, up to, but not exceeding, the value of $35,000. The plaintiff was to send in specifications of the quantities of each of the classes of goods set forth that he might require in sufficient time to enable the defendants

to ship the whole lot before the end of March, 1916.

The prices, subject to the discounts specified, were to be those stated in the "standard drill price list," which the evidence shews is used by the whole drill trade of North America. The consideration for the defendants assuming an obligation to furnish such drills as might be ordered, within the limits specified,

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was the plaintiff's undertaking to order, within a period capable of ascertainment, at least $25,000 worth of such drills.

I have so far dealt with the case apart from any difficulty presented by the 17th section of the Statute of Frauds. While the proof of a contract within Art. 1235, C.C. must as a matter of procedure be made according to the *lex fori*, its validity depends upon the *lex loci contractus*, which in this case is Ontario. Mr. Tilley's contention that the laws of Ontario and Quebec in regard to the requirement of writing in the case of contracts such as that under consideration are the same in effect is not quite correct, although article 1235 C.C. is no doubt founded on the Statute of Frauds. *Munn* v. *Berger* (1). Under the 17th section of the Statute of Frauds, an absence of the prescribed memorandum, if it does not affect the validity of the contract itself (*Leroux* v. *Brown* (2)), presents the same obstacle to the enforcement of it by action as arises under the 4th section. *Maddison* v. *Alderson* (3). Under article 1235 C.C., the question would appear to be purely one of evidence and the Quebec courts, quite logically, do not require a defendant to plead a mere absence of evidence which the law obliges the plaintiff to supply. He may *ore tenus* object to the admissibility of parol evidence when offered by the plaintiff. Article 110 of the Code of Civil Procedure is not regarded as applicable. English and Ontario practice is to the contrary. English Rule 211, o. 19, r. 15; Ont. Con. Rule (1915) No. 143.

Another difference is suggested by decisions of the Quebec courts (as to the soundness of which it is of course quite unnecessary now to express an opinion),

(1) 10 Can. S.C.R. 512.
(2) 12 C.B. 801, at p. 810.
(3) 8 A.C. 467, at p. 488.

that an admission of the contract by the defendant either in his pleadings or in giving evidence will satisfy article 1235 C.C. *Guay* v. *Guay* (1).

A judicial admission is complete proof against the party making it.

Article 1245 C.C. See too *Sheppard* v. *Perry* (2).

A plaintiff, in an English or Ontario court, cannot avail himself of a like admission against a defendant who sets up the statute as a defence. *Lucas* v. *Dixon* (3). Still another difference arises from the use of the words "accepted or received" in article 1235 C.C., in lieu of the words of section 17 of the English statute: "Accept * * * and actually receive." Mr. Justice Fournier discusses this important departure in *Munn* v. *Berger* (4).

But a defence of invalidity according to foreign law must be pleaded under each system alike (Lafleur, Conflict of Laws, 23). Here the only plea is that their acceptance of the plaintiff's letter of the 21st of August, directing the booking of his contract in the terms therein stated, does not by the law of Ontario constitute a valid contract enforceable against the defendants. Two professional gentlemen called as expert witnesses for the defence based their opinions that the contract was invalid under Ontario law—or rather that there was no contract—solely upon absence of mutuality of obligation. They regarded the document sued upon as a mere option. They were neither asked for, nor did they give, evidence as to the 17th section of the Statute of Frauds. The professional gentleman called by the plaintiff in rebuttal upheld the contrary view. Merely incidentally he said on cross-examination:—

A contract for the sale of goods does not require to be in writing. It can be oral.

(1) Q.R. 11 K.B. 425, at p. 427.
(2) 13 R.L. N.S. 188.
(3) 22 Q.B.D. 357, at p. 360.
(4) 10 Can. S.C.R. 512, at p. 521.

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(No doubt he meant, in cases within the 17th section of the statute, if it be not pleaded or if its alternative requirements be fulfilled.) He added that the element of price missing from the letter in question was sufficiently supplied by implied reference and by the evidence explanatory of the meaning of the discounts stated, which was received subject only to an objection based neither on the requirements of the Statute of Frauds nor on those of article 1235 C.C. There was no attempt to meet this evidence by calling testimony in sur-rebuttal. The learned trial judge apparently did not regard the validity of the contract under the 17th section of the Statute of Frauds as being an issue. He treated the omission of direct reference to the standard price list from the letter as raising an issue of contract or no contract independently of and apart from any question as to the sufficiency of the written evidence, and he found upon it, in my opinion quite rightly, against the defendants. He makes no allusion to the sufficiency or insufficiency of the letter of August 21st to satisfy the 17th section of the Statute of Frauds; nor is that question touched upon in the judgment of the Court of Review.

Yet in this court counsel for the appellants chiefly relied upon the absence of a reference to the standard drill price list in the letter of August 21st as affording his clients a defence under the 17th section of the Statute of Frauds. Without so deciding I shall assume that that defence was sufficiently pleaded to meet the requirements of Quebec procedure, although, in Ontario, it would be clearly otherwise, and, since counsel for the plaintiff did not object, I shall also assume that it is open to the appellants to invoke this defence in this court notwithstanding the apparent failure to do so at the trial.

Upon the evidence before it, the Superior Court, being bound to treat the construction and effect of the 17th section of the Statute of Frauds as a matter of fact to be established by evidence, could not have done otherwise than hold that its requirements had been satisfied. Mr. Hamilton Cassels so deposed and his testimony remained uncontradicted. The same is true of the Court of Review. See cases collected in Beauchamp, Rep. de Jur. Can., vol. 2, col. 2067, Nos. 326-7. Although we are required to render the judgment which the court appealed from should have rendered ("Supreme Court Act," section 51), it is the settled jurisprudence of this court that it

> is bound to follow the rule laid down by the House of Lords in the case of *Cooper* v. *Cooper* (1), in 1888, and to take judicial notice of the statutory or other laws prevailing in every province and territory in Canada, *suo motu*, even in cases where such statutes or laws may not have been proved in evidence in the courts below and although it might happen that the views as to what the law might be as entertained by members of the court might be in absolute contradiction of any evidence upon those points adduced in the courts below.

Logan v. *Lee* (2). This view was tacitly acted upon in *Garland* v. *O'Reilly* (3). This conception of the functions of this court as "an appellate tribunal for the whole Dominion" is in harmony with the Imperial Act of 1859, 22 & 23 Vict. ch. 63, noted by Mr. Lafleur at page 34 of his work. See too *Bremer* v. *Freeman* (4).

It was in my opinion open to the plaintiff to establish by parol evidence, as he did, that the discounts stated in his letters of the 21st of August (meaningless in themselves) according to the usage of the trade meant and could only mean discounts off the standard drill prices according to the list in common use throughout North America and that both the parties must have

(1) 13 App. Cas. 88.
(2) 39 Can. S.C.R. 311; 313.
(3) 44 Can. S.C.R. 197; 21 O.L.R. 201.
(4) 10 Moo. P.C. 306.

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so understood. The case seems to me to fall clearly within the principle of the decision in *Spicer* v. *Cooper* (1), where parol evidence was held admissible to shew that a sale of fourteen pockets of Kent Hops at 100s. meant at 100s. per cwt. according to the usage of the hop trade.

In *Newell* v. *Radford* (2), Bovill C.J. says, at p. 54:—

> It has always been held that you may prove what the parties would have understood to be the meaning of the words used in the memorandum and that for this purpose parol evidence of the surrounding circumstances is admissible.

Byles J. says at p. 55:—

> Evidence has been held admissible to settle the meaning of the price or of the quantity of goods sold mentioned in the memorandum.

In *Macdonald* v. *Longbottom* (3), parol evidence was admitted to shew that "your" wool meant wool which the plaintiff had purchased as well as wool clipped from his own sheep. In *Hutchison* v. *Bowker* (4), Parke B. says:—

> If there are peculiar expressions used in a contract which have, in particular places or trades, known meanings attached to them, it is for the jury to say what the meaning of these expressions was.

Of course the jury must act on evidence. *Alexander* v. *Vanderzee* (5), *Ashforth* v. *Redford* (6). See also cases collected in Benjamin on Sales, 5th ed., p. 236. In Blackburn on Sales, 3rd ed., the rule is thus stated at p. 51:—

> The general rule seems to be, that all the facts are admissible which tend to shew the sense the words bear with reference to the surrounding circumstances concerning which the words were used, but that such facts as only tend to shew that the writer intended to use words bearing a particular sense are to be rejected.

See too Addison on Contracts (11th ed.), pp. 69 & 70.

(1) 1 Q.B. 424.
(2) L.R. 3 C.P. 52.
(3) 1 E. & E. 977.
(4) 5 M. & W. 535, at p. 542.
(5) L.R. 7 C.P. 530.
(6) L.R. 9 C.P. 20.

I prefer to rest my conclusion that the letter of August 21st sufficiently stated the terms of the contract between the parties in regard to prices on this ground rather than on any other implied reference in it to the standard drill price list, which I consider dubious, to say the least.

Upon the weight of evidence I am convinced that "inch sizes" mentioned in the contract include fractions as well as multiples of an inch—just as "millimeter sizes" admittedly include fractions of a millimeter.

I have no doubt that the contract in question was within the ostensible, if not within the actual, authority of the defendant's assistant manager, Horton.

The question of damages presents some difficulty owing to the non-specification of definite quantities in the contract. But *id certum est quod certum reddi potest.* The plaintiff has established that, but for the defendant's repudiation, he would in due course have specified under his contract with them the drills which he ordered in the American market. The orders in respect of which loss is claimed do not exceed the $35,000 limit placed by the contract upon the defendant's obligation. The evidence disclosed that the plaintiff took reasonable steps to minimize his loss. I find no ground for disturbing the assessment of damages.

The appeal, in my opinion, fails and must be dismissed with costs.

BRODEUR J.—I had prepared some notes with regard to this case but I find, after having read the opinion of my brother Anglin, that our views coincide. I would be then of opinion that the appeal should be dismissed for the reasons given by my brother Anglin.

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MIGNAULT J.—I have read the opinion of my brother Anglin and I concur in his reasons for the dismissal of the appeal.

The parties undoubtedly looked upon the letter of the 21st August, 1915, written by the respondent and accepted by the appellant, as forming a contract, and, in its letters seeking to be relieved from the obligations it had assumed, the appellant treated it as such. The opinion of the learned trial judge, not printed in the case, but filed at the hearing before this court, as well as a careful examination of the record, have convinced me that the grounds urged by Mr. Tilley in his argument before us were not contended for in the court below. It is true that learned counsel of the Ontario Bar were called by the appellant at the trial to support its plea that,

> by the law of Ontario, even if the said letter had been accepted by the appellant, the same does not constitute a valid contract enforceable against the defendant.

But the learned counsel based their opinion on what they considered a lack of mutuality, while admitting that if, subsequently to the letter, the respondent had specified certain goods, before there had been any revocation, there would have been a contract "*pro tanto.*" I must, with deference, think that the objection of lack of mutuality was not well taken. Assuming that the respondent had the right, and had not in any manner lost this right, to specify the goods which the appellant had agreed to supply on specification, I fail to see how the latter could escape from its obligation to supply the goods by repudiating the whole contract before any specification had been made.

I also do not think that the letter of August 21st can be regarded as imposing no obligation on the respondent to take any goods. Properly construed, it obliged

him to purchase at least $25,000 worth of cast steel twist drills, with the right to take more up to $35,000. This, if accepted by the seller, would be a valid contract. The question whether any property passed is immaterial, for the contract would be valid even if the goods did not exist but had to be manufactured at a future date.

The objections of Mr. Tilley were very ably urged, but they appeared to me somewhat technical. Undoubtedly an order could be made subject to a standard price list, and I think that this was done in the present case. Of course, it is essential that a price be sufficiently agreed upon to constitute a valid contract of sale, but if, construing the contract according to the usages of trade, the prices were to be those determined by a standard price list in use in this trade, and were so understood by the parties, and if, moreover, as the evidence shews, the list of discounts mentioned in the letter, according to the common understanding of persons dealing in these articles, determined the price to be paid, I cannot believe that the element of price was absent in the agreement made by the parties. The appellant, in its letters to the respondent, never claimed that the contract was not understandable, but merely pleaded its inability to complete deliveries within the time fixed. The contention now made that the contract is meaningless seems in every way an afterthought.

I am clearly of opinion that the appellant cannot challenge the authority of Mr. Horton, who accepted the letter "for president and manager." The contract was not an unusual one, and this defence of lack of authority merely impresses me as shewing the anxiety of the appellant to escape from a contract which it repented having made.

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The effect of article 1235 of the Quebec Civil Code, on which Mr. Tilley relied, is well demonstrated by my brother Anglin. The whole question under this article is one of proof and not of validity of contract. My brother Anglin has also dealt with the effect of the Statute of Frauds under the Ontario law and I feel I can add nothing to his discussion of this question.

Perhaps I might add that, as the question came before the Superior Court, art. 1235 C.C. would have stood clearly in way of the respondent had he not produced a writing sufficient, under the terms of that article, to prove the contract alleged by him. I do not care to lay down any general rule on the question whether the proof of a foreign contract is, as a matter of procedure, governed by the *lex fori*, or by the *lex loci contractus*. But I do think that such a provision as article 1235 is one which a Quebec court must follow when it is sought to make evidence of any of the matters mentioned by it, quite irrespective of the locality where the contract, warranty, promise or acknowledgment was made. In this sense, and I do not wish to be understood as otherwise dealing with the subject of conflict of laws, the *lex fori* prevails over the *lex loci contractus*.

Mr. Tilley also relied on the decision of the Judicial Committee of the Privy Council in the case of *Reg.* v. *Demers* (1). In my opinion, this decision is clearly distinguishable from the one appealed from. Demers had undertaken to print certain public documents at certain specified rates. The contract imposed no obligation on the Crown to pay Demers for work not given him for execution, nor was there anything in the contract binding the Government to give him all or any of the printing work referred to in the agreement, the

(1) [1900] A.C. 103.

Government being free to give the whole work, or such part as it might see fit, to any other printer. Their Lordships did not hold the contract invalid, as is contended in the present case; on the contrary, they were of the opinion that for all work given to Demers on the footing of the contract the Government was undoubtedly bound to pay according to the agreed tariff, but they dismissed the claim made by Demers for damages because no printing work had been given him after a certain date.

In the present case the agreement of the parties properly construed was for the sale of certain goods to be specified by the respondent, the latter, in my opinion, being bound to take goods up to the amount of at least $25,000 with the right to order an additional amount of $10,000. The contract mentioned that the specifications were to commence about three weeks from its date and that shipment of the whole lot was to be made before the end of March, 1906. I cannot agree with the contention that there was not here a valid contract binding on both parties according to its terms.

On the whole, my opinion is that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Atwater, Surveyer & Bond.*
Solicitors for the respondent: *Weldon & Harris.*

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*Nov. 21, 22.
*Dec. 9.

JOSEPH PESANT DIT SANSCARTIER (PLAINTIFF) ..... } APPELLANT;

AND

CHARLES ROBIN ALIAS LAPOINTE (DEFENDANT)..... } RESPONDENT.

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

Husband and Wife—Donation to the wife—Acceptance—Absence of marital authorisation—Wife acting as mandatary—Evidence—Community not a juridical person—Authentic deed—Arts. 177, 183, 763, 1272 C.C.—Art. 933 C.N.

The appellant, by deed of cession, gave "pour bonnes et valables considérations" a sum of money to his daughter, the respondent's wife, common as to property, and she accepted without the authorisation of her husband. Some years later, the appellant took an action to set aside the deed as null and void.

Held that the deed of transfer was really one of gratuitous donation.

Held, also, Davies C.J. and Brodeur J. dissenting, that the donation, being made to the wife herself and accepted by her alone, without marital authorization never had any legal existence and the sum given did not fall into the community. The donation could not be treated as made to the community, which is not a juridical person apart from the persons of the two spouses, and the wife therefore could not be deemed to have acted as mandatary of her husband, head of the community.

Per Anglin J.—The requirement of the law, in the Province of Quebec, that an instrument should be in authentic form does not import that the authority of an agent to execute it must be evidenced in the same manner.

Per Davies C.J., Anglin and Brodeur JJ.—The proof of a mandate, made by parol testimony at the trial without objection, cannot subsequently be set aside in a court of appeal. *Schwersenski* v. *Vineberg*, (19 Can. S.C.R. 243; *Gervais* v. *McCarthy* 35 Can. S.C.R. 14), *followed.*

Per Davies C.J. and Brodeur J. (dissenting)—A donation made to a wife common as to property can be accepted by her alone as mandatary of her husband, head of the community.

Judgment of the Court of King's Bench (Q.R. 27 K.B. 88), reversed, Davies C.J. and Brodeur J. dissenting.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur, and Mignault JJ.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), reversing the judgment of the Superior Court, District of Montreal (2), and dismissing the plaintiff's action.

The appellant sold his lands to one Caron for $90,000, of which $21,000 was paid in cash, $11,000 was payable to the Crédit Foncier Franco-Canadien, and the balance was payable to himself. Later on, by a deed of transfer, "pour bonnes et valables considérations," he allotted to his daughter, the respondent's wife, a sum of $5,000.11 out of the balance of the price of sale. In the deed, the wife was erroneously described as separate as to property. The wife accepted alone, the husband not appearing in the deed to authorise her. She died a few years later, after having made her will by which she instituted the respondent her universal legatee. Two years after, the respondent signed a notarial deed of acceptance of the transfer which had been made to his wife and had that deed registered in the lands which were mortgaged for the payment of the sum so transferred. The appellant, later on, took the present action to have declared null the gift made to her daughter and claimed the radiation of the registration of the deed of acceptance by the respondent. The Superior Court maintained the action; but, on appeal, it was held that a gift made to a wife common as to property falls into the community and that the acceptance by the wife alone was legal, as made on behalf of her husband and as his mandatary acting under special mandate proved by parol evidence of the husband given at the trial without objection.

(1) Q.R. 27 K.B. 88. (2) 23 R. de J. 211.

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Paul St. Germain K.C. for the appellant.

Thibaudeau Rinfret K.C. and *R. Genest* for the respondent.

THE CHIEF JUSTICE (dissenting)—I concur with Brodeur J.

IDINGTON J.—I concur with Mignault J.

ANGLIN J.—The facts of this case sufficiently appear in the opinions delivered in the provincial courts (1). I am not disposed to differ from the view taken by the learned trial judge and the judges of the Court of King's Bench that, looking at the substance of the transaction in question, the donation by the appellant to his daughter should be deemed gratuitous.

Notwithstanding that, as a result of their marriage contract not providing otherwise (art. 1271 C.C.), legal community of property existed between the defendant and his wife, in the deed of cession, which the wife's father seeks in this action to have declared void, his daughter is described as "séparée de biens." The plaintiff, however, does not claim that the deed should be set aside on the ground of error (arts. 991 and 992 C.C.). Indeed, he does not even allege mistake. Neither does he aver that he intended to make the money donated to his daughter her separate property (*propre*), as he might have done by a distinct stipulation (art. 1272 (1) C.C.). Nor does he pretend that he made the donation under the belief that she would enjoy the money as her separate property. He was a party to his daughter's marriage contract, which bears date the 14th November, 1907, and contains a provision that a certain donation of money thereby

(1) Q.R. 27 K.B. 88; 23 R. de J. 211.

made by him to her should be *propre* to her. All he says in his evidence on this aspect of the case is that he does not know whether his daughter was or was not married under the system of community of property—he does not recollect her marriage contract, *i.e.*, at the time of his examination in October, 1916. He does not pretend that he had forgotten it when he made the deed of cession in December, 1911. Under these circumstances the plaintiff should, in my opinion, be taken to have known when he executed that deed that community of property existed between his daughter and the plaintiff and, since, under that regime, in the absence of a contrary provision, any movable property acquired by either of the spouses during coverture falls into the community (art. 1272 C.C.), he must be taken to have intended in giving $5,000 to his daughter to augment the community property. From the fact that if the wife were separate as to property the donation of this money to her would admittedly be void (art. 183 C.C.) for lack of marital authorisation to accept it, which must be in writing or evidenced by the husband's execution of the deed (arts. 177 and 763 C.C.)—there is no question here of judicial authorisation—there arises a presumption that it was not intended to go to her in this character—*ut res magis valeat.* Speaking generally, every one is presumed to know the law; I made an effort to review the authorities on this latter presumption in *Montreal Investment Company* v. *Sarault* (1), and refer to my judgment in that case—of course, merely for convenience—and no one should be presumed to intend his deed to be a nullity. It must, therefore, I think, be assumed that the plaintiff knew and intended that the $5,000 in question should fall into the community. If these

(1) 57 Can. S.C.R. 464.

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presumptions be rebuttable, there is no evidence of any contrary intention in the record to rebut them.

The invalidity under art. 183 C.C. is absolute and may be taken advantage of by any person interested, whereas under the corresponding article of the Code Napoleon (No. 225) it is relative and can be set up only by the wife, the husband or their heirs. D.P. 97, 1, 449 and note.

On this state of facts there arises an interesting question, viz., whether a gift of movable property made to a married woman subject to the regime of community can be validly accepted by her husband alone acting either personally or by an agent (who may be his wife, art. 1708 C.C.), or whether the acceptance must be by the married woman, either in person, or by agent, on her own behalf.

The theory put forward by the respondent, which has found favour in the Court of King's Bench, is that the acceptance by Emma Robin (Pesant) was on behalf of her husband and as his mandatary acting under special mandate proved by parol testimony of the husband given at the trial without objection. He also relies on a general mandate arising from the existence of the community and the wife's proven habit of controlling the *menage*. Inasmuch as the acceptance of property cannot be regarded as a matter of administration (art. 177 C.C. so indicates) a general mandate, express or implied, would seem insufficient (art. 1703 C.C.). I incline to think that the finding that a special mandate was proved should not be disturbed. The efficacy of parol evidence on such a question received without objection is not open to question in this court. *Schwersenski* v. *Vineberg* (1); *Gervais* v. *McCarthy* (2).

(1) 19 Can. S.C.R. 243. (2) 35 Can. S.C.R. 14.

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I am also inclined to agree with the respondent in upholding the view of the Court of King's Bench that, although the acceptance itself must be in authentic form (art. 776 C.C.), when it is executed by procuration the mandate therefor need not be so. Art. 933 C.N. is not reproduced in the Civil Code of Quebec. Under English law an agent who executes an instrument required to be under seal must be appointed by deed; *Steiglitz* v. *Egginton* (1); *Berkeley* v. *Hardy* (2); although the authority of an agent who signs a writing exacted by the Statute of Frauds may be oral. *Clinan* v. *Cooke* (3). Compare *Carruthers* v. *Schmidt* (4). The contention of the appellant as to the necessity for appointment by notarial instrument of a mandatary who is to execute a document required to be in notarial form assimilates the latter to the English deed under seal. But the Court of King's Bench, upwards of twenty years ago, decided that the appointment of an agent to execute a conventional hypothec, required by art. 2040 C.C. to be in notarial form, need not be made by notarial instrument. *La Société de Prêts, etc.* v. *Lachance* (5). An appeal to this court was quashed for lack of jurisdiction (6). The principle of this decision of the Court of King's Bench is directly in point. It determines that a requirement of the law that an instrument should be in authentic form does not import that the authority of an agent to execute it must be evidenced in the same manner. As Lacoste C.J. points out, the French authors are divided in their opinions on this question and the French courts have now definitely adopted a contrary view. See too

(1) Holt (N.P.) 141.
(2) 5 B. & C. 355.
(3) 1 Sch. and Lef. 22.
(4) 54 Can. S.C.R. 131; 32 D.L.R. 616.
(5) Q.R. 5 Q.B. 11.
(6) 26 Can. S.C.R. 200.

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Langelier, Cours de Droit Civil, vol. VI., p. 277. But the late Chief Justice of the King's Bench tells us that in Quebec the authentic form of mandate has never been required. This decision of the highest court in the province has stood unquestioned for twenty-two years. Many authentic acts have doubtless been executed on the faith of it by procuration not so evidenced. Confusion would be introduced and many titles possibly upset were we now to overrule it. In my opinion we should not do so. *Dunlop & Sons* v. *Balfour Williamson & Co.* (1).

Inasmuch as the acceptance by the wife, if regarded as given on her own behalf, would be inefficacious for lack of marital authority in writing (arts. 177 and 183 C.C.), if her acceptance as mandatary of her husband would render the gift valid I would incline on the evidence in the record to give it that construction. Upon the testimony given by him it is not open to the respondent to contend for any other. We are thus squarely confronted with the question whether acceptance by the husband alone suffices to maintain the gift.

A passage in Laurent (vol. XII., No. 244, which he bases on Pothier, Coutume d'Orleans, Introd. au titre XV., No. 35) would seem to indicate that it would. See, too, Furgole, Question IV., "Donations," t. VI., p. 27. But in my opinion this view cannot be supported:

> Mais cette doctrine qui pouvait se justifier sous le régime de l'ordonnance, qui admettait l'acceptation de la donation en vertu d'un pouvoir général (Furgole sur l art. 5 de l'ordon. de 1731; Ronssilhe, Jurisp. de Donations No. 284) serait inadmissible aujourd'hui * * * Dans tous les cas le mari seul ne peut pas accepter pour sa femme * * * Le mari en effet n'est pas donataire et n'a point, par conséquent, qualité pour accepter. Pan. Fr. "Donations." No. 3838.

(1) [1892] 1 Q.B. 507, at p. 518.

Compare arts. 177 and 763 of the Quebec Civil Code with arts. 217 and 934 of the Code Napoleon.

To permit the husband alone to accept a donation made to his wife would involve the mistaken idea that the law prescribes marital authorisation solely for his benefit and protection, and consequently that he alone can set up its absence (art. 183 C.C. in terms precludes this view); that he might give the required authorisation subsequently (which is contrary to the spirit, if not to the letter of art. 177: Langelier, Cours de Droit Civil, vol. 1, p. 316); and that *he may compel an acceptance by the wife which the Code merely empowers him to authorise*—Merlin Rep. vbo. "Authorisation Maritale," sec. 6, par. 3, No. 2; De Lorimier, Bibl. du Code Civil, vol. 2, pp. 182-3.

Le mari ne peut accepter la donation seul, sous quelque régime que les époux soient mariés * * * soit même qu il s'agisse d'une donation mobilière," 18 Fuzier-Herman, vbo. "Donation Entre Vifs," 362-365; 20 Demolombe 159; Beltjens, Code Civil Belge, art. 934, No. 3; 3 Troplong "Des Donations entre Vifs," No. 1122; 2 Arntz, Droit Civil No. 1862.

It may be urged that Demolombe, Troplong and Arntz rest their opinions, that the view of Pothier and Furgole, based on the *Coutume d'Orleans* and the *Ordonnance* of 1731, that a husband living in community, by virtue of his general marital authority, may, without his wife's concurrence, accept for her a donation made to her, cannot prevail under the Code Napoleon, on the presence in that Code of art. 933, which, as already stated, is without counterpart in the Quebec Civil Code. The argument deduced by these writers from art. 933, however, is that its requirements shew that the general mandate of the husband arising from his marital control under the community system cannot be invoked to uphold the acceptance by him of a donation made to his wife; a special mandate is necessary. But since,

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as has already been indicated, acceptance of property is not an act of administration and the Quebec Civil Code expressly provides that the authority conferred by a general mandate is restricted to acts of administration (art. 1703 C.C.), the absence from the Quebec Code of an article couched in terms similar to those of art. 933 C.N. does not seem to me to detract materially from the weight that should be given in Quebec to the opinions of the writers I have cited as to the necessity for acceptance by the wife or her specially authorised mandatary.

The Court of King's Bench appears to have proceeded on the assumption that the husband, in accepting, would do so as head of the community. This necessarily implies that the community exists as a juridical person apart from the persons of the two spouses. That, I think with deference, is a fundamental error. Laurent himself, with what seems to me unaccountable inconsistency, recognises that the community (the only regime to which he would extend the doctrine enunciated in No. 244 of his XII. volume, Supp. 1902, vol. 4, No. 123) is neither a civil nor a moral juridical person. Vol. XXI., Nos. 189, 210, 250. He concludes the latter number in these words:—

> La loi considère donc la communauté, non comme une personne, mais comme une masse de biens, un fonds social.

Huc, in his IX. volume, at p. 85, says:—

> Cette société, en l'absence d'un texte formel, ne constitue pas une personne juridique distincte de la personne des conjoints. Si la loi emploie l'expression en apparence abstraite, de communauté, c'est simplement pour désigner les époux eux-mêmes, considérés comme associés, par opposition aux époux envisagés individuellement.

Baudry-Lacantinerie, "Mariage," vol. 1, Nos. 249-250, writes to the same effect. The authorities are collected by this author in Note 1, p. 259, 3 ed. He concludes (No. 250) in these words:—

En somme, la véritable notion de la communauté nous parait être qu'elle constitue une copropriété entre époux, soumise à des règles particulières.

See, too, III Dalloz Codes Ann. 1905, Art. 1339, Nos. 4 and 5. One cannot act as agent for or representative of a non-existent person. If, therefore, the husband has authority to accept a gift to his wife it must be not as head of and on behalf of the community which has no existence as a person, and therefore cannot have an agent or representative, but as the mandatary of his wife and on her behalf. Citing Colmet de Santerre, vol. VI., No. 65, Huc, in his 9th volume (No. 157), says:—

Ce qui est vrai, c'est que le régime en communauté est combiné de telle manière que le mari chargé par la femme de faire prospérer les affaires communes, est censé, dans ce but, recevoir de celle-ci des pouvoirs presque illimités.

But, since acceptance is not an act of administration, the general mandate would not cover it; a special mandate would be necessary. Art. 1703 C.C. Compare art. 181 C.C.

It is not pretended, however, that there was in fact any such acceptance by the wife through the agency of her husband or that she was deputed to act as sub-mandatary of her husband and as such to accept for herself—if, indeed, such a situation as that of a donee *ex facie* accepting in her own name and on her own behalf, but in reality as sub-mandatary of her own agent, would be possible or conceivable, or if the requirement by art. 177 of an authorisation in writing could be thus circumvented.

But what are the limits of the husband's rights as agent of his wife in respect to the community property? They are impliedly defined by art. 1292 C.C. They are rights of administration, alienation (onerous), hypothecation and donation *inter vivos*. These rights

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all appertain to property already in the community. They do not extend to the acquisition of property by the wife which, when acquired, will fall into the community by operation of law. Acceptance is not administration (art. 177 C.C.). Since without acceptance a donation is not complete (arts. 755 and 776 C.C.), until there has been a valid acceptance of it the property which is its subject cannot be vested in the wife. Upon being so vested *eo instanti* it, no doubt, falls into the community. But until so vested it cannot be subject to community control. The fallacy therefore—if I may say so with respect—underlying the judgment of the Court of King's Bench is double. It consists (1) in ascribing to the husband the power as head of the community to contract with regard to property not yet in the community, and (2), in assuming the existence of the community as a distinct juridical person for which the husband may act as mandatary.

I am, for these reasons, of the opinion that the donation required acceptance by the wife on her own behalf in the form prescribed by art. 776 given with the authorisation of her husband evidenced either by his execution of the deed itself, or otherwise in writing (art. 177 C.C.), and that for lack of such authorisation the intended gift fails under art. 183 C.C.

I would, therefore, allow the appeal with costs in this court and in the Court of King's Bench, and would restore the judgment of the learned trial judge.

BRODEUR J. (dissenting).—Il s'agit dans cette cause de la validité d'une donation mobilière faite par l'appelant le 4 décembre 1911 à sa fille mariée sous le régime de la communauté.

Le père, qui est le demandeur-appelant, prétend que la donation est nulle parce que sa fille n'était pas

autorisée par son mari à accepter la donation. Le mari, qui est le défendeur-intimé, allègue, au contraire, que la donation est valable, et que sa femme, en acceptant la donation, a agi comme son mandataire.

L'acte de donation, en décrivant Emma Pesant, l'épouse du défendeur-intimé, comme une femme séparée de biens, était incorrect; car elle s'était mariée sous le régime de la communauté de biens; et, dans son contrat de mariage, qui avait été fait le 14 novembre 1907, son père, le demandeur-appelant, avait comparu à l'acte; et il savait, lui aussi, qu'elle était commune en biens, vu qu'il lui avait fait une donation mobilière qu'il avait déclarée être un propre de communauté.

Emma Pesant est décédée le 23 juillet 1913, laissant un testament par lequel elle instituait son mari son légataire universel. Des difficultés survinrent alors entre l'appelant et l'intimé au sujet de la propriété de certains tributs mortuaires qui avaient été faits à la mort de Dame Emma Pesant; et, le 4 décembre 1913, l'appelant donnait avis aux débiteurs de la somme donnée que cette donation était nulle.

Le 2 juin 1915, l'intimé, Robin, vu l'attitude de l'appelant, lui a fait signifier une déclaration disant que sa femme avait accepté la donation avec le consentement, l'autorisation, le mandat et suivant les instructions de son mari, le chef de la communauté; que cela était bien connu du père; que, de plus, en autant qu'il était nécessaire, il confirmait et ratifiait les actes de son épouse.

Joseph Pesant, le père, institue maintenant la présente action pour faire déclarer nulle cette donation, en alléguant qu'elle est illégale, vu que la femme n'avait pas été autorisée par son mari à l'accepter; et il demande également à faire mettre de côté la déclaration faite par le mari dans son protêt du 2 juin 1915.

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Le défendeur plaide, en substance, que l'acceptation faite par sa femme était valide et invoque comme moyens de défense ceux indiqués dans son acte de confirmation et d'acceptation.

L'intimé a aussi prétendu que l'acte en question était un acte à titre onéreux; mais la Cour Supérieure a décidé que cet acte constituait une donation; et sur ce point la Cour d'Appel est du même avis; je crois que sur cette question ces jugements sont bien fondés.

Sur la validité de la donation, la Cour Supérieure (1), a décidé que la donation, n'ayant pas été acceptée par la femme autorisée de son mari, était nulle. La Cour d'Appel (2), au contraire, en est venue à la conclusion que la femme a agi au contrat comme mandataire de son mari et que l'acceptation ainsi faite rendait la donation valable.

Par l'article 177 du code civil une femme ne peut accepter une donation sans le concours du mari dans l'acte ou sans son consentement par écrit.

Cette disposition de la loi s'applique aussi bien à la femme commune en biens qu'à celle qui s'est mariée sous le régime de la séparation de biens. La question qui se pose dans cette cause-ci est de savoir si une donation faite à la femme commune en biens peut être acceptée par le mari seul, ou bien acceptée par la femme comme mandataire du mari.

La question que je viens de poser demande à être résolue dans la présente cause parce que la donation est apparemment nulle, vu qu'elle est faite nommément à la femme, qu'elle a été acceptée par cette dernière et que le mari n'a pas comparu à l'acte et ne paraît pas avoir donné son consentement par écrit: et alors si nous prenons l'acte de donation lui-même il

(1) 23 R. de J. 211.

(2) Q.R. 27 K.B. 88.

paraîtrait à première vue nul, parce que l'acceptation n'a pas été faite par la femme autorisée de son mari.

Mais le mari dit: Nous étions en communauté de biens, ma femme et moi. Je lui ai donné mandat d'accepter la donation pour moi, chef de la communauté; et alors l'acceptation que ma femme a faite comme ma mandataire a rendu la donation valable.

L'autorisation exigée par l'article 177 doit être faite par écrit.

Le mandat, au contraire, peut exister sans qu'il y ait d'écrit. La preuve du mandat peut être parfois difficile à faire. Cependant s' il y a un commencement de preuve par écrit de la part de la partie adverse, ou s'il y a un aveu de sa part, ou encore, si la preuve testimoniale en a été faite sans aucune objection, le mandat doit être tenu pour avoir été légalement prouvé.

Dans la cause actuelle, le mandat que le mari alléguait avoir donné à sa femme n'a pas été prouvé par écrit. Mais le mari en a fait la preuve testimoniale, à laquelle aucune objection n'a été faite, et à raison des décisions qui ont été rendues par cette cour dans les causes de *Schwersenski* v. *Vineberg* (1), et de *Gervais* v. *McCarthy* (2), le mandat est donc prouvé.

Nous avons donc dans la présente cause la preuve du mandat.

Reste cependant à décider une question bien importante, celle de savoir si la donation, ayant été faite à la femme, le mari, comme chef de la communauté, pouvait accepter pour sa femme.

Pothier, dans son introduction au titre des donations, no. 35, dit:—

(1) 19 Can. S.C.R. 243. (2) 35 Can. S.C.R. 14.

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Le mari ayant le bail, gouvernement et administration des biens et de la personne de sa femme, il s'ensuit qu'il peut pour sa femme accepter une donation faite à sa femme.

Cette opinion de Pothier était, dans l'ancien droit, également entretenue par Furgole, "Donations," seconde édition, p. 29. Furgole, dans son commentaire sur l'ordonnance de 1731, nous dit qu'il y avait dans la jurisprudence divergence d'opinions sur la question de savoir si le mari pouvait accepter une donation faite à la femme. Les parlements de Toulouse et de Dijon optaient pour la négative: le parlement de Bordeaux était d'opinion que de telles acceptations étaient valables.

Furgole considère que la jurisprudence du parlement de Bordeaux paraissait très équitable et conforme aux maximes du droit romain, et il ajoutait:—

A tout cela il faut joindre cette règle, que suivant la Loi Maritus 21, Cod. de Procurator, le mari est procureur naturel et légal de sa femme, sans qu'il ait besoin d'aucun mandat; de là on peut inférer que l'acceptation faite par le mari, de la donation faite à sa femme absente, est suffisante pour rendre la donation parfaite, même pour les biens paraphernaux; car s'il s'agissait des biens dotaux, il n'y aurait aucun doute à cause de l'intérêt personnel du mari; il ne nous semble pas non plus qu'il y en ait lorsque la femme est en la puissance de son mari, parce que cette puissance ne doit pas avoir moins d'effet que celle du tuteur ou du curateur.

Et il ajoute:—

Cela paraît encore mieux fondé et plus raisonnable dans les pays où la communauté des biens est en usage, parce que le mari devant profiter de la moitié de la libéralité, comme étant un acquet qui entre dans la communauté, en acceptant la donation pour sa femme, il est censé le faire comme associé, non-seulement pour la portion qui doit lui revenir, mais encore pour le tout, parce que la qualité d'associé lui donne le droit de stipuler et d'accepter tous les contrats favorables à la société; car c'est une maxime établie par les lois et les auteurs, que chaque associé a un mandat tacite par la nature du contrat, et par la volonté des autres associés, pour faire l'avantage de la société: ce qui est encore plus indubitable dans la société conjugale, dont le mari est le maître.

Laurent, vol. 3, p. 145, est également de l'avis de

Pothier et de Furgole. Après avoir déclaré qu'il ne faut pas confondre l'autorisation avec le mandat, il ajoute:—

> Il importe donc beaucoup de distinguer quand il y a autorisation et quand il y a mandat. Ce ne sont pas les termes qui décident la question. Il est possible que le mari se soit servi du mot *autorisation* alors qu'il donne un véritable *mandat* à sa femme. Il faut voir si l'acte juridique concerne les droits de la femme ou les droits du mari. Dans le premier cas, la femme doit être autorisée; dans le second, elle ne peut agir qu'en vertu d'un mandat. La question de savoir s'il s'agit des droits de la femme ou des droits du mari dépend des conventions matrimoniales. Supposons que les époux soient mariés sous le régime de la communauté légale. Il va sans dire que si le mari donne pouvoir à la femme d'agir pour ses biens propres ou pour les biens de la communauté, il y a mandat et non autorisation. De là suit que si le pouvoir concerne l'administration des biens de la femme, il y a encore mandat; car sous le régime de la communauté, c'est le mari qui administre les biens de la femme.

Laurent est encore plus explicite dans son douzième volume, Traité des Donations, no. 244, p. 309, où, discutant la question de savoir si le mari peut accepter au nom de sa femme, il dit:—

> En principe, il est certain que le mari n'a aucune qualité pour acquérir au nom de sa femme, ni pour l'obliger. Mais les conventions matrimoniales ne peuvent-elles pas lui donner ce pouvoir? Pothier suppose que les époux se sont mariés sous le régime de la communauté; sous ce régime, les donations mobilières, de même que les successions mobilières, tombent dans l'actif de la communauté; le mari, comme chef de la société, est cessionnaire des droits de la femme; l'on admet qu'en cette qualité il peut accepter les successions mobilières échues à la femme, bien qu'il ne soit pas héritier; par la même raison, il faut lui reconnaître le pouvoir d'accepter les donations mobilières, bien qu'il ne soit pas donataire.

Je reconnais qu'il y a divergence d'opinions parmi les auteurs qui ont écrit sur le Code Napoléon. Ainsi, par exemple: Demolombe, vol. 20, no. 159; Troplong, vol. 3, des Donations entre vifs, no. 1122; Fuzier-Herman, vol. 18, vbo. Donations entre vifs, pp. 362 & 363; Beltjens, Code Civil Belge, art. 934, no. 3; Arntz, vol. 2, Droit Civil, no. 1862; Pandectes françaises, vbo. Donations, no. 3838, sont d'opinion que le mari ne

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peut accepter pour sa femme une donation mobilière qui est faite à cette dernière.

Il est bon de remarquer cependant à ce sujet que le dernier ouvrage que nous ayons sur ce sujet est celui de Dalloz: Répertoire pratique, où il est dit, au no. 189, vbo. Donations entre vifs, après avoir déclaré que le mari seul ne peut accepter pour sa femme:—

> Toutefois si les époux étaient mariés sous le régime de la communauté légale, le mari aurait qualité pour accepter sans le concours de la femme des donations mobilières faites à celle-ci.

Je vois que Demolombe et quelques-uns des auteurs qui n'acceptent pas l'opinion de Pothier se basent sur l'article 933 du Code Napoléon pour déclarer que le mari ne peut pas accepter une donation faite à sa femme. Cet article 933 déclare que si le donataire est majeur l'acceptation doit être faite par lui, ou, en son nom, par la personne fondée de sa procuration portant pouvoir d'acceptér la donation faite, ou un pouvoir général d'accepter les donations qui auraient été ou qui pourraient être faites. Ces auteurs trouvent dans cette disposition de la loi relative au pouvoir d'accepter les donations une disposition contraire à l'Ordonnance des Donations de 1731 et au vieux droit français: et alors ils en arrivent à la conclusion qu'à raison de cette différence entre le Code Napoléon et l'ancien droit, le droit du mari d'accepter une donation faite à sa femme n'existait plus sous le Code Napoléon.

Je n'entreprendrai pas de discuter cette question au point de vue du Code Napoléon, car ce ne sont pas les dispositions de ce code que nous avons à appliquer dans notre droit. Les ouvrages des commentateurs de ce code sont très utiles en autant qu'ils peuvent expliquer quelque partie ambigue ou douteuse du code Civil de Québec; mais ils ne sont certainement pas des guides sûrs dans l'interprétation de notre code lorsque leurs arguments sont basés sur des dispositions formelles

du code Napoléon qui ne se trouvent pas dans notre loi. Il vaut bien mieux, sous ce rapport, suivre les anciens auteurs lorsque la loi sur la matière ne paraît pas avoir été modifiée.

Herse v. *Dufaux* (1).

Or, l'article 933 sur lequel se base Demolombe et d'autres auteurs n'a pas d'article correspondant dans notre code.

Voir Beauchamp, Code civil annoté, 3ème vol. p. 1549; Sharpe, Civil Code, vol. 2, p. 823.

De plus, les deux codes diffèrent sur un autre point très important. Ainsi le code Napoléon dit à l'article 932 que la donation devra être acceptée "*en termes exprès.*" L'article 788 de notre code dit, au contraire:

Il n'est pas nécessaire que l'acceptation d'une donation soit en termes exprès; elle peut s'inférer de l'acte ou des circonstances.

Ces deux textes de la loi sont absolument différents, comme on le voit. Et alors peut-on suivre avec certitude les commentateurs du Code Napoléon sur cette question d'acceptation, puisque, tandis que le Code Napoléon exige que l'acceptation soit faite en termes exprès, notre code énonce, au contraire, le principe que l'acceptation peut s'inférer des circonstances?

Il vaut bien mieux alors, sous ce rapport, suivre l'opinion des auteurs qui ont écrit sous l'ancien droit; et il est avéré que sous l'ancien droit la donation pouvait être acceptée par le mari seul.

Personne ne devrait contester l'opinion de Pothier. Les codificateurs, bien loin d'écarter cette opinion de Pothier, semblent l'avoir acceptée, puisque l'article 177 de notre code civil est basé sur Pothier lui-même.

(1) 9 Moore N.S. p. 281.

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Rapports des codificateurs, vol. 1er, p. 298. Alors, dans les circonstances, je suis d'opinion qu'on doit suivre Pothier de préférence aux auteurs modernes qui ont eu à commenter des articles du Code Napoléon qui ne se trouvent pas dans le nôtre ou qui en diffèrent.

Peut-on prétendre, en outre, que le principe de la puissance maritale a été violé dans le cas actuel?

La femme ne peut pas même accepter une donation sans l'autorisation de son mari, parce que l'incapacité de la femme dérive manifestement de l'état de mariage et qu'elle est incapable de contracter ni même de recevoir une donation sans la volonté expresse de son mari. Si la femme mariée ne peut pas recevoir une donation entre vifs sans l'autorisation de son mari, c'est que le mari a un intérêt moral à examiner la source et le motif de la libéralité faite à sa femme.

Or, dans le cas actuel, nous sommes en présence d'un père qui veut mettre de côté une donation en prétendant que sa fille mariée n'a pas été autorisée; et, d'un autre côté, nous avons le mari qui veut maintenir cette donation-là en disant que sa femme avait agi avec son consentement et son autorisation: que, de fait, elle était sa mandataire dans les circonstances.

La position pourrait être différente si le mari prétendait qu'il n'a pas donné d'autorisation; mais, au contraire, il prétend que sa femme n'a pas agi en violation de la puissance maritale qu'il a sur elle mais qu'elle a, au contraire, en tout point respecté cette puissance.

J'en suis donc venu à la conclusion que la donation a été validement acceptée par la femme mandataire de son mari et le jugement de la Cour d'Appel doit être confirmé avec dépens.

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MIGNAULT J.—Avec toute déférence possible je ne puis me convaincre que le jugement de la Cour d'Appel ait fait une application exacte des principes du droit qui régissent la capacité de la femme sous puissance de mari. Au contraire, je suis d'opinion que ce jugement confond deux choses qui pourtant sont très distinctes; les conditions de validité d'un contrat et les effets de ce contrat lorsqu'il est valide. Ainsi, il est hors de doute que, sous le régime de communauté de biens, les donations mobilières faites à la femme tombent dans la communauté (art. 1272 C.C.); c'est là l'effet du contrat de donation fait au bénéfice de la femme commune. Mais pour que cet effet se produise, il faut que la donation elle-même soit valide; si elle est nulle elle ne produira aucun effet et la communauté n'en tirera aucun bénéfice, car, suivant l'axiome de droit, *quod nullum est nullum producit effectum.*

La confusion d'idées dont je viens de parler me semble bien apparente quand on lit les motifs du jugement dont est appel. Je les cite textuellement:—

> Considering that the deed of cession or transfer from the plaintiff respondent, to Napoleon Pesant and others made on December 4, 1911, before Mtre. Leclerc, notary, though purporting to transfer the sum of $5,000 to the said late Dame Emma Pesant would, by law, upon the same being duly executed, have had the effect of vesting the said sum in the said matrimonial community of property and in the said defendant, appellant, as head of the said community, and not in the said Emma Pesant;
>
> Considering that the said cession or transfer was consequently not a gift of the said sum to the said Emma Pesant; and that she was not a contracting or accepting party to the said deed of cession or transfer, but merely the mandatary of her husband, the appellant, and did not need to be assisted by the latter or authorised by him otherwise than as a mandatary.

En d'autres termes, on dit: la donation d'une somme d'argent à la femme commune a l'effet de faire tomber cette somme dans la communauté; donc la donation n'est pas une donation à la femme, et cette

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dernière n'est pas partie contractante à l'acte de donation et n'y figure que comme mandataire de son mari, chef de la communauté.

Je ne puis m'empêcher d'opposer un *non sequitur* absolu à ce raisonnement. Le premier motif du jugement aurait dû, il me semble, conduire à une toute autre conclusion, car, en disant que la donation d'une somme d'argent à la femme commune a l'effet de faire tomber dans lac ommunauté la somme donnée, le jugement ajoute le qualificatif "upon the same being duly executed." Là, en effet, est toute la question. Pour que la donation produise cet effet, il faut qu'elle soit "duly executed." Si la donation était nulle pour vice de forme, nul ne prétendrait que la somme donnée tomberait dans la communauté, car la donation n'existerait même pas. Or, si la donation n'est pas validement acceptée par le donataire—et la femme commune ou séparée de biens, peu importe, ne peut accepter une donation *qu'avec le concours du mari dans l'acte ou son consentement par écrit* (art. 177, 763 C.C.)—la donation est nulle, ou plutot elle n'a jamais existé, et il va sans dire qu'elle ne peut produire aucun effet, et que la somme qu'on voulait donner ne tombera pas dans la communauté.

Invoquer dans ces circonstances les principes qui régissent le mandat, quand il s'agit, au contraire, des règles de validité de la donation entre vifs, c'est augmenter la confusion d'idées. Ou bien il s'agit d'une donation faite à la femme mariée, et alors cette donation n'existera qu'à la condition que la femme l'ait acceptée avec le concours de son mari dans l'acte ou son consentement par écrit, sauf les cas où l'autorisation judiciaire peut suppléer celle du mari; ou bien il s'agit d'une donation au mari, et alors il va sans dire que ce

dernier peut l'accepter personnellement ou par procureur. L'effet que produira la donation dans l'un ou l'autre cas n'a rien à faire dans cette question de validité du contrat.

La donation dont il s'agit a-t-elle été faite à la femme ou bien au mari, car on ne peut concevoir une donation faite à la communauté, cette communauté n'étant pas une personne morale ou juridique, mais simplement une masse de biens ou un patrimoine? Voy. Baudry-Lacantinerie, Contrat de Mariage, tôme 1er, nos. 249 & 250.

Je suis d'opinion que cette donation—et comme le Juge Mercier, en Cour Supérieure (1), et le Juge Cross, en Cour d'Appel (2), je crois que l'acte de cession et transport constitue une véritable donation—est une donation faite à la femme. L'appelant avait consenti, avec son fils Napoléon, un acte par lequel, en vue d'une promesse de vente qu'il avait donnée, il s'obligeait, si la vente se réalisait, à attribuer une partie du prix à Napoléon Pesant, à Eva Pesant et à Dame Emma Pesant (la femme de l'intimé), ses enfants. La vente s'étant faite, l'appelant, par l'acte dont la validité partielle est en question, a

cédé, quitté et transporté à ses enfants

Napoléon, Eva et Emma,

les sommes suivantes stipulées payables au dit cédant,

et l'acte énumère ces sommes, et, en ce qui concerne Emma, il dit:—

à la dite Dame Emma Pesant dit Sanscartier la somme de $5,000.11.

Même Emma Pesant est décrite à l'acte comme

épouse séparée de biens de Charles Robin,

mais je n'attache pas plus d'importance qu'il ne faut à cette désignation erronée, car je ne puis douter que la

(1) 23 R. de J. 211. (2) Q.R. 27 K.B. 88.

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cession ou transport, ou la donation, car c'est une donation, a été faite à Emma Pesant, et, cette dernière n'y figure et n'a prétendu l'accepter que comme donataire.

Si donc Emma Pesant est donataire, elle ne pouvait validement accepter qu'avec le concours de son mari dans l'acte ou son consentement par écrit, et comme elle a accepté sans ce concours ou ce consentement, la donation est nulle à son égard, et nulle d'une nullité que rien ne peut couvrir (art. 183 C.C.); et, par conséquent, l'acte ne produit aucun effet ni quant à elle ni quant à la communauté de biens entre elle et son mari.

L'intimé a prétendu accepter cette donation après le décès de sa femme. Il suffit de dire que, même s'il pouvait accepter une donation faite à sa femme, cette acceptation ne pouvait se faire après le décès de la femme donataire (art. 794 C.C.).

Depuis que l'opinion qui précède a été écrite, j'a eu l'avantage de lire la savante discussion de mon collègue, l'honorable juge Brodeur, mais j'ai le regret de ne pouvoir me rendre à sa manière de voir. La question de savoir si le mari peut accepter une donation pour sa femme suppose nécessairement que la donation a été faite à la femme, mais que le mari a accepté cette donation comme procureur de sa femme. Dans cette hypothèse, la femme est bien partie contractante à l'acte, mais elle y est représentée par son mari, et mon honorable collègue invoque l'autorité de Pothier et de Furgole pour soutenir que le mari

> ayant le bail, gouvernement et administration des biens et de la personne de sa femme, il s'ensuit qu'il peut, pour sa femme, accepter une donation faite à sa femme

(Pothier, Introd. au titre des Donations de la Coutume d'Orléans, no. 35).

Telle n'est cependant pas l'espèce que l'on présente à cette cour pour décision. On ne prétend pas que le mari a accepté une donation faite à sa femme, comme mandataire de cette dernière, mais que la femme aurait été le mandataire de son mari pour accepter la donation en son nom, et partant que le mari et non la femme aurait été le donataire. Le jugement de la Cour d'Appel (1), dit en toutes lettres:—

that the said cession or transfer was consequently not a gift of the said sum to the said Emma Pesant; *and that she was not a contracting or accepting party to the said deed of cession or transfer, but merely the mandatary of her husband.*

Il n'est donc pas nécessaire de décider si le mari peut accepter une donation faite à sa femme, comme procureur de cette dernière.

Dans les circonstances de l'espèce, je n'ai pas non plus à exprimer une opinion sur la question purement théorique, suivant moi, de savoir si la femme peut accepter, comme mandataire, une donation faite à son mari. Pothier, dans le passage cité, semble croire que non, car il dit:—

Une femme ne pourrait pas accepter pour son mari une donation faite à son mari.

Cette opinion comporterait probablement des réserves, mais, encore une fois, elle n'exige pas une solution dans cette cause, car je suis d'avis que la donation a été faite à la femme et non au mari, et on ne prétend pas que ce dernier l'a acceptée comme mandataire de sa femme.

Je ne puis qu'ajouter qu'à tous égards il est préférable de donner effet aux articles du code civil qui régissent la capacité de la femme mariée de donner ou accepter, aliéner ou disposer entre vifs ou autrement contracter (art. 177 C.C.; voy. aussi l'article 763 C.C.). Ces dispositions sont d'ordre publie, et le défaut d'autor-

(1) Q.R. 27 K.B. 88.

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isation maritale comporte une nullité que rien ne peut couvrir (art. 183 C.C.). La volonté du législateur est formelle et c'est le devoir des tribunaux de s'incliner devant elle.

Pour ces motifs je suis d'opinion de maintenir l'appel, avec les dépens de cette cour et de la cour d'appel, et de rétablir le jugement de la cour supérieure.

Appeal allowed with costs.

Solicitors for the appellant: *Deguire & Nantel.*
Solicitors for the respondent: *Perron, Taschereau, Rinfret, Vallée & Genest.*

DOMINION CHAIN COMPANY (PLAINTIFFS) ..... APPELLANTS;

AND

McKINNON CHAIN COMPANY (DEFENDANTS) ..... RESPONDENTS.

1918
*Dec. 4, 5.

1919
*Feb. 4.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Patent—New invention—Manufacture in Canada—Importation of parts.

An application for a patent on "New and useful improvements in Grip Treads for Pneumatic Tires" contained fourteen claims respecting what the applicant desired to patent. In an action instituted for infringement a disclaimer was filed as to nine of the fourteen claims, the plaintiff relying on the one feature of placing at right angles, instead of diagonally as in other grip treads patented, the chains connecting the side chains of the grip treads.

Held, Mignault J. dissenting, that the remaining claims shewed that the invention was intended to consist of the entire grip tread and not the right-angled feature only; that all of the elements of this invention were old and well known and it had been anticipated by prior patents and prior user; and that the patent was properly declared void.

All the parts of the plaintiffs' grip tread were imported the only work done in Canada being to put them together by a simple operation that could be performed by any person.

Held, Mignault J. dissenting, that this was importation of the invention forbidden by section 38 of "The Patent Act" and the work done in Canada was not the manufacture required by that section.

Per Mignault J.—Placing the cross chains at right angles was a combination, previously unknown, of old elements and, as such, was a patentable invention.

Judgment of the Exchequer Court (17 Ex. C.R. 255, 38 D.L.R. 345); affirmed.

APPEAL from the judgment of the Exchequer Court of Canada (1), dismissing an action for damages by infringement of the plaintiffs' patent and declaring the patent void.

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

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 17 Ex. C.R. 255; 38 D.L.R. 345.

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DOMINION CHAIN CO. v. MCKINNON CHAIN CO.

Russell Smart for the appellants.

Tilley K.C. and *J. G. Gibson* for the respondents.

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

IDINGTON J.—The appellant, as the assignee of a patent obtained by one Weed, a resident of New York State, on the 20th December, 1904, in response to a petition praying for the grant thereof, for an alleged new and useful improvement in grip treads for pneumatic tires, sought in the Exchequer Court to restrain respondent from infringing its alleged rights under said patent.

It was met by two defences amongst others; first, that the said patent if ever valid had been rendered null by reason of failure to comply with the requirement of section 38 of the "Patent Act" rendering it obligatory upon a patentee to manufacture the article covered by a patent; and instead of doing so importing said article into Canada; and secondly, that the patent had always been void. Both of these defences have been, as I think rightly, maintained by the learned trial judge, Sir Walter Cassels, and the action dismissed.

As I agree entirely with the reasons assigned by the learned judge I only desire now to add thereto a few remarks suggested by the course of the argument here.

And what I am about to say I intend to apply to and cover, so far as applicable thereto respectively, each of the said defences.

Counsel for appellant claimed that the obligation relative to manufacture had been complied with by an assembling of the chains imported and fitting them together with the hook fastenings which required only the application of an ordinary tool and very little labour, evidently an infinitesimal fraction of what is

involved in the manufacture of the grip tread for pneumatic tires.

It seems to me the determination of the question thus raised must turn upon the nature of the patent and what the alleged inventor claimed to have invented and covered in his application for a patent, and especially by the terms of the specifications therein.

Originally there were fourteen specifications in Weed's application of what he

claimed and desired to secure by letters patent.

The majority of them were disclaimed by the appellant filing a disclaimer on the 2nd November, 1917, over six months after this action had been initiated and the pleadings were at issue.

Of those remaining, counsel selected, in argument here, the tenth as that upon which he felt he might with most safety rely. It reads as follows:—

10. A reversible trip tread for elastic tires comprising two paralle lengthwise chains composed of comparatively short links, and paralle cross chains at right angles with and linked to the lengthwise chains.

I pointed out to him that by these very terms the patented article so described as a "reversible grip tread for elastic tires," etc., seemed to be a thing capable of manufacture in Canada and thus fitted to complete and render imperative the obligation imposed by section 38, on pain of nullification of the patent.

The answer made was that it was only an improvement upon what was well known in the market that in fact was now claimed.

And then, in reply as to what the improvement consisted of, counsel pointed out the fitting of the cross chains so that they would run at right angles across the tire instead of diagonally as in accordance with the specification in an application made by someone else for an earlier patent granted by the United States.

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It does not seem to me, however ingenious that, this gets the appellant out of its difficulties on the score of non-manufacture.

It is not as an improvement that the invention is claimed in a single line of its specifications. It is a complete whole that they each and all aim at a definition of.

And the very obvious purpose of the application was to claim an invention of the whole.

The objects of the invention are set out as follows:—

> The object of my present invention is to provide a flexible and collapsible grip or tread composed entirely of chains linked together and applied to the sides and periphery of the tire, and held in place solely by inflation of the tire, and which is reversible so that either side may be applied to the periphery of the tire, thus affording double wearing surfaces.
>
> These grips or auxiliary treads are adapted to be applied to the traction or driving wheels of automobiles, and one of the important objects is to enable any one, skilled or unskilled, to easily and quickly apply the auxiliary tread when needed by partially deflating the tire and then placing the grip thereon, and finally, reinflating the tire to cause the transverse chains to partially imbed themselves into the periphery of said tire, whereby the auxiliary tread or gripping device is firmly held in operative position against circumferential slipping on the tire.
>
> Another object of equal importance is to construct the auxiliary grip or tread in such a manner that it may be collapsed into a minimum space when not in use to be carried in the vehicle, and owing to the fact that it is constructed of chains with comparatively short links, it will be apparent that it may be compressed into a very small space, and therefore can be placed under the seat or in any other available receptacle in the vehicle.

Some minor objects in drawing details are given which in no way help appellant in this regard.

Nor does the usual introduction, common to all such applications, of "certain new and useful improvements" help.

There is in short nothing than can be said to point specifically to any improvement on old grip treads as the purpose of the inventor. And this is not the case of an application for a patent of a combination of old,

well-known devices being applied to a new object, and an improvement of that character.

The only claim either expressly or impliedly made in way of combination is that made in the 7th specification, which is a combination of the specified grip tread with the pneumatic tire.

Nor can the combination to be patented be found, as has been found in some cases, by a consideration of the scope and purpose of the whole application, to be either expressly or impliedly in a claim for a mere improvement.

It is a claim for the whole article as a new invention that is made and hence not of an improvement that is entitled to be protected by a patent.

I would refer to Terrell on Patents, 4th ed., under the heading of "The Complete Specification" and the cases cited therein, and especially the language of Mr. Justice Buckley in *The British United Shoe Company* v. *Thompson* (1), quoted therein, pp. 155 and 156, for I venture to think the pith of the relevant law necessary for us to consider is well summed up in the last sentence of that so quoted, as follows:—

> The whole is summarized in a few words by saying that the patentee must shew what is the new thing that he claims.

Assuredly the patentee in this case has failed entirely in shewing that the new thing he claims is the alleged simple improvement counsel is reduced by force of circumstances to contend for.

If that had been all that had been claimed and specified as his claim, a very nice question might have arisen as to what, if anything, had to be manufactured in Canada. And another nice question as to whether it was not so impalpable as to be impossible of definition

(1) 22 Cut. Pat. C. 177.

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or when defined so evidently simple in its character as to render it impossible to claim it as a novelty.

I repeat it is, with tiresome reiteration, made manifest by the fourteen claims set forth in the original specifications that what the alleged inventor had in mind was a whole article, easily capable of manufacture in Canada, and nothing of that kind having been attempted within the prescribed time, the patent should be held null.

The argument so fully and forcibly set forth in appellant's factum founded upon the extensive use of the article and the attendant prosperity arising therefrom, I respectfully submit, appears most fallacious when we use that common knowledge we are permitted to resort to relative to the recent advent of the automobile and its remarkably rapid progress in becoming an article of common use.

That, and not this adoption of the right angle crossing of a gripping chain, is the result of the expansion of trade in and manufacture of such devices as the patentee claimed.

Common knowledge again tells us that in manifold ways the parallel lines of ridges on a wheel, crossing it at right angles when intended to furnish it with a gripping capacity, was older than automobiles and in common use in many mechanical applications of the use of power.

It was not the need of inventive faculty that prevented that exact adaption of a well-known gripping device such as a ridge across a wheel, but the application thereof by means of metal across a rubber wheel in such a way as not to destroy the rubber that was the thing that was wanted.

The chain device of the Parsons' patent, which I take the liberty of thinking the patentee here in question appropriated, because that was not patented in Canada,

and made the foundation of his patent got here in question, furnished what was really needed.

The fact that Maxim's attempt to construct a leather grip for a bicycle a few weeks anterior to the patent in question was tried transversely and, I imagine, more nearly at right angles than the grip in question, shews how naturally the mind turned that way would resort to the parallel right angle traversing the wheel in solving what was in question.

It was the choice of material and the least hurtful mould thereof that really was the puzzle, and that was solved by Parsons' ample demonstration anticipating and destroying any foundation for the claim in question.

He, however, apparently had the accomplishment of some other objects in view as well as the gripping, as his specifications plainly shew, and hence the diagonal shape he specified instead of the usual transverse ridge for the chains running.

There was nothing left for the alleged inventor here in question except to copy two old things. Indeed, everything he used or claimed to use had long been in one form or another anticipated; and of a patentable combination he never had the faintest conception.

I think the appeal should be dismissed with costs.

ANGLIN J.—The material facts of this case appear sufficiently in the report of the judgment of the learned judge of the Exchequer Court (1), from which the plaintiff appeals. Although the claims in the Weed patent remaining after full effect is given to the disclaimer filed by the plaintiff, on the 2nd November, 1917—Nos. 4, 7, 9, 10 and 12—as I read them cover much more than the mere disposition of

(1) 17 Ex. C.R. 255; 38 D.L.R. 345.

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parallel cross chains at right angles with and linked to the lengthwise chains,

mentioned in claim No. 10, the appellant now would limit the patented invention solely to this arrangement of the cross chains at right angles to the side chains. I assume that this feature is claimed by the phrase

extending transversely the shortest distance across the tread of the tire

in claim No. 4, and by the words

extending from anchor to anchor directly across the periphery of the tire

in No. 7. In No. 9, however, there is not even a veiled reference to the right-angled arrangement of the cross chains. They are described merely as

cross chains parallel with each other and connecting the lengthwise chains.

They might be at any angle—right, acute, or obtuse—provided all were at the same angle to the side chains. In No. 12 the description is

cross chains disposed at substantially right angles to the lengthwise chain.

In a very recent case, *Betts* v. *Reichenberg* (1), Mr. Justice Younger held a patent void because the particular idea or device relied on as the novelty was not set forth in two of the seven claims and the specification in some of its descriptions of the patented articles—in that case a wrist watch strap—also omitted it. Here the right angle feature is only mentioned once in the specification and then not in the vital part of it but merely in a paragraph descriptive of a figure said to be shewn as demonstrating or illustrative of "the practicability of my invention." Reading the specification as a whole, the right angle feature would appear to be quite unessential and a mere accident in the illustration

(1) 35 Cut. Pat. C. 1.

and the idea that that was the real invention claimed certainly would not occur to one.

The patentee declares that,

> The object of my present invention is to provide a flexible and collapsible grip or tread composed entirely of chains linked together and applied to the sides and periphery of the tire, and held in place solely by the inflation of the tire, and which is reversible so that either side may be applied to the periphery of the tire, thus affording double wearing surfaces.
>
> * * * * *
>
> Another object of equal importance is to construct the auxiliary grip or tread in such a manner that it may be collapsed into a minimum space when not in use to be carried in the vehicle, and owing to the fact that it is constructed of chains with comparatively short links, it will be apparent that it may be compressed into a very small space, and therefore can be placed under the seat or in any other available receptacle in the vehicle.
>
> * * * * *
>
> The end links at one side of the (lateral) chains are of special construction.

Flexibility in all directions, reversibility, and compactness were the objects.

Mr. Justice Cassels has pointed out other features of the invention of importance as described in the patent which have been wholly discarded. Claims No. 7 and 9 are as follows:—

> 7. In combination with a pneumatic tire, a reversible gripping device comprising endless anchors disposed at opposite sides of the tire and flexible circumferentially, and flexible members extending from anchor to anchor directly across the periphery of the tire and secured to said anchors.
>
> 9. A reversible grip tread for elastic tires comprising two parallel lengthwise chains, and additional cross chains parallel with each other and connecting the lengthwise chains.

How is it possible in view of these claims to maintain that the disposition of the cross chains at right angles to the side chains is the entire invention patented, or even an essential feature of it? In my opinion the invention claimed and for which the patent stands is much wider and covers the entire grip-tread. The idea of confining the patent to the feature of right-angled

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connections between the cross and side chains was purely an afterthought resorted to in an attempt more ingenious than ingenuous to meet the difficulty presented by non-manufacture and importation of the invention as described by the patentee in the specification and in the claims which his disclaimer did not remove from the patent.

Confessedly, however, this feature of cross chains at right angles to the lateral or anchor chains is the only novelty to which the patentee could lay even the semblance of a fair claim in view of the Parsons' patents (British and American) for a grip-tread consisting of side chains with transverse chains attached thereto. Although Parsons in the specification of his United States patent described the cross chains as passing "diagonally across the tire," the claims of that patent are not confined to that construction. Under them the cross chains might be placed at any angle to the side members. In his British patent the cross chains are described merely as

> fitting loosely over the periphery of the tire and passing from side to side across the tire.

In his illustrative figures shewing "modes of construction and classifications" the cross chains appear as passing diagonally across the tire. In both patents, however, he distinctly says:—

> I do not limit myself to any particular construction of chains.

The defendant's chief witness, Prof. Carpenter, speaking of the Weed patent, says that,

> a departure not exceeding 10 or 15 degrees from the right angle would not be a practical variation.

Yet it would be within the Parsons' patent.

Having regard to all these facts, I am of the opinion that the plaintiff's patent is impeachable on the grounds of want of novelty and anticipation, as well as for failure

to disclose and claim as the invention patented the feature which is now solely relied on. I express no opinion on the question whether the arrangement of cross chains at right angles to the side chains was a patentable invention.

I also think the defendant's patent has been avoided under clause (*b*) of section 38 of the "Patent Act" by importation.

(*b*) If, after the expiration of twelve months from the granting of a patent, or an authorized extension of such period, the patentee or patentees, or any of them, or his or their or any of their legal representatives, for the whole or a part of his or their or any of their interest in the patent, import or cause to be imported into Canada, the invention for which the patent is granted, such patent shall be void as to the interest of the person or persons so importing or causing to be imported. 3. Edw. VII. ch. 46, sec. 4.

In *United Telephone Company* v. *Dale* (1), Pearson J. is reported, at page 782, to have said:—

If there was a patent for a knife of a particular construction, and an injunction was granted restraining a defendant from selling knives made according to the patent, and he was to sell the component parts so that any school boy could put them together and construct the knife, surely that sale would be a breach of the injunction.

In *Dunlop Pneumatic Tyre Co.* v. *Mosely* (2), at page 280, Vaughan Williams L.J. approves of this statement of the law, adding:—

If you are in substance selling the whole of the patented machine, I do not think that you save yourself from infringement because you sell it in parts which are so manufactured as to be adapted to be put together.

In *E. M. Bowden's Patents Syndicate* v. *Wilson* (3), a sale of all the component parts of a patented brake was held to be a violation of an injunction protecting the patented invention. I find the observation of Pearson J. in the *Dale Case* (1), cited with approval in Frost on Patents, vol. 1, at page 377, and Fletcher Moulton on Patents, at page 161.

(1) 25 Ch. D. 778. (2) 21 Cut. P.C. 274.
(3) 20 Cut. P.C. 644.

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The importation of *all* the component parts of the patented invention ready to be put together by some very simple process would, in my opinion, constitute an infringement of the patent quite as much as would the sale of the same parts. The importation of them by the holder of the patent would entail its avoidance under Clause (*b*) of section 38 of the "Patent Act." See also Fisher and Smart on Patents, pp. 148 *et seq.* But without condemning it, I wish especially to guard myself against being committed to an indorsement of the first paragraph on page 152, expressing the personal view of the authors of the work last cited as to the effect of the importation of

anything on which labour has been done to particularly adapt it to use in the invention.

The decision of Burbidge J. in *Anderson Tire Co.* v. *American Dunlop Tire Co.* (1), is an authority against their view.

But we are dealing not with a case of the importation of one or more of the component parts of the patented article, but with the importation of *all* the component parts

together in such a form that they can easily be made into the combination.

I have not overlooked the cases of *Sykes* v. *Howarth* (2), and *Townsend* v. *Howarth* (3). The *Townsend Case* (3), was not a case, such as this is, of supplying all the component parts of the invention—parts specially manufactured according to specifications in sizes and lengths and with appropriate attaching fittings, the whole as manufactured being suitable and suitable only for the making of the patented invention. The *Sykes Case* (2), is merely authority for the general proposition that

(1) 5 Ex. C.R. 82. (2) 12 Ch. D. 826.
(3) 12 Ch. D. 831.

selling articles to persons to be used for the purpose of infringing a patent is not an infringement of the patent.

Here, according to the evidence, the side chains with hooks attached, and the cross chains with hooks attached, all made to order and of particular sizes—"manufactured to the proper lengths"—being *all* the component parts of the plaintiff's chain tire grip were imported "adapted to be put together" by a simple process which "any school boy," if endowed with sufficient strength, could apply. All that was done in Canada was the insertion of the hooks of the cross chains in the links of the side chains and the clamping or nipping of these hooks together by the use of a heavy pair of pincers. That this, if not actually inconsistent with his specifications was, at least, not regarded by the patentee as an essential operation in constructing his invention is shewn by the following extract from the specification:—

I also contemplate detaching the cross chains from one or both of the parallel chains by making an open link or hook connection, as seen on the left hand side of Fig. 3, in which case the ends of the parallel chains might be permanently connected.

Whether what was done in Canada amounted to construction or manufacture sufficient to satisfy clause (*a*) of section 38 of the "Patent Act," even if the patent could be confined to the disposition of the cross chains at right angles with the side chains, is, to say the least, very doubtful. But if the patent claimed is wider, as I think it is, there was nothing approaching construction or manufacture in Canada of the patented article.

On the grounds that I have indicated, I would affirm the judgment of the Exchequer Court and dismiss the appeal.

BRODEUR J.—I am in favour of dismissing this appeal for the reasons given by my brother Idington.

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MIGNAULT J.—The whole question here is whether the Weed Canadian patent, No. 90650, for alleged new and useful improvements in grip treads for pneumatic tires, now belonging to the appellant, is a valid and subsisting patent. If so, the action taken by the appellant against the respondent for infringement should be maintained, if not, it must be dismissed.

The appellant having taken proceedings against the respondent for infringement, the latter asked for the dismissal of the action on three grounds:—

1. The patent is not a valid invention within the meaning of the "Patent Act."

2. The patent is void because the owners of the patent did not within two years from the date thereof commence, and, after commencement, continuously carry on in Canada the construction or manufacture of the invention patented, as required by section 38 of the "Patent Act."

3. The plaintiff, after the expiration of twelve months from the granting of the patent, imported into Canada the alleged invention.

The learned trial judge in the Exchequer Court, Sir Walter Cassels, maintained these three grounds of defence, and dismissed the plaintiff's action, and the latter now appeals to this court.

I am, with deference, of the opinion that the second and third grounds of defence are not made out. Section 38 of the "Patent Act," which provides for both, is in the following terms:—

> Every patent shall, unless otherwise ordered by the Commissioner as hereinafter provided, be subject, and expressed to be subject, to the following conditions:—
>
> (a) Such patent and all the rights and privileges thereby granted shall cease and determine, and the patent shall be null and void at the end of two years from the date thereof, unless the patentee or his legal representatives, within that period or an authorized extension thereof, commence, and after such commencement, continuously carry on in

Canada, the construction or manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada;

(b) If, after the expiration of twelve months from the granting of a patent, or an authorized extension of such period, the patentee or patentees, or any of them, or his or their or any of their legal representatives, for the whole or a part of his or their or any of their interest in the patent, import or cause to be imported into Canada, the invention for which the patent is granted, such patent shall be void as to the interest of the person or persons so importing or causing to be imported.

As to non-manufacture in Canada, the requirement is that the patentee or his legal representatives shall within two years from the date of the patent or an authorised extension thereof

commence, and after such commencement, continuously carry on in Canada *the construction or manufacture* of the invention patented, in such a manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada.

The alleged invention consists of a lateral chain around the wheel or tire of an automobile or other similar vehicle, to which are attached several cross chains crossing the tire so as to prevent the wheel from skidding when the automobile is being driven along a slippery road.

The evidence shews that both the lateral and cross chains were, during the two years, manufactured in the United States and imported into Canada, where, at a small establishment at Bridgeburg, Ontario, they were fastened together so as to be ready to be fitted on the tires. When orders were received, and they were not very numerous during the first years, specifications were sent to the manufacturers of the chains, and then chains of the required lengths were made, sent to Canada, and were there fastened together in the manner required by the patent of invention.

I cannot escape the conclusion that this was at least a *construction* of the patented invention in Canada,

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for the whole invention consisted of fastening the cross chains to the lateral chains, so that they could be fitted on the tires. Moreover, it was such a construction of the invention patented that, in the words of section 38, "any person desiring to use it" could

> obtain it or cause it to be made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada.

Consequently, in my opinion, the defence of non-manufacture fails.

The same reason disposes of the defence of importation into Canada of the alleged invention. What the patentee imported into Canada was the chains, which could have been used for other purposes, and not the invention. The latter, as I have said, was constructed in Canada.

There remains the first ground of defence, whether the alleged invention was, at the date of the patent, a valid subject-matter for a patent of invention. On this ground, after serious consideration, I have come to the conclusion that this defence also fails and that the judgment of the Exchequer Court should be set aside.

The case, I must frankly say, is one of considerable difficulty, and I have not felt entirely free from doubt. Such a device as Weed patented comes very close to the border line which separates invention from no invention. I have very briefly described it, and the only novel feature that the appellant claims has been achieved, the placing of the cross chains at right angles to the lateral chains.

The question now is whether this arrangement of the cross and lateral chains has sufficient novelty to entitle it to a patent of invention. To answer this question I will briefly give the history of this particular art.

The evidence made as to the prior art shews that

several devices had been manufactured and were subsequently patented with a view to prevent the skidding of rubber tires. The really pertinent alleged anticipations are those of Maxim and Bardwell, 1901, and of Parsons, 1903, these dates being those of the above patents, and the appellant's patent having been granted in 1904.

The Maxim and Bardwell device was made of leather or other tough, pliable material, and consisted of side or lengthwise members to which were attached cross members or straps, some of which were arranged to be strapped around the tires so as to hold the whole appliance firmly in place. The cross members were placed at right angles to the side members. Mr. Maxim, one of the inventors, examined as a witness at the trial, stated that the invention did not prove a success, for it was impossible to strap on the appliance tightly enough to keep it in place, and, moreover, the leather would become wet, and then it would stretch, lose its strength and finally break. He says that the straps could not be put on otherwise than at right angles, adding that

> the general idea seemed to be that we must have something diagonal across the tire, and it was the general opinion that this was necessary, but when it came to leather the proposition was different owing to the flexibility of the leather to have it across the tire at right angles, and by fastening it down very tightly.

The difficulty as to other materials was that it was then considered that the use of metal instead of leather would injure the tire, so the Parsons' patent was a distinct advance in the art, for he used metal cross chains attached to a lateral ring made out of wire or of chains (the English patent mentions both wire and chains, the American one merely wire or wire rope or other suitable material). But following the prevailing idea mentioned by Mr. Maxim that the cross members

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should be placed diagonally and not at right angles to prevent skidding, Parsons' cross chains were so placed and described in his specification, although his claims and especially the claims of the American patent, merely state that the cross chains extend across and around the periphery of the wheel. These claims, however, should be construed to mean the form of construction specified, that is to say, the diagonal arrangement of the cross chains.

The evidence shews conclusively to my mind that the then prevailing idea that the cross members should be placed diagonally and not at right angles to prevent skidding was a fallacy. It was thought the diagonal position would arrest an incipient skidding movement, but it was found that once the skidding had commenced, Parsons' device would not stop it, so that practical experience shewed that the desired end was not obtained by the Parsons' grip tread. This device, had, however, a creeping effect which was useful to prevent the wearing of the tire.

It was under these circumstances that Weed designed a grip tread made of chains like Parsons', with lateral and cross chains, but the latter were placed at right angles to the lateral chains, and this arrangement was found to produce the desired effect, for the right-angle position of the cross chains altogether prevents incipient skidding. Moreover, although the inventor appears not to have foreseen this result, there was the same creeping effect as with the Parsons' grip tread, and, like the latter, Weed's device was reversible.

The evidence shews that, after the fallacy of the diagonal arrangement of the cross chains had been demonstrated by actual experience, the success of the Weed device was conspicuous and lasting, and while at

first a very small establishment was sufficient, to-day there is an immense manufactory of Weed's device at Niagara Falls, Ont., representing an investment of half a million dollars for the building and equipment, and of an equivalent amount for material and stock, and the Parsons' grip tread has been driven out of the market by the Weed invention.

This success of the appellant's patent, as well as the history of the art which I have very briefly traced, have convinced me that there is here sufficient invention to sustain the patent. I think that Weed, contending, as he did, against a prevailing fallacy, evolved something really new, and based on different principles as to skidding prevention devices. One of the best tests of patentability is the fact that the alleged invention has supplied a long-felt need which previous devices had failed to satisfy. Commercial success, of course, is not the only test, and may in some cases be an insufficient one, of invention, but it certainly goes very far to prove that an invention has really been made. Referring to the evidences of invention, Fletcher Moulton, in his work on Letters Patent for Invention, page 23, says:—

> One class of such evidence is of extreme importance. If the development be one of great utility, and one which has satisfied a long-felt want in the trade, the evidence is almost overwhelming that it required inventive ingenuity or it would have been made before, that is presuming that there has been no material change in the conditions of the trade, such, for example, as a new demand caused by a change of fashion.

It is suggested that the popularity of the Weed grip treads may have been caused by their lightness as compared to the Parsons' appliance, but even this would be a merit in a matter of this kind.

And should it be said that all the elements here are old and were well known, I would consider that as furnishing no insurmountable objection to the patent,

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if these old elements are brought or combined together in a new form and have satisfied a long felt need of the trade.

Of course the question of the novelty of an invention is in each case a question of fact, so that other cases, where other matters and problems were involved, are not always a very secure guide. However, I think that I can rely on the statement of Lord Halsbury in *Taylor* v. *Annand* (1), at pages 62 and 63, with regard to the principles governing the class of cases where a very useful improvement has been made meeting the needs of the trade, but involving nothing more than the combination of old and well-known elements.

The learned trial judge expressed the opinion that under the evidence the Weed device with the cross chains at right angles would be an infringement of the Parsons' patent, the cross chains of which would still be diagonal if placed at so small an angle from the right angle as fifteen degrees. It must, however, be observed that Parsons, not having obtained a patent in Canada, no question of infringement of his patent here can arise. Moreover, the learned counsel of the appellant stated at the hearing that his clients owned the Parsons' patent in the United States, so they could not be considered as infringers there. I may add that the criterion of novelty and that of infringement are not the same. A device improving a patent can be patented, although it might be an infringement of the original patent. Frost on Patents, 4th ed., vol. 1, p. 349. Of course, the patentee of the improvement would not have the right to use the original invention, but this would not affect his patent for the improvement. "Patent Act," sec. 9.

(1) 18 Cut. P.C. 53.

Since writing what precedes, I have had the advantage of reading the opinion of my brother Anglin, and I will merely say that I have not overlooked the question discussed at bar with regard to the claims of the patent sued on. During the pendency of these proceedings in the court below, the appellant filed a disclaimer of certain claims contained in Weed's patent, and, as I understand the respondent's contention, as stated in its factum, it is that the claims retained were restricted to the placing of the cross chains at right angles, and that there is no originality in this form of construction. I do not find that the respondent raised any question whether the remaining claims, as restricted to the right-angle arrangement, were too wide to support a patent for such an arrangement, assuming that there is sufficient originality in this arrangement of the cross chains. And as I feel constrained to decide that the right-angle arrangement of the cross chains is an advance on the prior art, and that by means of this arrangement the patentee has successfully solved the problem of discovering an effective anti-skidding device, I would not deem myself justified in setting aside this very useful patent for the reasons now urged in connection with the disclaimer and the remaining claims.

For these reasons, I state as my opinion that the appellant's patent is a valid patent of invention. The appeal should, therefore, be allowed with costs in this court and in the court below.

Appeal dismissed with costs.

Solicitors for the appellants; *Fetherstonhaugh & Co.*
Solicitors for the respondents: *Gibson & Gibson.*

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*Nov. 15, 18.
*Dec. 23.

SHIVES LUMBER COMPANY (DEFENDANT) ..... } APPELLANT;

AND

PRICE BROTHERS & COMPANY. (PLAINTIFF) ..... } RESPONDENT.

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

Evidence—Ambiguity—New trial—Parol evidence—Admissibility—Art. 1234 C.C.; art. 1341 C.N.

The action was for the recovery of damages for wood cut by S. upon timber limits of which boundary lines were in dispute between S. and P. The Quebec Wood and Forest Regulation No. 24 provides that the survey of Crown timber limits, to be valid, must be made according to instructions "previously approved by the Minister" of Lands and Forests, and when the survey is completed, the reports, plans and field notes of the surveyor must "be submitted to the Minister" and "approved by him." In this case, the instructions, after being issued, were modified by the Chief Superintendent of Surveys, who, being called upon to explain these changes, made a report to the Minister containing his reasons for making them and also annexed to it a plan of the survey operations which had been carried out on those amended instructions. The Deputy Minister, whose approval was equivalent to that of the Minister, then placed his initials on the report with the letters "Appd."

Held, Davies C.J. and Mignault J. dissenting, that a new trial should be had to determine whether the Deputy Minister of Lands and Forests had merely approved the explanations given by the Superintendent of Surveys or whether he meant to give his approval to the survey operations as required by Regulation No. 24.

Per Idington, Anglin and Brodeur JJ.—Parol evidence is admissible to remove such a latent ambiguity.

Per Brodeur and Mignault JJ.—The requirements of Regulation No. 24 are of the nature of rules of procedure, and the approval of the Minister covers any previous informality in the fulfillment of these requirements. *Alexandre* v. *Brassard* ([1895]A .C. 301,) *followed.*

Per Davies C.J. and Mignault J. dissenting.—Upon evidence, the intention of the Deputy Minister in approving the report of the Superintendent of Surveys was to give the approval required by Regulation No. 24.

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*Present:—Sir Louis Davis C.J. and Idington, Anglin, Brodeur and Mignault JJ.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Rimouski, which dismissed the plaintiff's action.

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

Alex. Taschereau K.C. and *J. Hall Kelly K.C.* for the appellant.

Tessier K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—This is an appeal from the judgment of the Court of King's Bench which reversed a judgment of the Superior Court and awarded the respondent, Price Brothers & Company, the sum of $1,367.45 as damages for wood cut by the appellants upon the respondent's timber limit.

The dispute between the parties was as to boundary lines of their respective timber limits and that dispute depended largely, if not altogether, upon the result of a survey of these limits made by surveyor Addie, the plans and report of which survey Addie had reported to Mr. Girard, the Director and Inspector of Surveys, who in his turn had formally submitted Addie's report to the Hon. Jules Allard, Minister of Crown Lands, with very full explanations as to certain changes in the instructions for the survey which had been made by him and the reasons why they had been made.

This latter report had been approved of by the Deputy Minister of the Department of Lands and Forests on the 7th April, 1914, and it is conceded that the approval of the Deputy Minister is equivalent by statute to the approval of the Minister himself.

The main contention of the appellant Shives Lumber Company on the appeal was that the report of

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Girard, the Director and Inspector of Surveys, was only one relating to the changes he had made in the "instructions" for the survey and did not cover the survey itself which consequently had not been approved of as required by statute before it becomes binding upon interested parties.

I am quite unable to accept this argument.

It is true Girard deals at length in his report with the reasons why he had altered the original instructions, such reasons being that both the parties interested had desired and consented to the changes made, because while one would on the altered instructions gain somewhat on the west the other would receive compensation on the east.

The conclusions of his report, however, contain its pith and substance and read (as I translate) as follows: (The italics are mine.)

> I will draw your attention also to the fact that said instructions were modified in March, 1912, that the line in question was run according to them, in 1913, giving therefore to the Shives Lumber Co. all the time necessary to oppose said instructions before the work was done on the ground, and that the protest was handed over to Price Bros. and to the Department only on the 15th March last (1914).
>
> To the present report I attach a copy of the local map, shewing in yellow the dividing lines between the timber limits belonging to the Shives Lumber Co. and the Price Bros., *as well as a blue copy of the plans of the work of Surveyor Addie dividing the timber limits belonging to the two companies on River Rimouski as well as on River Kedzwick. I respectfully submit the whole matter.*

In my opinion this report of Girard with its accompanying map and

> plans of the work of Surveyor Addie dividing the timber limits belonging to the two companies

on both rivers contains all the essentials required by the law to enable the Minister to approve or otherwise of the report of the survey, and when approved by the Deputy Minister became binding on the parties.

Many other questions were argued by counsel at bar. I have had the opportunity of reading the reasons for judgment prepared by Mr. Justice Mignault on all of these points and his conclusions are quite satisfactory to me and need not be repeated. In a letter of the 14th August, 1914, sent by the Deputy Minister of the Department to each of the parties and enclosing copies of the report of Mr. Girard, Superintendent of Surveys, the Deputy says expressly: "This report has been approved by this Department." Nothing could be plainer or clearer than this as shewing departmental approval.

This appeal should be dismissed with costs.

IDINGTON J.—This is an action by the respondent claiming by virtue only of being licensee of the Crown on behalf of Quebec, of a right to cut timber on the Crown domain, to recover from the appellant, which also is a licensee of the said Crown, the value of certain timber alleged to have been cut by the latter.

The licences issued by the Crown for such purposes are somewhat indefinite in regard to the exact area supposed to be covered thereby. They transfer no right of property. They are mere licences to cut. The fruits thereof are not such tangible things that trespass or trover may lie for, against one claiming as of right (whatever might be such right against a third party who was a mere tort feasor), unless and until the area covered thereby has been delimited.

The parties hereto are rival claimants. The Crown owns the land and the timber and, in order, I presume, to keep in its own hands the control of the delimitation of such lands as a licence may be applicable to and cover, and avert the possibility of confusion arising from mistakes, or worse, on the part of any of those

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claiming under such licences and consequent loss of revenue, as well as for the protection of all concerned, there are, amongst others of a like kind, regulations passed by the Lieutenant-Governor in Council, authorized by statute, of which the important one now in question is as follows:—

> 24. Crown timber agents, or any other authorized person shall, at the joint written request of holders of adjacent limits, give instructions as to the manner of surveying and running the boundaries of such lands in order that they may be conformable to existing licenses. But, in order to be valid, such instructions must be previously approved by the Minister. Surveys shall be made at the expense of the parties requiring the same, and, when completed, the reports, plans and field notes shall be submitted to the Minister and, if approved by him, a copy shall be sent to the office which issued such instructions and be kept in its archives. The boundaries so established at the joint request of the interested parties shall be fixed and permanent and cannot be altered.

There had been instructions by the Deputy Minister, presumably pursuant to another regulation, issued to a surveyor at the request of respondent, to make a survey which might, if fully executed and the results had been duly adopted by the Minister, have been held to have delimited the line between these parties. That work, however, was interrupted upon the appellant complaining to the Minister or his Department.

I am unable to see how the respondent can found upon that alone any claim.

Indeed it is not pretended that in law such work as done thereunder can of itself support the respondent's claim.

It is useful as an historical introduction to that which transpired later and then coupling what had been so done with later work founded upon a variation of the prior instructions it is contended the whole proceedings constituted a compliance with the above quoted regulation, and thereby in law finally deter-

mined the line between the parties and consequently the right of property in that in question.

It is not seriously disputed, I imagine, that if such a line had been duly established then the appellant must be held on the facts to have cut some timber within the respondent's limit so established.

It is clear that there was a meeting, after the interruption of the survey as directed, of some persons representing in some capacity or other the parties concerned, in presence of the Superintendent of Surveys.

It is surprising that they should have left the nature of their decision, if any, of a clear definite nature ever reached, to be the subject matter of dispute, as it is herein, instead of putting in writing what the above quoted regulation requires, namely, "a joint written request of holders of adjacent limits" to a Crown timber agent or other authorised person, which I presume the Superintendent of Surveys was. Even then the Minister must previously have approved of the instruction to execute the purpose of said owners before proceeding therewith.

Instead of such a simple and direct method of procedure as the "joint written request," we are asked to accept instead thereof what may be extracted from an involved, long drawn out correspondence from which assent or conditional assent by each party might be found in the nature of ratification or a willingness to join in such written request. I cannot think that should be accepted as a substitute for the express requirement of the regulation.

Nor can I accept in substitution for the previous approval of the Minister, required by the regulation, a later adoption thereof long after the work relied upon had been completed. And much less so when there is

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the gravest reason to doubt the import of that which is relied upon as approval.

Long after the work now relied upon as establishing the line in question was done pursuant to such loose and unbusinesslike methods as I have adverted to, upon appellant complaining of the original instructions having been improperly changed, there seems to have been a request made by the Deputy Minister to the Superintendent of Surveys, to report upon that subject.

I infer from the contents of the report itself that such was the nature of the request the Superintendent refers to, for we have not in the record the written request for a report. Why that is so, I am at a loss to understand but must do the best I can with the material placed before us. I cannot, under these circumstances, draw from the initialled mark of approval by the Deputy Minister any such sweeping conclusions as we are asked to do from such dubious mark of approval.

That was no more nor less than a proper exoneration of an officer charged with erroneously having interpolated something into the original instructions his predecessor had framed, and which the Minister had acted upon.

It was an entire work, founded entirely upon instructions previously given or approved by the Minister, that the exigencies of the situation demanded.

What is produced and relied upon as in conformity with the exacting requirements of the regulation falls very far short thereof.

Indeed no ratification would seem permissible under the regulation in the way of substitution therefor, no matter how desirable.

Ratification was beyond the power of the Minister or his deputy.

Nor could the assent of the parties concerned either previous to or after the work was done alter the nature or quality of the proceeding or its results.

The rights of the Crown the dominant proprietor could not be thus disposed of.

Until the relation between the Crown and each of its licensees in question herein had been accurately determined or the lines thereof laid down as required by law, there was no property vested in respondent, or even right of property which it could assert.

It is conceivable that two such licensees as those in question might frame a contract between them providing that in certain contingencies in relation to such districts as in question either should pay or indemnify the other for some supposed wrong done to the other's interest under its licence and thus found a something out of which an action at law upon that contract might arise even if independent of the regulation in question. But nothing of that sort exists in fact herein nor is any such like claim pleaded or attempted to be proven.

The action is founded upon a supposed wrong done in or upon or in relation to property which had not yet in law or fact become the property of respondent.

I can see no possibility of such a right of action being maintainable at present under existing circumstances. Nothing is existent capable of supporting a claim for damages or enabling the proper assessment thereof. Nor can there be unless and until, if ever, the delimitation of the properties under licence has been established either pursuant to the section quoted above or the following sec. 25 of the regulations which does not seem to have been invoked herein as foundation for present claim. I assume above it had originally been acted upon but was not pursued in such a way as to lead to any definite results.

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I am, therefore, not surprised to find that upon appellant pressing its complaints on the attention of the Minister that he finally decided to refer the question to the law officers of the Crown and as a result thereof that he found it necessary to inform these litigants that he had decided that the modification of instructions, not having been officially made, were of no value and proceedings would have to be taken "to have this error straightened up," to use the phrase announcing the result.

The respondent saw fit to take and prosecute this action instead of abiding thereby.

It thus assumed the heavy burden of proving a compliance with the regulation and attempted it by circuitous methods which I find failed.

The onus of proof resting upon it, the proper and direct method would have been to call the Minister or his deputy as a witness.

I infer that by reason of the impossibility of shewing that the surveyor's instructions, as amended, had the previous approval of either the Minister or his deputy, which was needed to render same valid, either would have failed to supply the needed proof.

I, therefore, am of opinion, that the appeal should be allowed with costs throughout and the action be dismissed with costs without prejudice to the new survey being had under either regulation—24 or 25—with the approval of the Minister or his deputy and to such, if any, rights as the result thereof may disclose the respondent to have.

Since writing the foregoing I find that I am alone in the result just reached, and to render a judgment of the court possible I assent to the result expressed by those desiring a new trial as being nearest of the divergent opinions of my colleagues to what I conceive right.

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ANGLIN J.—I concur with Mr. Justice Brodeur.

BRODEUR J.—Il s'agit dans cette cause du bornage de terres publiques sur lesquelles l'appelante et l'intimée ont des permis de coupe de bois qui leur ont été octroyés en vertu des articles 1597 et suivants des Statuts Refondus de la province de Québec.

Le bornage de ces concessions forestières ne peut pas se faire de concert entre les propriétaires voisins, ou par l'intervention de l'autorité judiciaire, ainsi que les articles 504 et 505 du Code Civil le prescrivent pour les terrains des particuliers, mais il ne peut avoir lieu que sur les instructions de l'autorité administrative et il ne devient effectif et légal qu'après avoir été approuvé par le ministre ou le sous-ministre des Terres et Forêts (arts. 24 et 25 des Règlements des Bois et Forêts; et arts. 1527 et 1597 S.R.P.Q.).

Toute la question dans cette cause est de savoir si le bornage invoqué par la demanderesse intimée a été fait suivant des instructions valables de l'autorité administrative et s'il a été approuvé par le sous-ministre.

Il devient nécessaire de raconter brièvement les faits importants qui ont donné lieu au litige. Je citerai cependant d'abord le texte de l'article 24 des Règlements des Bois et Forêts qui détermine dans quelles conditions l'arpentage doit se faire, et quel en est l'effet:—

"Les agents de bois de la Couronne," dit l'article 24, "ou toute autre personne autorisée donnent, à la demande *écrite et conjointe* des possesseurs de locations voisines, des instructions sur la manière d'arpenter et de délimiter ces terrains pour les rendre conformes aux licences existantes; mais ces *instructions, pour être valables, doivent être préalablement approuvées par le ministre.* Les arpentages se font aux frais des requérants et lorsqu'ils sont complétés, les rapports, plans et notes de l'arpentage sont soumis au ministre et *s'il les approuve* copie en est transmise au bureau qui a émis ces instructions et gardée dans ses archives. Les bornes ainsi établies à la demande conjointe des intéressés sont fixes et permanentes et *ne peuvent être changées.*"

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J'ai souligné dans cette citation les parties qui portent sur le présent litige.

Voici maintenant les faits de la cause.

En 1909, la compagnie Price s'est adressée par écrit au Département des Terres pour faire faire le bornage de plusieurs concessions forestières qu'elle avait dans la région de la rivière Rimouski et de la rivière Kedzwick. Des instructions furent préparées par M. Gauvin, qui était alors surintendant des arpentages, approuvées par le sous-ministre du temps, M. Taché, et transmises à l'arpenteur Addie. Cette procédure était irrégulière, car cette demande de bornage devait se faire, suivant l'article 24 des Règlements, par les deux parties intéressées conjointement. Il n'y a que dans le cas où l'un des possesseurs (art. 25) refuse de se joindre à son voisin pour faire le bornage que ce dernier a le droit de faire seul la demande. Il n'y a pas de preuve dans le cas actuel que la compagnie Shives ait refusé de faire une demande conjointe. Mais ce défaut initial a été certainement couvert par les démarches subséquentes de la compagnie Shives qui, en 1911, a demandé à la compagnie Price de faire ce bornage en commun et, sa demande ayant été acceptée, les compagnies ont toutes deux fait l'organisation nécessaire pour que l'arpentage de leurs lignes de division soit effectué suivant les instructions qui avaient été approuvées par le sous-ministre; et elles ont toutes deux envoyé des représentants pour assister l'arpenteur Addie et surveiller ses opérations. C'était dans l'hiver 1912.

Les concessions forestières de la compagnie Shives sont entourées au nord, à l'est et à l'ouest par celles de la compagnie Price. L'arpenteur Addie a d'abord commencé à l'ouest de la concession Shives, sur la rivière Rimouski, et, suivant les instructions qu'il avait

du département, il procéda à tirer les lignes en droite ligne astronomique. Cette opération faisait gagner environ sept milles de terre à la compagnie Shives.

Quand l'arpenteur fut arrivé pour déterminer la ligne orientale de la concession Shives, il a naturellement suivi la même direction; mais alors la compagnie Shives s'est opposée énergiquement à ce que l'arpenteur continuât ses opérations; et ce dernier, accompagné des parties intéressées, s'est rendu à Québec pour voir l'arpenteur général du département, qui était alors M. Girard.

Celui-ci, après avoir entendu les parties et leurs suggestions, a reconnu que l'arpentage à angle droit avec les rivières serait plus juste; et, pour donner effet à ce qu'il considérait le consentement des intéressés, il a modifié les instructions de l'arpenteur. Mais, par oubli ou autrement, il n'a pas fait approuver cette modification par le ministre ou le sous-ministre.

L'arpenteur muni de ces nouvelles instructions en a fait tenir une copie à la compagnie Shives le 23 mars 1912 et cette dernière en a accusé réception en disant:

> The correct instructions which you now have from the department are in keeping with what was agreed upon.

Quelques jours plus tard, la compagnie Shives demandait combien la compagnie Price Bros. se trouverait à gagner de terrain dans la ligne ouest par ces nouvelles instructions; et l'arpenteur lui a répondu, par lettre du 4 avril 1912, qu'elle gagnerait environ 7 milles.

La ligne fut dans l'hiver suivant, en 1913, tirée suivant les nouvelles instructions et la compagnie Price s'est trouvée à reprendre les sept milles de terrain qu'elle avait perdus par l'arpentage de l'hiver précédent. D'un autre côté, la compagnie Shives se trouvait à gagner considérablement de terrain dans sa ligne est.

L'arpenteur déposa au ministère son rapport, ses

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notes d'arpentage et le plan du bornage fait et il fut payé de ses frais d'arpentage par les deux compagnies; mais la compagnie Shives fit ce paiement sous protêt, en disant que la compagnie Price avait eu plus de terrain qu'elle n'avait droit d'en avoir. Elle se rendit alors auprès du département pour s'objecter à ce que le rapport et le plan de l'arpenteur fussent acceptés parce que les instructions de ce dernier n'avaient pas été au préalable approuvées par le ministre ou le sous-ministre.

Les choses en restèrent là pour un an environ, quand le surintendant des arpentages, M. Girard, le 7 avril 1914, fit un rapport au ministre sur la plainte faite par la compagnie Shives. Il reconnait dans son rapport qu'il a peut-être eu tort d'avoir modifié les instructions sans en avoir reçu l'autorisation du département; mais, cette modification ayant été basée sur le consentement des parties, il ne croit pas qu'il y aurait lieu maintenant de changer de nouveau ces instructions sans le consentement de la compagnie Price. Il déclare aussi que les descriptions des locations forestières pouvaient être interprétées de différentes manières et que c'est la raison pour laquelle il a fait le changement demandé par les intéressés.

Il annexe à son rapport une copie du plan de l'arpentage.

Ce rapport, autour duquel roule tout le litige, a été approuvé par le sous-ministre actuel en y inscrivant le mot "app." suivi de ses initiales: "E. M. D." et des chiffres "8-4-14," ce qui signifierait, suivant la preuve, approuvé le 8 avril 1914.

Il s'agit de savoir si cette action du sous-ministre constitue l'approbation requise par l'article 24 des Règlements au sujet du plan de l'arpenteur ou bien si l'approbation du sous-ministre porte simplement sur

la conduite de M. Girard et de la modification faite par lui dans les instructions.

J'aurais été d'abord porté à croire que cette signature du sous-ministre sur le rapport de M. Girard constituait une approbation non-seulement des instructions données à l'arpenteur mais aussi du rapport et du plan d'arpentage faits par ce dernier. Mais M. Girard, dans sa déposition, nous dit que le ministre ou le député-ministre n'a pas pris action sur le plan de l'arpenteur. Voici le texte de cette partie de sa déposition:—

D. Est-ce que le ministre a pris quelque action sur ces plan et *field-notes*, depuis qu'ils sont là? R. Non, monsieur.

D. Ni le sous-ministre? R. Non.

D. Ni le département? R. Non. Je peux ajouter que j'ai fait vérifier les notes et le plan pour voir si tout était correct, pour voir si les pièces de monsieur Addie concordaient entre elles.

D. Qu'est-ce que vous entendez par ces mots? R. J'ai fait faire par un dessinateur, j'ai fait reconstruire les plans pour voir si le plan est conforme à celui qui est produit, pour voir si le plan est parfaitement conforme aux notes fournies; c'est ce que l'on fait toujours.

D. Tout ceci n'a pas été soumis au ministre ou au sous-ministre pour son approbation? R. Non, monsieur.

Il me semble qu'il aurait été nécessaire d'avoir sur ce point le témoignage du sous-ministre pour savoir exactement ce qu'il a entendu approuver quand il a mis ses initiales sur ce rapport, d'autant plus que l'action du département, en transmettant une copie du rapport tel qu' approuvé aux parties intéresséest, a été interprétée par l'intimé comme signifiant que le bornage fait par Addie était approuvé par le sous-ministre et que certaines expressions relevées dans les lettres de l'avocat de la compagnie Shives nous portent à croire que, dans son opinion, l'approbation du rapport Girard par le sous-ministre mettait à néant les prétentions de cette compagnie quant à la légalité de l'arpentage.

Il est important de mettre fin à ces difficultés entre

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les deux compagnies. Je ne serais pas prêt, pour ma part, à renvoyer l'action de la demanderesse si, par oubli ou autrement, on n'avait pas mis au dossier le témoignage du sous-ministre, car en renvoyant l'action les parties auraient à procéder de nouveau au bornage et à encourir des frais bien plus considérables que la valeur du bois en litige. S'il s'agissait d'un bornage entre particuliers où l'autorité judiciaire pourrait elle-même faire tracer les bornes (art. 504 C.C.) nous pourrions, je crois, disposer du litige avec les pièces que nous avons devant nous. Mais les tribunaux, dans le cas de concessions forestières, n'ont rien à faire avec la légalité du bornage. Cette question est du ressort exclusif de l'autorité administrative.

Dans la présente cause nous avons d'abord à rechercher si le bornage a été approuvé par le député ministre.

Le document que nous avons devant nous est certainement ambigu. Le rapport de M. Girard nous indique bien les circonstances dans lesquelles il a modifié les instructions de l'arpenteur; et comme son rapport est approuvé, il en résulterait alors que les instructions qu'il a préparées sont également approuvées.

Il est bien vrai que ces instructions n'auraient pas alors été approuvées avant d'avoir été transmises à l'arpenteur. Mais la ratification postérieure de ces instructions par l'autorité administrative serait suffisante pour les valider. C'est ce qui résulte de la décision rendue par le Conseil Privé dans la cause de *Alexandre* v. *Brassard* (1), ou Lord Macnaghten, en parlant de ce qui devait se faire devant l'autorité religieuse pour l'érection canonique d'une paroisse, disait:—

(1) [1895] A.C. 301, at p. 307.

It is rather in the nature of a rule of procedure, and in their Lordships' opinion it is for the ecclesiastical authorities and for them alone to decide as to the validity of any objection founded on non-compliance with it.

Dans le cas actuel, c'était aux autorités administratives du Département des Terres de décider si les instructions avaient été émises régulièrement ou non. Et comme le sous-ministre a approuvé la conduite de son officier, M. Girard, il a, par là même, suivant moi, approuvé les instructions qu'il avait données à l'arpenteur.

Et quand subséquemment il envoyait copie du rapport à la compagnie Shives et disait que ce rapport avait été approuvé, il ne faisait que porter à la connaissance de cette partie le fait que l'on décidait que ces instructions étaient valides et acceptées comme telles par le ministre.

On dira peut-être que la demanderesse ne pourrait pas faire la preuve testimoniale du fait que le sous-ministre a approuvé non-seulement les instructions préparées par M. Girard mais aussi le rapport et le plan de M. Addie.

La règle édictée par l'article 1234 C.C. est que la preuve testimoniale ne peut pas être admise pour contredire ou changer les termes d'un écrit valablement fait. Les termes de cet article sont évidemment pris de Greenleaf on Evidence, qui est d'ailleurs cité par les codificateurs sous cet article 1234 C.C. Cet article 1234 C.C., dans la version anglaise, se lit comme suit:—

Testimony cannot in any case be received to contradict or vary the terms of a valid written instrument.

Greenleaf, au paragraphe 275, cité par les codificateurs, énonce la même règle en se servant des termes suivants:—

Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid instrument.

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L'article correspondant du Code Napoléon, qui est l'article 1341, est dans des termes plus restrictifs, vu qu'il dit qu'il n'est reçu aucune preuve par témoins *contre* et *outre* le contenu des actes.

Cependant Bonnier, Traité des Preuves, p. 120, no. 143, en commentant cet article déclare que:—

> Ce n'est point prouver outre le contenu aux actes que de compléter au moyen de la preuve testimoniale des énonciations ambigues ou insuffisantes.

Langelier, De la Preuve, nos. 584-585, après avoir déclaré que les rédacteurs de notre article ont copié la règle du droit anglais plutôt que celle du droit français et après avoir énoncé au no. 603 la règle que l'on ne pourrait prouver par témoins la manière dont les parties à un acte l'ont elles-mêmes entendu, dit au no. 604 que si l'écrit donne une désignation de chose qui peut s'appliquer à plusieurs choses, on peut prouver quelle est la chose que l'auteur de l'écrit a voulu désigner ainsi.

Le même principe est énoncé dans Taylor, on Evidence, 10th ed., p. 855, par. 1194, et dans Best, on Evidence, 10th ed., p. 208, par. 226.

Dans la présente cause on pourrait donc prouver par témoins si le sous-ministre entendait, en approuvant le rapport de M. Girard, approuver en même temps le plan de l'arpenteur qui lui était soumis. Les tribunaux pourront ensuite avec cette preuve décider d'une manière certaine si le bornage fait par l'arpenteur Addie a été approuvé par l'autorité administrative et si l'action de la demanderesse était bien fondée.

Partant du principe que les tribunaux n'ont pas juridiction pour décider de la légalité d'un arpentage de locations forestières, mais que c'est là une question dont la décision appartient exclusivement au ministre ou au sous-ministre des terres; étant donné le fait que nous avons à interpréter une ambiguité cachée (latent

ambiguity) et que la preuve écrite ne dit pas clairement si le sous-ministre a approuvé le bornage, je serais d'opinion, dans ces circonstances, de renvoyer le dossier en Cour Supérieure pour qu'on y prouve si le sous-ministre, en initialant le rapport Girard, a ou non approuvé le bornage et a eu ou n'a pas eu l'intention de donner lui-même l'approbation requise par l'article 24 des règlements.

Les frais de cette cour, ainsi que des cours inférieures, devront suivre le sort de la cause.

MIGNAULT J. (dissenting)—At first sight this case appears quite a complicated one, but when the voluminous record and the lengthy factums are examined, the question to be decided is restricted into a very narrow compass.

The appellant and the respondent hold adjoining timber licences from the Government of the Province of Quebec. The respondent has, towards the west, timber limit River Rimouski No. 1 East, and, towards the east, timber limit Kedzwick No. 2. Between these limits, going in an easterly direction, the appellant holds timber limits River Kedzwick No. 3 and Kedzwick East. Consequently, the parties occupy neighbouring territory both on the east and on the west, and the difficulty between them arose in connection with the running of the boundary line between their respective concessions.

It is to be remarked that in as much as timber licences confer no right of ownership in the land, the provisions of the Civil Code as to boundaries are without application. The whole matter is governed by the provisions of the Quebec revised statutes concerning public lands, and by regulations made by

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order-in-council under these provisions (art. 1534 R.S.Q.).

The regulation governing the parties in this case is Regulation No. 24 of the Wood and Forests Regulations and reads as follows:—

SURVEYS.

24. Crown Timber Agents, or any other authorised person shall, at the joint written request of holders of adjacent limits, give instructions as to the manner of surveying and running the boundaries of such lands in order that they may be conformable to existing licences. But, in order to be valid, such instructions must be previously approved by the Minister. Surveys shall be made at the expense of the parties requiring the same, and when completed, the reports, plans and field-notes shall be submitted to the Minister and, if approved by him, a copy shall be sent to the office which issued such instructions and be kept in its archives. The boundaries so established at the joint request of the interested parties shall be fixed and permanent and cannot be altered.

It is common ground between the parties that, although the approval of the Minister of Lands and Forests is required by this regulation, the approval of the Deputy Minister is to the same effect and is binding upon the licensees.

Some time in 1909, the respondent applied to the Crown Lands Department to have boundaries run between their respective limits, and Mr. George K. Addie, provincial land surveyor, was charged with the tracing of these boundaries under instructions issued by the Department.

This was not the joint written request required by Regulation 24, but the correspondence exchanged between the appellant and the respondent in 1911 and 1912 shews that the latter company agreed, and even proposed to the respondent, to join it in having the survey made jointly and to pay one-half of the expense, and in view of this agreement it is somewhat singular that the appellant should now raise the technical objection that a joint request from both parties for the

survey should have preceded the instructions given by the Department in 1909. I think the appellant should not be heard now to urge this objection in view of the full consent which it gave to the survey being made at the joint expense of the parties and of its participation therein.

I may, moreover, dispose of the objections of the appellant that, under Regulation 24, a joint written request of the parties should have preceded the instructions given to the surveyor, and that these instructions should have been previously approved by the Minister, by stating that, in my opinion, all these requirements, and also the approval of the field notes, strenuously insisted on by the learned counsel of the appellant at the argument, are of the nature of rules of procedure and are not a condition precedent to the validity of all subsequent proceedings. These rules are useful ones for the guidance of the Minister and to permit him to give a sanction, by his approval, to the survey made with the concurrence of the holders of contiguous timber limits, but the whole matter is one for the consideration of the Minister alone, and if he gives his approval to the survey and tracing of the boundary, this approval, when sufficiently expressed, covers any previous informality of the proceedings.

Support for the position I take is afforded by the decision of the Judicial Committee of the Privy Council in the case of *Alexandre* v. *Brassard* (1). The question there was whether a decree of the Archbishop of Montreal, followed by civil recognition, canonically erecting the parish of St. Blaise, which had been formed by the dismemberment of three old parishes, could be sustained in view of the fact that it was alleged that the requirements of the Quebec revised

(1) [1895] A.C. 301.

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statutes concerning the erection of parishes and their civil recognition had not been complied with. And it was contended that, although it was not competent for the court to set aside a canonical decree for the erection of a parish for ecclesiastical purposes, the court was at liberty to inquire into the proceedings which gave rise to the decree and that if these proceedings were found not in accordance with the provisions of the law, the decree could not be treated as a decree available for the purposes of founding civil recognition.

Answering this contention, Lord Macnaghten said, at p. 307 of the report:—

> Their Lordships cannot take this view. It appears to them that the provision in question is not a limitation on the jurisdiction of the ecclesiastical authorities, or a condition precedent to the validity of all subsequent proceedings. It is rather in the nature of a rule of procedure, and in their Lordships' opinion it is for the ecclesiastical authorities and for them alone to decide as to the validity of any objection founded on non-compliance with it.

I would apply this test to determine the validity of all the proceedings previous to the approval of the Minister, and state that, in my opinion, it is for the Minister alone to decide as to the validity of any objection with regard to the regularity of the proceedings. If he gives his approval, it precludes any question being raised as to the regularity of the proceedings.

Returning now to the recital of the pertinent facts, I may say that Mr. Addie went on the ground in February and March, 1912, and proceeded, in presence of representatives of the parties, to run these boundaries. Without any opposition whatever he ran the boundary between River Rimouski No. 1 East, held by the respondent, and River Kedzwick No. 3, occupied by the appellant. He then prepared to run the boundary between Kedzwick East (the appellant's) and

Kedzwick No. 2 (the respondent's), when Mr. Dickie, representing the appellant, objected to the manner in which Mr. Addie desired to trace the boundary, and, in view of this opposition, Mr. Addie suspended operations and with, or followed by, representatives of the parties, he returned to Quebec.

Next in sequence in the recital of the facts comes a meeting, on 20th March, 1912, between Mr. Addie and representatives of the parties, to wit, Mr. Anderson on behalf of the appellant and Mr. Sissons on behalf of the respondent, in the office of Mr. Plamondon, an employee of the Department, at which Mr. Girard, Superintendent of Surveys, assisted. At this meeting, an agreement was arrived at by the parties as to the running of the boundaries between their respective limits on both the west and the east side, and the former instructions to Mr. Addie were modified. It is alleged that Mr. Girard made some changes in these instructions, but it was stated at the hearing by the learned counsel for the respondent that the changes in the instructions of 1909 were mentioned in Mr. Addie's letter to the appellant, dated 23rd March, 1912, and if so the appellant fully acquiesced therein by its letter to Mr. Addie of 27th March, 1912.

Mr. Addie returned on the ground in February and March, 1913, and then and there, in presence of the representatives of the parties, and without any opposition from them, he ran new boundary lines between River Rimouski No. 1 East and River Kedzwick No. 3 on the one hand, and between Kedzwick east and Kedzwick No. 2 on the other. On the 14th May, 1913, he made a full report to the Minister, with a plan of his operations and his field notes thereunto annexed. He also sent a full report to the appellant on the 27th May, 1913, with a copy of his report to

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the Minister and duplicates of the plans accompanying the latter report.

The appellant, on the 7th June, in a letter to Mr. Addie, acknowledged receipt of this report, sent to Mr. Addie a cheque for $1,085.54, for its share of the expenses of the survey, but stated that it was not at all satisfied with the result as it could not understand why there should be the great difference between the first and last lines that Mr. Addie ran out.

Some months later, 8th October, 1913, the Hon. Mr. John Hall Kelly, K.C., Legislative Councillor, wrote to the Department on behalf of the appellant expressing the same dissatisfaction, and asking for a copy of all instructions given for the survey. It does not appear what answer was made to this letter, but nearly six months after, 14th March, 1914, Mr. Kelly caused to be served on the respondent and on the Minister a formal protest against the running of the line. At least one ground of this protest, that the line was run without the consent of the appellant, appears to me contrary to the facts proved in this case. Mr. Kelly followed this protest by a letter to the Minister of the 28th March 1914, in which he alleges that the first instructions were changed at the request of the respondent, an assertion also controverted by the evidence. Mr. Kelly asked the Minister to give the matter his consideration at once, as otherwise the matter will have to be thrashed out before the courts to have it decided.

It is under these circumstances, and in view of these letters and protests and of the request of Mr. Kelly that the Minister should give the matter his consideration at once, that Mr. Girard, Superintendent of Surveys, made his report to the Minister of Lands and Forests on the 7th April, 1914, in which he refers to Mr.

Kelly's letter of the 28th of March, and in which he makes a complete report of all the operations connected with the survey and the running of the line, frankly admitting that he had made some changes in the instructions to the surveyor without the authority of the Department. He concludes by saying:—

J'annexe au présent rapport copie de la carte régionale, indiquant en jaune les lignes divisant les diverses locations forestières appartenant à la "Shives Lumber Company" et à "Price Bros.;" ainsi qu'une copie bleue des plans du travail de monsieur l'arpenteur Addie divisant les locations forestières appartenant à ces deux compagnies sur la rivière Rimouski aussi bien que sur la Kedzwick.

At the foot of this report we find the following:—

App.
E.M.D.
8, 4, 14.

This, Mr. Girard states, means:—

Approved E. M. D. (being the initials of the Deputy Minister, Mr. Elzéar Miville Déchênes) and the date, 8th April, 1914.

I fail to see how it can be disputed that this was a decision by the Deputy Minister on the very point which Mr. Kelly had asked the Minister to consider. And although it is argued that this is merely an approval of Mr. Girard's explanation why the former instructions were modified, I am of the opinion that the approval so given extends to the whole report and to the plans and maps submitted with it. I cannot see the object of so initialling the report, if the intention was merely to accept Mr. Girard's explanation, and not to give official approval to the survey.

Mr. Kelly evidently placed this construction on the approval, for, on the 13th August, 1914, he wrote to the Minister, referring to a letter from the Department of the 16th April, enclosing a copy of Mr. Girard's report, and in this letter he says:—

I also note that this report has been approved by the Department;

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and he expresses the regret that he had not been given the opportunity

> to answer the said report, before the approval of the Department was obtained.

In this letter Mr. Kelly submits that the instructions could not be modified without the written request of his clients and that these instructions should have been previously approved by the Minister, and he requests that these two points be submitted to the law officers,

> because a suit of considerable importance will be pending between Price Brothers and the Shives Lumber Company and the Department, in the event of the Department maintaining the position that it has taken that the line, as run in the last instance, is a legal one.

Finally, we have a letter of the 14th August from the Deputy Minister to the respondent, in which the Deputy Minister transmits a copy of Mr. Girard's report, adding:—

> This report has been approved by the Department.

I cannot but believe that the intention of the Deputy Minister, in approving Mr. Girard's report, was to give the approval required by art. 24 of the Wood and Forests Regulations, for if the object of the Deputy Minister was merely to accept, as argued, the personal explanation of Mr. Girard and not to approve the report itself, there would have been no reason for writing a formal approval at the foot of the report itself. And, as already stated, Mr. Kelly's letter of the 13th August shews that he placed the same construction on the approval.

It is true that, at Mr. Kelly's request, the Department referred the points raised by him to its law officers and subsequently to the Attorney-General. It is also true that the Deputy Attorney-General reported that Mr. Kelly's objections were well taken, and that the Department thereupon notified the parties that a

new survey and determination of the boundary would be necessary. But I have, with deference, to disagree with the conclusions of the learned Deputy Attorney-General, and I think the approval of the Deputy Minister, covering, as it does, the whole of Mr. Girard's report, necessarily carries with it approval of the instructions issued to Mr. Addie. While no doubt it would have been more regular to insert the approval of the Deputy Minister on the plan itself, and the Department should see that this is done now, I cannot take the responsibility of exposing the parties to the expenses of a new survey when I am convinced that there has been substantial compliance with the requirements of Regulation 24, and that, if there be any informality, the approval of the Minister disposes of any question as to the validity of the proceedings.

This is the only point on which this court is called upon to express any opinion, and it has not to say whether the lines run in 1913 gave to each party the territory to which it was entitled. This is a point as to which the Minister, or his Deputy, is the sole judge, and as I find that the Deputy Minister, by approving Mr. Girard's report, has given his approval to the line run by Addie, I can only concur in the exhaustive and very complete opinions of the late lamented Sir Horace Archambeault, Chief Justice, and of Mr. Justice Carroll in the court below.

The lumber, the price of which is claimed by the respondent, was cut in territory which the survey of 1913 placed within the limits granted to it. The value of the lumber was admitted, and the appellant was condemned to pay it to the respondent. With this determination of the litigation between the parties I concur.

Some point has been made of the fact that the

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Deputy Minister was not called as a witness to state what he intended when he wrote his approval at the foot of Mr. Girard's report. Another question would be upon whom rested the onus of so calling Mr. Dechênes, on the respondent who relied on the approval as extending to the entire report, or on the appellant who sought to restrict this approval to the personal explanations of Mr. Girard? My personal view is that the respondent could rely on the approval as extending, as its unqualified terms shewed, to the whole report, and that if the appellant desired to limit in any way the general effect of this approval, the onus of proving the limitations rested on it. At all events, neither party saw fit to call Mr. Déchênes, and I do not think that the omission is one for which the respondent alone should be considered liable.

In my opinion substantial justice has been done to the parties by the judgment of the Court of King's Bench. A new survey might possibly give the same result and would undoubtedly expose the parties to considerable expense. It seems in every way desirable to bring the litigation to a close, and I would not lightly disturb so well considered a judgment as the one appealed from.

For these reasons, I am of the opinion that the appeal should be dismissed with costs.

Appeal allowed, new trial ordered.

Solicitor for the appellant: *John Hall Kelly.*
Solicitors for the respondent: *Tessier & Côté.*

S. M. ROSS AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

SCOTTISH UNION AND NATIONAL INSURANCE COMPANY (DEFENDANTS) } RESPONDENTS.

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*Dec. 17.
*Dec. 23.

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

Insurance, Fire—Subject matter—Occupied dwelling houses—Suspension of risk—Change material to risk.

Several buildings were insured against fire by separate policies each of which expressed the risk to be on the building "while occupied by.....as a dwelling."

Held, affirming the judgment of the Appellate Division (41 Ont. L.R. 108; 39 D.L.R. 528), that a building used as a combined store and dwelling was not insured.

Held also, Idington and Brodeur JJ. dissenting, that the contract was intended to insure occupied dwellings only; that the failure of the insurance agent to insert the name or description of the occupant was immaterial; and that the word "by" in the restrictive description quoted could be deleted as not required to express the intention and make the contract sensible. *London Assur. Corp.* v. *Great Northern Transit Co.* (29 Can. S.C.R. 577), followed.

To the knowledge of insurer and insured the buildings were not completed when the policies issued and could not be expected to be occupied for some time.

Held, Idington and Brodeur JJ. dissenting, that though the risk might presently attach to the unoccupied buildings, yet after they were once occupied the insurance would be suspended on any becoming vacant, and a loss occurring during such vacancy would not be covered.

The Appellate Division held that the insured was entitled to recover $1,200 on each building actually occupied as a dwelling at the time of the fire, and ordered a reference to ascertain the amount due.

Held, per Davies C.J., Anglin and Mignault JJ., that as the basis of the claim was certain and the amount, once the facts were established, ascertainable by a mere arithmetical computation, the insured was entitled to interest on the sum eventually found due from the expiration of sixty days after the proofs of loss were furnished.

PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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Held, further, that the Supreme Court of Canada should not interfere with the discretion of a provincial appellate court in allowing issues of law arising on the documents and facts in the record to be raised though not pressed at the trial.

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

The facts are stated in the above head-note. The only questions raised were whether or not the insurance policies covered houses that were vacant when destroyed by fire and one used as a store and dwelling combined. Also whether the judgment could provide for payment of interest before the amount due the insurer was ascertained.

Hugh J. Macdonald and *J. E. Lawson* for the appellants, cited *Hawthorne* v. *Canadian Casualty Ins. Co.* (2); *Davidson* v. *Waterloo Ins. Co.* (3); *Toronto Railway Co.* v. *City of Toronto* (4), at pages 120-1.

McKay K.C. for the respondents, referred to *McKay* v. *Northern Union Ins. Co.* (5); *Boardman* v. *North Waterloo Ins. Co.* (6); *The Baltic Case* (7).

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

IDINGTON J. (dissenting).—The respondent, on the 9th May, 1913, issued ten insurance policies to the owners of a row or block of ten buildings, insuring for three years said owners (who paid a cash premium for each of same) against losses by fire in respect of any of said buildings.

(1) 41 Ont. L.R. 108; 39 D.L.R. 528.
(2) 14 Ont. L.R. 166; 39 Can. S.C.R. 558.
(3) 9 Ont. L.R. 394.
(4) [1906] A.C. 117.
(5) 27 O.R. 251.
(6) 31 O.R. 525.
(7) 29 Can. S.C.R. 577.

One of said owners, with the consent of the respondent, transferred his interest in said policies to his wife, the appellant B. Langbord.

The houses were all unoccupied, and indeed not quite finished at the time when these transactions took place. None were occupied till at least six weeks had run from the date of the insurance thus professed to have been effected and in fact paid for.

And some further time expired before tenants were got for all. Exactly how long is not made clear. Yet, according to some opinions expressed below, these thrifty people were knowingly paying in advance for nothing. I cannot find on the true interpretation and construction of the contract that such was ever conceived by those concerned to be the nature of their contract.

The said policies were all in the same form and each was designed to cover the tenement corresponding with the number it was applicable to.

Each contained the following clause:—

> $1,200.00 on the 2 story brick fronted, roughcast, shingle roof building and additions, including foundations, plumbing, steam, gas and water pipes and fixtures, while occupied by..... as a dwelling, and situated on.....on the east side of Keele Street, Toronto, Lot 50, 51, 52, Plan No. 1612, between Eglinton Avenue and Cameron Avenue, known as house Number —.

In the course of the trial many defences were set up. And as, in my opinion, each and all thereof, except two dependent upon the legal interpretation and construction of their contract, were so effectually disposed of by the findings of the jury in answer to questions submitted, which upon the relevant facts they alone were entitled to pass upon, I will deal only with those excepted which I have referred to.

It seems that four, or possibly five, of the houses in question had been vacant for a considerable time

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before, and at the time of, the fire which destroyed said block and resulted in what is now in question herein.

It is urged that the said policies must be read as if the words "owner or tenant" had been written therein, where a blank space is left after the word "by," and much varying ingenuity has been displayed in filling up in imagination what the respondent, in using the printed form, deliberately left blank.

I respectfully submit we have no right to fill up anything in a contract emanating from the respondent and therefore to be rather construed as against than in favour of it.

At best it stands as an ambiguous contract.

In order to interpret and construe it correctly, we may summon to our aid the surrounding circumstances before and immediately succeeding its execution.

The conduct of the parties in such relation is, in my opinion, fatal to any such contention as set up and maintained on the ground of vacancy, when we consider that the insured was paying, evidently from the outset, on the hypothesis that the policies were intended to insure against loss by fire notwithstanding vacancies of no matter how long duration, unless under circumstances giving rise to conditions beyond what the contracting parties had in that regard in view in contracting.

In such latter event there might arise a question of something material to the risk falling within the terms of statutory condition No. 2.

That possible aspect of the matter has been disposed of by the verdict of the jury to whom it was submitted.

Moreover, the vacancies now claimed to have voided the policies existed at the time when the appellant paid for and got a renewal of each policy in May, 1916, for a further term of three years.

I know not why we should actually fill in the blank with words selected by the manager of respondent instead of what common sense would indicate in light of the conduct of the parties by inserting the word "nobody" if, as I am not, obsessed with the idea that it must be filled in.

The words "occupied by" are in themselves meaningless and should be treated, as they evidently are, as surplusage. I submit that we must ever, if possible, try to fit the language used to the actual situation with which those contracting were confronted and dealing, if we would do justice.

Can there be a shadow of doubt herein that it was the impossibility of fittingly meeting that situation by any ordinary expedient of filling in the blank in a way which could be rendered conformable with the mutual understanding of the parties, that led to the entire omission of any attempt to do so?

That being my view of the situation I forbear from inserting anything, and then the language used to be given effect to can only be rendered intelligible by treating those words "occupied by" as mere surplusage which somebody forgot to draw a pen through in filling up a printed form.

The clearly intelligible purpose was to insure dwelling-houses at the usual rate therefor as agreed upon, and not stores, which would have to pay a higher rate and could not be insurable for a three-year term.

If the respondent could have shewn any such difference of rates had ever been made applicable to distinguish occupied from vacant dwelling-houses, I might have been able to see the situation in another light. But no such distinction has ever been made that the experts called by respondent can tell of. Cases dependent upon the varying conditions which marine

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insurers have to meet and have long provided for in manifold ways can be of no help here.

No one pretends that insurance may not be made to meet conditions of any kind.

What we are asked to do here is make a contract which the parties did not make, never thought of making, and by resorting to another class of insurance business entirely outside the class of insurance business the parties were dealing with to make a series of contracts for them.

I think the appeal should be allowed and the judgment of the trial judge be restored with an amendment thereto excepting the shop or corner store of the block as furnishing any basis for recovery, and hence reducing the judgment to $10,800 with costs to appellants of the trial and in the Appellate Division and two-thirds of the cost of their appeal here, in which they have only partially been successful.

The question of interest should not be meddled with now.

ANGLIN J.—At the trial the plaintiffs recovered $12,000—$1,200 in respect of each of ten houses insured with the defendants. On appeal, as a result of somewhat divided opinions (1), their recovery was restricted to their claims upon policies on such of the houses as were actually occupied as dwellings at the time of the fire, and the occupancy of one house being uncertain, a reference was directed to ascertain the amount of the plaintiffs' enforceable claim.

I think it is not possible to set aside the finding of the jury that the vacancy of the premises was not a change in their condition material to the risk within the meaning of the second statutory condition. While I

(1) 41 Ont. L.R. 108; 39 D.L.R. 528.

should quite probably have found otherwise if trying the case myself, there are circumstances in evidence which make it impossible to say that ten or twelve reasonable men could not honestly have reached such a conclusion. Neither, on the other hand, in view of the fact that there was a separate policy on each house, can it be held that vacancy in any one or more of them was a change material to the risks upon others which were tenanted.

That the words,

while occupied by . . . . . as a dwelling-house,

if, and so far as, they should be taken to form part of the contract of insurance sued upon, are not to be regarded either as a condition or a warranty but are descriptive and restrictive of the subject-matter of the risk is conclusively determined by the decision of this court in *London Assurance Corporation* v. *Great Northern Transit Co.* (*The Baltic Case*) (2). The only possible distinction between that case and the one now at bar arises from the omission to fill in the blank following the word "by" in the policy before us.

Should the court fill in that blank by whatever word the circumstances indicate, in its opinion, as the most likely to have been in the contemplation of the parties, giving due weight to the maxim *verba chartarum fortius accipiuntur contra proferentem?* Or should the result of the omission be the excision from the policy of the entire clause in which it occurs on the assumption that the proper inference from the failure to fill in the blank is that the person issuing the policy intended not to make any use of that portion of the form? Or should only that word, or those words, be deleted which can be given no sensible application without filling in the blank?

(2) 29 Can S.C.R. 577.

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In *Glynn* v. *Margetson & Co.* (1), at page 358, Lord Halsbury quotes with approval the statement of Lord Ellenborough in *Robertson* v. *French* (2), at page 135, that,

> the same rule of construction which applies to other instruments applies to * * * a policy of insurance.

In my opinion the first alternative of the three suggested should not be adopted. It involves too great a risk of making a wrong guess—too great a probability of making the description, something which neither party intended—unless perhaps the blank should be filled in with the word "somebody" or "anybody," which would be equivalent in effect to striking out the word "by." While

> the law will, as much as it can, assist the frailties and infirmities of men in their employments, who * * * may easily make a slip (*Lord Say & Seal's Case* (3).

the reason underlying the supplying of omitted words is *ut res magis valeat quam pereat* (*Langston* v. *Langston* (4)), and a clear case of necessity to avoid apparent absurdity, repugnancy or inconsistency (*Clements* v. *Henry* (5)), and

> such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties.

(*Coles* v. *Hulme* (6)), are pre-requisites to the exercise of this benevolent curial function. Moreover, since the ambiguity or uncertainty is patent, the intention can be gathered only from the other parts of the instrument, as in *Flight* v. *Lake* (7). It cannot be established by extrinsic evidence. See cases collected in 10 Halsbury's Laws of England, No. 796, notes (k) and (m), and *Turner* v. *Burrows* (8). The policy here affords no

(1) [1893] A.C. 351.
(2) 4 East 130.
(3) 10 Mod. 40, 47; 4 Br. P.C. 73.
(4) 2 Ch. & F. 194, 243.
(5) 10 Ir. Ch. R. 79, 87-8.
(6) 8 B. & C., 568, 573.
(7) 2 Bing. N.C. 72.
(8) 5 Wend N.Y. 541.

clue to the word (if any) which should be supplied to fill the blank.

In regard to the second and third alternatives, an analysis of the clause under consideration may be helpful. Its apparent purpose is to provide for a triple restriction upon the subject matter of the risk; (a) it must be a dwelling-house as distinguished from a building of any other character; (b) it must be occupied as such; (c) assuming the blank to be restrictively filled in, the occupant must be the person designated or answer the description given. It would seem to have been intended to leave a discretion to the person issuing the policy only as to the third restriction.

In the construction of an instrument the rejection of words is sometimes permissible but only so far as they are repugnant or insensible—only so far as is necessary to make that sensible which their presence renders insensible. *Grey* v. *Pearson* (1), at page 106. In delivering the opinion of the judges advising the House of Lords in *Smith* v. *Packhurst* (2), Lord Chief Justice Willes said, at page 136:—

> Before I proceed to the questions I shall lay down some general rules and maxims of the law, with respect to the construction of deeds; first, it is a maxim, that such a construction ought to be made of deeds, *ut res magis valeat quam pereat,* that the end and design of the deeds should take effect rather than the contrary.
>
> Another maxim is, that such a construction should be made of the words in a deed, as is most agreeable to the intention of the grantor, the words are not the principal things in a deed, but the intent and design of the grantor; we have no power indeed to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, *and may reject any words that are merely insensible:* these maxims, my Lords, are founded upon the greatest authority, Coke, Plowden, and Lord Chief Justice Hale, and the law commends the astutia, the cunning of judges in construing words in such a manner as shall best answer the intent; the art of construing words in such a manner as shall destroy the intent may shew the ingenuity of counsel, but is very ill-becoming a judge.

(1) 6 H.L.Cas. 61. (2) 3

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Here the lacking word is the objective of the preposition "by." If that word "by" be deleted the rest of the clause makes perfect sense. The failure of the person issuing the policy to fill in the blank no doubt precludes the company invoking any restriction as to the personality of the occupant. But what possible justification can there be for rejecting or ignoring such distinct restrictions placed upon the nature of the risk assumed as the words "occupied" and "as a dwelling-house" import? I can find none. I am prepared to treat the failure of the agent issuing the policy to fill in the blank as apparently an exercise of his discretion not to place any restriction on the personality of the occupant, but I am not prepared to treat it as warranting the excision of the entire clause—something apparently not intended to be left to his discretion at all. I would strike out the word "by" to make the contract sensible; but to attain that object no further deletion is requisite; none is permissible. To excise the remainder of the clause would be to make a new contract for the parties.

The meaning of the words

while occupied as a dwelling-house

read consecutively, as I think they must be, in my opinion admits of no doubt. As the *Baltic Case* (1), establishes, the word "while" imports an intermittently suspensive negative. The quest of a difference in shades of meaning between the adverbial conjunction "while" of the policy now before us and the "whilst" of that dealt with in the *Baltic Case* (1), would be even more vain than pedantic. If not merely two forms of the same word, they are certainly synonymous. The Imperial Dictionary; The Century Dictionary, Vbo. "Whilst." The risk ceases to attach

(1) 29 Can. S.C.R. 577.

during periods when the subject matter may not answer to the restrictive description "occupied as a dwelling-house." See, too, *Langworthy* v. *Oswego Ins. Co.* (1), cited by Riddell J. and Huebner on Property Insurance, page 20.

Although the word "occupied" used alone as a word of description may only mean occupied at the date of the assumption of the risk (*O'Neil* v. *Buffalo Fire Ins. Co.* (2), *Maher* v. *Hibernia Ins. Co.* (3)), used as it is here with the word "while" it clearly imports continued occupation during the term of the risk, and that that occupation should be actual as distinguished from mere legal possession as the basis of the risk.

It was long since (28 Car. 2) held that:—

> Occupant and occupier are always in law taken for an actual possessor, one that useth, enjoyeth or manureth the land. *Ironmongers Co.* v. *Nayler* (4).

Occupied means actual *de facto* occupation. *Robinson* v. *Briggs* (5). To treat the word "occupied" otherwise in the present context would be to deny it all effect, just as Mr. Justice Sedgewick points out the word "running" had been denied effect by the provincial courts in the *Baltic Case* (6). The building would be insured simply as a dwelling-house, not as an occupied dwelling-house, or, "while occupied." If there could be any doubt as to the signification of the two words "while occupied," the addition of the word "by," which, although to be deleted for other purposes, may if necessary be looked at to ascertain the meaning of the word "occupied" to which it is appended, would seem to remove it. While vacant, as they were for many months prior to, and at the time of, the fire because of failure to rent them, the houses in respect

(1) 85 N.Y. 632.
(2) 3 N.Y. 123.
(3) 67 N.Y. 283, 288.
(4) Pollexfen's Rep., 207, 216.
(5) L.R. 6 Ex. 1.
(6) 29 Can. S.C.R. 577.

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of which it has been held that the plaintiffs cannot recover did not answer the description of the subject matter in the policy and were therefore not covered by the insurance. Mere temporary vacancy, such for instance as that due to the whole family of the occupant being absent over night would involve entirely different considerations. See *Meeks* v. *The State* (1).

The fact that the houses were uncompleted and therefore not occupied as dwelling-houses when the risks were assumed and for several weeks thereafter was much relied on as indicating that the parties must have intended that the restriction of actual occupation should not apply. No doubt the insurance agent knew of this state of facts; and the policy expressly provides that the risk is to begin from noon on the 8th of May, 1913, the date of the plaintiffs' application. It may be that, having regard to these circumstances, had one (or more) of the houses been burned before it had become tenanted, assuming the lapse of time not to have been greater than the parties might reasonably be taken to have contemplated for the completion of the building and the securing of a tenant, the courts would have held the plaintiffs entitled to recover in respect of it. But I am quite satisfied that as soon as each house became occupied the suspensive restriction in the policy on it applied and vacancy thereafter, so long as it lasted, took that house out of the risk. Moreover, the action is not upon the original policies, but upon renewals, which are to be regarded as new contracts; *Agricultural Savings and Loan Co.* v. *Liverpool, &c. Ins. Co.* (2); and the evidence is not entirely clear as to the conditions as to occupation at the date of the renewals of the houses that were vacant at the time of the fire, and

(1) 102 Ga. 572.

(2) 3 Ont. L.R. 127.

there is no evidence that they were made with knowledge of vacancy on the part of the company.

The controverted suggestion of counsel for the appellants that the defence based on vacancy was confined at the trial to change material to the risk not notified as required by the second statutory condition, if well founded, cannot assist him, inoccupancy as a departure from the description of the risk having been neither pleaded nor pressed. The fact of vacancy was distinctly pleaded (R. 141) and there is no suggestion that any additional evidence bearing on it could have been adduced. The defence which succeeds is purely one of law arising from the construction of the policy sued upon. It was certainly raised and passed upon by the Appellate Division, and it is not usual for this court to interfere with the discretion exercised by a provincial appellate court in regard to raising on appeal issues of law arising on the documents and facts in the record though not pressed at the trial. A case of surprise within R. 143 is scarcely made out. The argument based on the 8th statutory condition is answered by the learned Chief Justice of the Common Pleas.

I agree with the disposition made by the Appellate Division of the claims in respect of the corner building occupied as a store and of the dwelling-house as to the occupancy of which there is some uncertainty.

Counsel for the respondent pressed his plea for a reduction in the amount allowed for the loss upon each house only in the event of the court holding that the plaintiffs should recover in respect of the vacant houses.

On the claim for interest I agree with Mr. Justice Rose that the plaintiffs are entitled to succeed, but their right to interest dates from the expiry of sixty days after proofs of loss were furnished. In *Toronto Rly. Co.*

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v. *City of Toronto* (1), the Judicial Committee impliedly, if not expressly, approved the statement of Armour C.J. in *McCullough* v. *Newlove* (2), at page 630, as to the scope of the provision of the "Ontario Judicature Act" which makes interest payable in all cases in which it has been usual for a jury to allow it. The learned Chief Justice said:—

> Judging from my own experience, I may say that I think it has been usual to tell juries in cases where money is claimed under what were formerly called the common counts, that they might give interest from the time when the money claimed became payable, and that juries have usually given it.

In the *City of London* v. *Citizens Ins. Co.* (3), Ferguson J. held that the fact that the amount to be paid had not been ascertained until the termination of the action did not prevent the plaintiffs, suing on an insurance contract, from recovering interest on

> the sum now ascertained to have been, and to be, owing to the plaintiffs. The money was payable by virtue of the defendants' deed and I think the interest should be allowed.

Since the defendants no longer contest the plaintiffs' right to recover the full amount of each of the policies on the tenanted houses and since by their general repudiation of liability they precluded themselves from objecting to the sufficiency of the proofs of loss, the face amounts of such policies should be deemed to be debts that became payable according to their terms on the expiry of sixty days after the proofs of loss were furnished. These features distinguish this case from *McCullough* v. *Clemow* (4), in which a different result was arrived at by Osler J.A.

In view of the very limited measure of success that has attended the plaintiffs' appeal our discretion as to costs will, I think, be judiciously exercised if we allow to the respondent five-sixths of its costs in this court.

(1) [1906] A.C. 117, 121.
(2) 27 O.R. 627.
(3) 13 O.R. 713, 723.
(4) 26 O.R. 467.

BRODEUR J. (dissenting)—The main question on this appeal is as to the construction of the contract.

In May, 1913, ten insurance policies were issued on ten houses built in a row of buildings in Keele Street in Toronto. When the policies were made the houses were not yet finished and were unoccupied. It took several weeks before the work was finished. However, the company, being aware of the fact that those houses were unoccupied, issued a policy for three years and charged the owners the usual rates for a dwelling-house for such a period. The three years having expired, renewal receipts were issued for another period of three years, during which the fire occurred on the 29th of August, 1916.

The insurance company having denied liability, the plaintiffs had to institute the present action to recover the amounts of those ten insurance policies. At the trial the issues fought were as to the amount of the loss and as to the contention of the insurance company that the vacancy of some houses caused a change material to the risk not only for those vacant houses but also for those which were occupied at the time.

The findings of the jury were that the losses as claimed were proved and that the vacancy of some houses would not constitute a change material to the risk.

There was evidence that the fire actually started upon one of those occupied premises and there were other circumstances proved which justified the jury in finding that there was no material change in the risk, and, according to the provisions of the "Insurance Act," such a question is a question of fact which should be left to the jury (sec. 156, sub-sec. 6).

A judgment was rendered in favour of the plaintiffs,

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by the trial judge, for the losses on the whole of the ten houses.

In appeal that judgment was maintained as to the occupied houses but was reversed as to the corner house (because it was a store) and as to the houses which were vacant at the time of the fire.

The plaintiffs now appeal to this court. There is no cross-appeal on the part of the company; so we have to determine here only whether or not the losses incurred with regard to the store and the unoccupied houses are covered by the contract.

I will first deal with the unoccupied houses, which is the more important item.

The ten policies are all drafted in the same way, with the exception of the house number. Here are the material parts of the policy concerning house No. 1:—

Scottish Union and National Insurance Company . . . . . does insure Rass Bros. and M. Langbord *for the term of* three years, *from the* 8th *day of* May *1913, at noon to the* 8th *day of* May *1916, at noon, against all direct loss or damage by fire except as hereinafter provided, to an amount not exceeding* Twelve hundred xx/100 *Dollars to the following described property while located and contained as described herein and not elsewhere, to wit:*

Then follows the description of the subject-matter of the insurance on a printed slip pasted into a blank space in the policy, which slip is headed "Dwelling House Form":—

On the 2 *story,* brick fronted, roughcast, shingle *roof building and additions, including Foundations, Plumbing, Steam, Gas and Water Pipes and Fixtures, while occupied by . . . . . as a Dwelling, and situated No. — on the* east *side of* Keele *Street* Lot 50, 51, 52, Plan No. 1612, between Eglinton Avenue and Cameron Avenue known as House No. 1 Toronto.

The parts in italics are printed the others are written.

It is contended by the appellant that it was not necessary that those buildings should be occupied.

On the other hand, it is contended by the respondent that the words

while occupied by . . . . . as a dwelling

are descriptive of the thing insured and they rely on the judgment rendered by this court in the case of *The London Assurance Corporation* v. *The Great Northern Transit Co.* (1), which is known as the *Baltic Case*. That case was concerning the insurance against fire on the hull of the S.S. "Baltic"

whilst running on the inland lakes, rivers and canals during the season of navigation. To be laid up in a place of safety during winter months from any extra hazardous building.

The "Baltic" was laid up in 1893 and was never afterwards sent to sea. In 1896, she was destroyed by fire.

The Supreme Court came to the conclusion that the ship was insured only while employed on inland waters during the navigation season or laid up in safety during the winter months.

It was pretty plain and evident in that case that what was insured was a navigating vessel and that the insurance could not cover that vessel when she was laid up, except during the winter months. For several years that vessel had been out of commission and in such a case I could understand very well the decision of this court that the assurance could not cover the time when she had ceased to be used as a navigating vessel.

But the facts in this case are very different. First, the circumstances under which the contract was made shew the intention of the parties. When the policies were issued, the houses insured were not quite finished and they were vacant and were likely to be unoccupied for weeks and months. The insurance company knew

(1) 29 Can. S.C.R. 577.

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that the houses were vacant. However, the company was willing to insure them as vacant dwellings, since it was stipulated in the contract prepared by the company itself that the insurance would cover the period from the 8th day of May, 1913, to the 8th day of May, 1916.

Can it be said, in view of that formal stipulation and in view of the fact that the company knew that the houses would be unoccupied for weeks and months, and in view also of the fact that the company charged for the full three years, that it was not intended on its part to insure the dwelling-houses, whether vacant or not?

I think that those circumstances shew conclusively that the contract intended by the parties was purely and simply to insure those dwellings; and it was not absolutely necessary that they should be occupied, because if they wanted to stipulate such a condition, it was very easy for them to fill the blank which was in their policy. But they left a phrase there,

while occupied by . . . . . as a dwelling house,

which did not mean anything by itself, except by striking out the word *by* or by adding some others, like *the owner*, *the tenant* or *anybody*.

The stipulation is the stipulation of the company and it was its duty to make it clear and if there is any ambiguity then it should be construed against the company. According to my view, those printed words,

while occupied by . . . . . as a dwelling-house

should be considered as non-existing. *Chapman* v. *Chapman* (1); *Gill* v. *Bagshaw* (2); Cyc. vo. Accident Insurance, p. 245; *Hull* v. *American Employers Ins. Co.* (3); *Merritt* v. *Yates* (4).

(1) 4 Ch. D. 800.
(2) L.R. 2 Eq. 746.
(3) 96 Ga. 413.
(4) 71 Ill., 636.

The subject-matter of the insurance was a dwelling. Its vacancy might constitute a change material to the risk. But it would then be a question to be determined by the jury, and, in this case, we have a finding that those vacancies did not constitute a material change.

It has been suggested that the word *by* in the phrase,

while occupied by . . . . . as a dwelling-house.

could be struck out and that the policy would then read as on a *building while occupied as a dwelling-house.*

That condition would not change the liability of the company. It would not necessarily mean that the dwelling should be vacant, but it would mean simply that this building should be used as a dwelling-house, and not as a store, as a barn, as a garage, or something different from a dwelling-house.

Now as to the store. The building was insured as a dwelling-house. It is in evidence that the property was partly occupied by a store and partly for residential purposes. By the "Insurance Act of Ontario," it is provided that policies for stores should be made on a different footing. The company never intended in this case to insure a store, because the policy should have been for a period not of three years but of one year, as required by the law, and should have described the property not as a dwelling-house but as a store. We have no evidence to shew whether, when the insurance was taken out, it was considered as a store or as a dwelling. If the change was made after the policy was taken out, it became the duty of the insured to notify the company of the change, which I consider as being a material one: and, in that regard, I am of opinion that the jury came to a wrong conclusion which the evidence did not justify.

The judgment of the Court of Appeal should be

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maintained as to that corner house but it should be reversed with regard to the vacant houses.

The appeal should be allowed with costs.

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

Appeal dismissed with costs.

Solicitor for the appellants: *Hugh J. Macdonald.*

Solicitors for the respondents: *Ryckman, Denison & Foster.*

THE CANADIAN PACIFIC RAILWAY COMPANY..... } APPELLANTS;

AND

THE DEPARTMENT OF PUBLIC WORKS OF THE PROVINCE OF ONTARIO..... } RESPONDENT.

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ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Statute — Construction — Ad proximum antecedens fiat relatio — 59 V. c. 11 (Ont.)—Railway crossing—Maintenance—Seniority.

An order-in-council passed by the Government of Canada in 1866 for survey of lands on the northerly shore of Lakes Huron and Superior, and to provide for roads while the district was unorganised, directed that "an allowance of 5% of the acreage be reserved for roads * * * also reserving the right of the Crown to lay out roads when necessary." By the Ontario Act, 59 Vict. ch. 11, the Government was authorised to transfer to the Dominion of Canada, by order-in-council, certain lands occupied by the Canadian Pacific Railway, and in 1901 the lands were so transferred and afterwards granted to the railway company subject to the condition in section 2 of the above Act, namely, that the order-in-council should not be deemed "to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof" in said lands. In 1917 the Board of Railway Commissioners made an order allowing the Ontario Government to carry a highway across the railway on a part of said lands, finding as a fact that there were no highways in the district prior to 1901, and ordered a crossing to be constructed and maintained at the expense of the company. On appeal from this latter part of the order:—

Held, Brodeur and Mignault JJ. dissenting, that in view of the finding that there were no highways in the district when the railway company acquired title the condition in section 2 of the Act must be construed as meaning "the rights of the public existing at the date hereof in common and public highways," and as including rights in highways to be laid out under the reservation for roads by the order-in-council of 1866. Therefore, as these potential highways existed before the crossing the company being the junior occupant was properly charged with the expense.

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*PRESENT: Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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APPEAL from an order of the Board of Railway Commissioners for Canada directing that a highway crossing over its railway in the Township of Kirkpatrick be constructed and maintained at the expense of the railway company.

The head-note states the facts on which the appeal depends. The orders-in-council and statutes invoked are contained in the opinions of the judges.

Tilley K.C. for the appellants.
Bayly K.C. for the respondent.

THE CHIEF JUSTICE.—This is an appeal from the order of the Board of Railway Commissioners authorising the construction of a highway across the appellants' railway in the Township of Kirkpatrick, Ontario, and directing that the expense of construction and maintenance of the crossing should be borne by appellants.

The leave to appeal was granted by the Board upon the following question of law, namely,

> Whether upon the facts found by the Board the title of the railway company is subject to a prior right reserved in the Crown, to construct and maintain a public crossing over the railway company's right-of-way, as applied for by the Department of Public Works for the Province of Ontario herein.

The issue between the parties to the appeal is one confined to the expense of construction and maintenance of the crossing which the Board had in their previous order decided should be borne by the railway company.

The facts found by the Board, subject to which the question is to be answered are: (1) That the company's railway through the township in question was constructed in the year 1883, and the right-of-way in which it was constructed was conveyed to the railway company under and by virtue of an order-in-council

of the Province of Ontario made in 1901, and issued under the authority of the statute of the Province, 59 Vict., ch. 11; (2) that no highway was actually laid out across the said railway before title to its right-of-way was acquired and that under the terms of the said order-in-council such title was expressly made subject to the conditions and limitations contained in section 2 of the said provincial Act, which reads as follows:—

> Such transfer shall be deemed to be subject to any agreement, lease or conveyance affecting the same made by the Government of Ontario before the passing of this Act, as well as to the limitations and conditions, if any, in the order-in-council making the transfer, and the order-in-council shall not be deemed to have conveyed or to convey the gold or silver mines in the lands transferred, or to affect or prejudice the rights of the public with respect to common and public highways existing at the date thereof, within the limits of the land hereby intended to be conveyed.

(3) That under the terms of an order-in-council made by the Government of Canada, before Confederation, in 1866 relating to the surveying and patenting of lands on the northerly shores of Lakes Huron and Superior, which include those now in question and declaring, amongst other things,

> that many years will elapse ere the townships enjoy the benefits of municipal corporations and it is necessary to make provisions for the establishment of roads in the meantime,

it was provided

> that an allowance of 5% of the acreage of lands be reserved for roads * * * and that a clause be inserted in letters-patent for the land accordingly, also reserving the right of the Crown to lay out roads where necessary.

I confess that if I had to answer the question submitted to us without regard to the findings on the questions of fact of the Railway Board, I should hesitate a good deal before answering in the affirmative. The language of the section of the statute quoted above, under which the railway company acquired the title

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to their right-of-way, is open to two constructions neither of which would be unreasonable.

I do not, however, under the facts as found, have any difficulty in answering the question submitted to us in the affirmative.

The fact that the order-in-council of 1866 reserved out of the lands crossed in the township named by the company's railroad

an allowance of 5% for roads,

and that at the date when the statute under which the company acquired its title to the roadbed was passed there were no public or common highways actually laid out enables me to place a construction upon the statute which, I think, under the facts proved, is a reasonable and proper one.

If there were no public or common highways laid out at the date the statute was passed, it would be without meaning or effect unless it was held to apply to potential highways which might be opened from time to time under the reservation of the five per cent. area provided for in the order-in-council of 1866. If there are two meanings which may be given to the language of a public statute one of which would render the statute meaningless and ineffective for the purposes it was meant to cover and the other which would give effect to the statute, I take it the latter must be adopted.

I construe, therefore, under the proved facts, the language of the second section of the statute, 59 Vict., ch. 11, authorising the transfer from the Government of Ontario to that of the Dominion of any lands theretofore taken by the railway company for its roadbed, etc., to mean that such transfer

shall not affect or prejudice the rights of the public with respect

to the only common and public highways which were in existence at that time, namely, those potentially existing in the 5% acreage reserved in all Government lands by the order-in-council of 1866. If the language of the statute had been slightly transposed, as I submit in order to give it any meaning or effect at all it must be, it would read,

> shall not be deemed to affect or prejudice the rights of the public existing at the date hereof with respect to common or public highways within the limits of the lands, etc.

In the last analysis the question turns upon the meaning of the words, "existing at the date hereof," which, in the light of the facts that there were no actual highways then existing, I think must refer to potential highways which, up to the reservation of 5%, could be any day called into existence.

I answer the question in the affirmative and would dismiss the appeal with costs.

IDINGTON J.—I am of the opinion that the language of the statute in question, though of dubious import, is capable of the interpretation and construction put upon it by the majority of the Board appealed from, and therefore do not see my way to allow the appeal.

ANGLIN J.—The Board of Railway Commissioners has allowed the appellants, the Canadian Pacific Railway Co., to submit to the court under section 56 (3) of the "Railway Act" a question of law stated in these terms:—

> Whether upon the facts found by the Board, the title of the railway company is subject to a prior right reserved in the Crown, to construct and maintain a public crossing over the railway company's right-of-way, as applied for by the Department of Public Works for the Province of Ontario, herein.

The order of the Board recites its finding,

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That no highway was laid out across the said railway before its right-of-way was acquired under the order-in-council dated October 31st, 1901.

The Canadian Pacific Railway Co. acquired its title under a patent from the Dominion Government which made it subject to

the limitations and conditions and the reservations set forth in the order-in-council of the Lieutenant-Governor of our said Province of Ontario, dated the 31st day of October, 1901.

This order-in-council transferred the tract of land in question from the Province to the Dominion pursuant to the direction of the Ontario statute, 59 Vict., ch. 11 (1896),

subject to the limitations and conditions specified in section 2 of the said Act.

Section 2 of the statute reads as follows:—

Such transfer shall be deemed to be subject to any agreement, lease or conveyance affecting the same made by the Government of Ontario before the passing of this Act, as well as to the limitations and conditions, if any, in the order-in-council making the transfer, and the order-in-council shall not be deemed to have conveyed or to convey the gold or silver mines in the lands transferred, or to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof within the limits of the lands hereby intended to be conveyed.

At bar there was not a little discussion upon the proper construction of this section, the appellant maintaining that the well-known grammatical rule "*ad proximum antecedens fiat relatio*" requires that the phrase "existing at the date thereof" should be read as qualifying "common and public highways," and the respondent, while conceding the force of this rule of grammar, contending that it is not so rigid or inflexible as a rule of construction that it should not, under the circumstances of this case, be held to yield to another principle of statutory construction, that a statute will not be held to operate so as to take away existing rights unless its terms expressly, or by necessary

implication, so provide, especially where such a construction would involve an unexplained and improbable change in the previous policy of the law and would entail consequences seriously inconvenient to the public.

By an order-in-council passed in 1866, under the authority of Con. Stat. Can., ch. 22, sec. 7, which had the force of a statute, it was provided in the case of lands on the northern shores of Lakes Huron and Superior that since road allowances had not been laid out, municipal corporations would not be established for many years and it was necessary to make provision for the establishment of roads in the meantime,

> an allotment of 5% of the acreage of lands be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters patent for the land accordingly, also reserving the right of the Crown to lay out roads where necessary.

This order-in-council has never been repealed. As existing law it was continued in force by section 129 of the "British North America Act." There is nothing to indicate that there was any intention on the part of the Legislature of Ontario in 1896 to depart from the policy which had been thus established. The lands in question admittedly lie within the territory to which it applied, and the 5% reservation has not been exhausted.

In my opinion the effect of this order-in-council was to render the lands covered by it subject to a reservation of 5% for the purpose of public highways to be located within them either by the Crown, or, when they should come into existence, by municipal authorities clothed with the right to do so. Such highways existed *in posse* from the date of the order-in-council making the reservation, and when duly located may, *quoad* the rights of subsequent grantees of the lands

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which they traverse, be deemed to have existed *de jure* from that date just as if they had been then shewn as road allowances on official surveys of those lands made under the system which prevailed in the older parts of Ontario.

In view of the finding of the Board, stated in its order-in-council, that no highway had been laid out across the right-of-way before its transfer to the appellant company in 1901, "the common and public highways" mentioned in section 2 of the Act of 1896 almost certainly mean such highways *in posse* as I have indicated. If not, the inference would seem to be irresistible that the phrase "existing at the date hereof" must be referable to "the rights of the public."

An omission to follow the direction for the insertion of a clause of reservation in any patent (or transfer) issued after 1866 would not relieve the land thereby granted from the reservation, whatever other rights the patentee might have as against the Crown, should a portion of his land be afterwards required for highway purposes.

It is almost inconceivable in face of such a declared policy as is evidenced by the order-in-council of 1866, that the Legislature of Ontario should have intended in 1896 to transfer to the Dominion, in order that it should become vested as a right-of-way in the Canadian Pacific Railway Co., a strip of land stretching across this entire territory wholly free from the reservation provided for by the order-in-council of 1866, with the result that rights of highway across it would have to be acquired from that company by the province, or by the municipal corporations which it should create, as they should be needed in order to open up roads for the public convenience. I agree with Mr. Bayly that any construction of which its language reasonably

admits should be placed on section 2 of the statute of 1896 that will prevent such a consequence—that will harmonise it with, and will obviate the necessity of implying a repeal *ad hoc* of, the order-in-council of 1866. See *In re Norman's Trusts* (1), *Eastern Counties and London and Blackwell Railway Co.* v. *Marriage* (2) at p. 64, *per* Pollock C.B., at p. 44, *per* Channel B. *Thellusson* v. *Woodford* (3), at pp. 392-3, *per* Macdonald L.C.B., and cases collected in Maxwell on Statutes (5th ed., pp. 3 and 30). That result will, in my opinion, be attained by treating the phrase "existing at the date hereof" as referable to "rights of the public" rather than to "common and public highways."

The facts that the grant is by the Crown and is gratuitous, and that owing to the non-existence of municipal organisation the right to open highways was reserved by the order-in-council of 1866 to the Crown itself, which was also the custodian of the rights of the public, afford additional reasons for a construction favourable to the respondent if the terms of the statute of 1896 admit of it, as I think they do.

I am, for these reasons, of the opinion that the question submitted should be answered in the affirmative and that the appeal should be dismissed with costs.

BRODEUR J. (dissenting)—This is an appeal from the Railway Board on a question of law, under the provisions of section 56 of the "Railway Act."

The question which the Board has given leave to submit reads as follows:—

Whether upon the facts found by the Board the title of the railway company is subject to a prior right reserved in the Crown to construct

(1) 3 DeG. M. & G. 965, 967-8. (2) 9 H.L. Cas. 32.
(3) 1 B. & P. N.R. 357.

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and maintain a public crossing over the railway company's right-of-way, as applied for by the Department of Public Works for the Province of Ontario herein.

In order to fully understand the bearing of that question, it is necessary to state briefly what are the facts and the circumstances which have given rise to the present appeal.

In 1883, the Canadian Pacific Railway was built in the north-western part of Ontario. When the Township of Kirkpatrick in which the crossing in issue in this case is situated was surveyed in 1884 no highways existed in that Township.

The lands on which the company built its line belonged to the Province of Ontario.

In 1896, the Legislature of Ontario passed an Act to authorise the transfer of the lands occupied by the Canadian Pacific Railway. By section 2 of that statute it was provided that the transfer should be made in such a way as not to

> affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof within the limits of the lands hereby intended to be conveyed.

The transfer was made with the stipulation required by that statute concerning the highways.

Having found it necessary to open a highway in the Township of Kirkpatrick, the Department of Public Works of Ontario applied to the Railway Board for an order directing the Canadian Pacific Railway Co. to construct and maintain a public crossing over their right-of-way in connection with that highway.

The company agreed that the highway was necessary and should be opened but objected to being bound to construct and maintain the crossing.

The Board came to the conclusion that the company should build and maintain the highway crossing on the ground that the proviso contained in the law

of 1896 referred to the reservation for highways authorised by an order-in-council passed in 1866.

The question of law above quoted has been submitted to this court by way of appeal from the decision of the Board.

The first question which presents itself, according to my mind, is whether the statute of 1896 had reference simply to existing highways or to the reservation for highways mentioned in the order-in-council of 1866.

If we construe it according to the ordinary grammatical rule, "*ad proximum antecedens fiat relatio*," I should say that the words

> rights of the public with respect to common and public highways existing at the date hereof

mean, not rights then existing with respect to highways but rights of the public with respect to highways then existing. The participle "existing" qualifies not the substantive "rights" but the substantive "highways" because it is nearer the latter than the former.

It is true that there were no highways in the Township of Kirkpatrick; but nobody would suggest that from the District of Nipissing to the western boundary line of Ontario there were not hundreds of highways existing when the law of 1896 was passed.

I may, in that respect, refer to the revised statutes of Ontario of 1887, ch. 46, sec. 1 and secs. 45 and 48, and ch. 7, sec. 15, sub-secs. 79 and 80, which shew that the territory mentioned in that law of 1896 was organised for municipal and judicial purposes and formed part of two electoral districts.

The Dominion legislation then in existence referred also to the settlements of that region: R.S.C. 1886, ch. 6, sub-sec. 73 of sec. 2.

The legislation had in view the protection of the

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rights that the public had in the highways then actually existing in that territory.

If the legislature wanted to refer to the highway reservation provided in the order-in-council of 1866, it would certainly have expressed itself differently. It would have been so easy to mention specifically that order-in-council.

What is the meaning of that order-in-council? It is a recommendation or order to the executive authority having to deal with the Crown lands that

an allowance of 5% of the acreage of the lands be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters-patent for the lands accordingly.

Perhaps, as there is a specific reference to the Lower Canada legislation, it might be of interest to see what that legislation contemplated.

It is embodied in an order passed under Lord Dorchester on the 30th of October, 1794. By his instructions, Lord Dorchester had the power, in laying out townships, to make reservations for public use (Constitutional Documents, Doughty and McArthur, 1791-1818, p. 21); and it is in execution of these powers that the order of the 30th October, 1794, was passed.

It provided that each lot in a township would contain 210 acres instead of 200, in order to provide for an allowance of 5% for highways. That legislation was the one in force in Lower Canada in 1866, when the order-in-council concerning Upper Canada was passed.

Those two orders-in-council are intended to oblige the settlers to give without indemnity 5% of their acreage for the use of highways. They have no reference to the rights-of-way of a railway company.

I fail to see then that the order-in-council of 1866 is referred to in the statute of 1896. I have come to

the conclusion that the question submitted to us should be answered in the negative.

The appeal should be allowed with costs.

MIGNAULT J. (dissenting)—The Board of Railway Commissioners for Canada has granted to the appellant leave to appeal to this court on a stated question of law, from its order No. 26,393, authorising the appellant to construct and maintain at its own expense a highway crossing over the railway on the line between lots 8 and 9, concession 5, in the Township of Kirkpatrick, District of Nipissing, and Province of Ontario. In this order the Chief Commissioner, Sir Henry L. Drayton K.C. and the Assistant Commissioner, Mr. D'Arcy Scott, concurred, while Mr. Commissioner S. J. McLean dissented. The order granting leave to appeal states the facts found by the Board and the question to be answered, and obviously, in answering this question, no facts other than those found by the Board can be considered.

These facts are:—

1. The company's railway through the township in question was constructed in the year 1883, and the right-of-way on which the said railway was constructed conveyed to the railway company, by an order-in-council made by the Lieutenant-Governor-in-Council of Ontario, dated October 31st, 1901, and issued under the authority of a statute of the province, 59 Vict., ch. 11.

2. No highway was laid out across the said railway before title to its right-of-way was acquired under the said order-in-council.

3. The company's title was, under the terms of the said order-in-council dated October 31st, 1901, made expressly subject to the conditions and limitations contained in section 2 of the said provincial Act, which said section provides * * * (see text further on).

4. Under the terms of the order-in-council made on the recommendation of the Commissioner of Crown Lands, dated August 6th, 1866, it was provided that an allowance of 5% of the acreage of lands be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters-patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary.

The question to be decided is as follows:—

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Whether upon the facts found by the Board, the title of the railway company is subject to a prior right reserved in the Crown, to construct and maintain a public crossing over the railway company's right-of-way, as applied for by the Department of Public Works for the Province of Ontario herein.

The question before the Board was who should bear the cost of the crossing. According to the established practice, this liability for cost is determined by reason of the "seniority" either of the railway or of the highway. Where the railway is senior, that is to say, where it was established before the highway, the expense of the crossing is borne by the municipality or other public authority opening the highway. Conversely, if the railway comes after the highway, it must pay for the crossing. In the present case the majority of the Board, Mr. McLean dissenting, decided the question of seniority in favour of the highway.

As the statement of facts shews, the question submitted involves the construction of section 2 of the Ontario statute, 59 Vict., ch. 11, and in connection with this section it is proper to consider the provisions of the order-in-council of the 6th August, 1866, passed by the Government of Canada before Confederation.

The statute in question, 59 Vict., ch. 11, sanctioned the 7th April, 1896, is entitled

An Act to authorise the transfer of certain provincial lands occupied by the Canadian Pacific Railway.

The first section authorises the Lieutenant-Governor-in-Council in his discretion to transfer to the Dominion of Canada any lands theretofore taken and occupied by the Canadian Pacific Railway for the road-bed, stations, station grounds, and other purposes of the railway, and included in its plans, the same being so transferred to enable the Government of Canada to fulfil its obligations to the said company in that behalf with respect to the railway.

Section 2, the construction of which is in question, reads as follows:—

Such transfer shall be deemed to be subject to any agreement, lease or conveyance affecting the same made by the Government of Ontario before the passing of this Act, as well as to the limitations and conditions, if any, in the order-in-council making the transfer, and the order-in-council shall not be deemed to have conveyed or to convey the gold or silver mines in the lands transferred or to affect or prejudice the rights of the public with respect to common and public highways *existing at the date hereof*, within the limits of the lands hereby intended to be conveyed.

The italics are mine.

The final section of the statute declares that such transfer shall be as binding on the Province of Ontario as if the same were specified and set forth in the Act of the legislature.

The lands mentioned in this statute were transferred to the Government of the Dominion of Canada by an order-in-council adopted by the Government of Ontario on the 31st October, 1901,

subject to the conditions and limitations specified in section 2 of the said Act.

Subsequently, the Dominion of Canada granted a patent of the lands to the Canadian Pacific Railway Company, subject to the same conditions and limitations.

The order-in-council of August 6th, 1866, referred to in the statement of facts of the Railway Board, was adopted by the Government of Canada, comprising then Upper and Lower Canada, and is in the following terms:—

On a report, dated 2nd instant, from the Honourable the Commissioner of Crown Lands, stating that, in surveying the lands on the northerly shore of Lakes Huron and Superior, the United States system of meridianal lines has been adopted, as it possesses the decided advantage of uniformity, regularity and economy.

That by this system the townships are laid out six miles square, a more convenient size for municipal purposes than that of the older townships, which are generally ten miles square.

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That the township boundaries are drawn on the true meridian, and at right angles thereto, each township being subdivided, by lines drawn parallel at its outlines, into thirty-six sections of one mile square containing 640 acres each. These sections are subdivided into quarters by posts planted on the outlines.

That in these surveys no road allowances are laid out on the surveyed lines as formerly, the rugged and broken nature of the ground making them unfit for sites of roads. That the intention being to follow the American system with regard to the roads as well as the subdivisions of the lands, the roads there are laid out by the municipal authorities in the most suitable sites, and the proprietors of the lands over which they pass receive such compensation for the lands taken as the authorities consider just and reasonable. That, owing to the inferior quality of the lands generally on the northerly shore of Lakes Huron and Superior and the large blocks which have been taken up as mineral locations, many years will elapse ere the townships enjoy the benefits of municipal corporations, and it is necessary to make provisions for the establishment of roads in the meantime, he, the Commissioner, therefore recommends that an allowance of 5% of the acreage of lands be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary.

The committee submit the recommendation of the Commissioner of Crown Lands for Your Excellency's approval.

The recommendation of this order-in-council, adopted by the Government, was that an allowance of 5% of the acreage of lands be reserved for roads, and that a clause be inserted in letters patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary.

Mr. Tilley, for the appellant, argued that this order-in-council merely adopted a policy which should govern grants of lands on the northerly shores of Lakes Huron and Superior, which policy was to be given effect by the insertion in letters patent of any of these lands of a reservation of 5% of the acreage of the land for roads, and also of the right of the Crown to lay out roads where necessary.

Upon due consideration, I do not think this construction an unreasonable one, for if a grant of lands were made by the Crown without this reservation I fail

to see how the order-in-council could be relied on to restrict an absolute and unqualified grant.

No letters-patent were issued for the lands in question, which were transferred by the Government of Ontario to the Government of Canada by the order-in-council of the 31st October, 1901, without any other instrument of title, and this order-in-council does not contain a reservation of 5% for roads, or a reservation of the right of the Crown to lay out roads where necessary. The only reservation made—excluding one concerning Indian reserves and concerning previous grants made without a reservation of the right-of-way, stations, station grounds, and other purposes of the Canadian Pacific Railway, which is not pertinent to the present inquiry—is to subject the transfer to the conditions and limitations of sec. 2 of 59 Vict., ch. 11. The construction of this section, therefore, determines the answer that should be given to the question submitted. To repeat the language of the statute, the order-in-council making the transfer shall not be deemed

> to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof, within the limits of the lands hereby intended to be conveyed.

The expression, "rights of the public" (there is no reservation of the rights of the Crown as distinguished from those of the public) is extremely vague. Giving this expression, however, full effect, the "rights of the public" seem to be those with respect to common and public highways *existing* at the date of the order-in-council.

It is suggested that what was intended was to reserve the existing rights of the public with respect to common and public highways, and not merely their rights to existing highways. This seems to be a forced construction, for if it was intended to reserve existing

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rights and not rights to existing highways, if really the public can be said to have existing rights to non-existing highways, the legislature could have used apt language to make this intention clear, and in the absence of anything plainly indicating such an intention, I would not feel warranted in giving to the language of the statute any other construction than the natural and grammatical one. It therefore appears to me that the rights of the public are reserved merely as to highways which existed on the 31st October, 1901. The statement of facts of the Board is that no highway was laid out across the railway before title to its right-of-way was acquired under the order-in-council.

It is also suggested that no highways existed across the lands transferred by virtue of the statute, and that therefore the language of section 2 would be meaningless if it be restricted to the then existing highways. This fact, however, is not among the facts found by the Board as applied to the large tract of land transferred under the statute, which is described as being

> the lands lying between the terminus of the Canada Central Railway near Nipissing, known as Calander station, and the western boundary of the Province of Ontario, near Rat Portage (Kenora), and between the junction at Sudbury on the main line of the Canadian Pacific Railway for the Algoma Branch and the River Saint Mary.

I cannot therefore assume that there were no existing highways in this large tract of land covering several hundred miles—the contrary assumption would be much more reasonable—and therefore the construction which I feel constrained to place on the language of section 2 does not, in my opinion, render this language meaningless.

I would further think that if existing rights of the public to highways are to be considered as being protected by the statute, the order-in-council of the 6th

August, 1866, standing by itself, and in the absence of a reservation of 5% of the acreage for roads in the order-in-council of the 31st October, 1901, or of the right of the Crown to lay out roads where necessary, would not vest any such rights in the public with respect to highways then not laid out or planned. The language of the order-in-council of 1866 would indicate that at least some roads had been then laid out by the municipal authorities, but the Board has found as a fact

> that no highway was laid out across the said railway before its right-of-way was acquired.

I therefore think that the question submitted should be answered in the negative. I would consequently allow the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *E. W. Beatty.*
Solicitor for the respondent: *E. Bayly.*

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*Oct. 16, 17.
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*Feb. 4.

ALBERTA ROLLING MILLS COMPANY (DEFENDANT) ..... } APPELLANT;

AND

WILLIAM J. CHRISTIE (PLAINTIFF) . RESPONDENT.

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

Company — Contract — Rescission — Shareholder — Subscription — Condition precedent or subsequent—Collateral agreement—Surrender of shares—Ultra vires of company.

C.'s action is for the rescission of an agreement to take shares of the capital stock of the appellant company and for the return of the purchase price on the ground of non-fulfilment of a term of his subscription. The sale of the shares was authorized by the directors, but no formal allotment was made to C.; no notice of allotment was given to him, but notices of meetings were sent. His name was not entered in the register of shareholders but appeared in a ledger account. Four months after full payment of shares, certificates were issued and sent to C. during his absence, which were retained by him for two years. C. never attended any meeting of the company, but filled and sent proxies to the president and promoter of the company who had obtained his subscription.

Held, Idington J. dissenting, that, under these circumstances, C. must be regarded as having become a *de facto* shareholder.

Held also, that, even if the term alleged by C. had been precedent to his subscription, he would have waived it by becoming, and exercising rights of, a shareholder; but, upon the evidence, it was a condition subsequent or a collateral agreement and its fulfilment was *ultra vires* of the appellant company as involving an unlawful reduction of its capital.

Judgment of the Appellate Division, 12 Alta. L.R. 445, 38 D.L.R. 488, reversed, Idington J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Simmons J. (2), and maintaining the plaintiff's action.

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

(1) 12 Alta. L.R. 445; 38 D.L.R. 488; [1918] 1 W.W.R. 98.

(2) [1917] 1 W.W.R. 1431.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

R. McKay K.C. for the appellant.
A. H. Clarke K.C. for the respondent.

THE CHIEF JUSTICE.—This is what is generally known as and called a very hard case and I regret greatly feeling myself compelled to reverse the judgment of the appellate court and to refuse to the respondent Christie the relief he has sought in the action.

I have given the case much consideration. The reasons for judgment of my brother Anglin and the authorities cited by him seem to me conclusive, and as I cannot usefully add anything to what he has said I will concur with him and allow the appeal with costs and restore the judgment of the trial judge.

IDINGTON J. (dissenting).—The respondent declined to sign the ordinary application for shares in appellant company. He never was in due form allotted such shares. Nor was he ever placed upon the register as a shareholder which, by so many provisions in the Companies Ordinance, ch. 20 of 1901, is made the test of what constitutes membership in any company incorporated thereunder as appellant was; for example, by secs. 25, 27, 34, 37, 40 and 42.

It is incorrectly stated, as I read the exhibits referred to, in support of the statement, that respondent's name appears on the register.

The ledger account, kept apparently with numbers, does not appear to me to constitute part of the register. It contains what one might expect to find in relation to a conditional subscription of the character respond-

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ent's contention might require. It was not exactly an ideal ledger for that purpose, but where we meet so many irregularities as prominently appear on the part of the appellant, a trifling matter of that kind is not very surprising.

Let us assume for a moment that upon such a register and record of the transactions here in question, there had arisen a contest as to the respondent's right to vote, could his doing so have been properly entertained for a moment?

And let us go further and assume that upon its having been challenged, respondent had applied, under sec. 40 of the ordinance, to the court or judge designated therein to have his name entered on the register, with nothing more in support thereof than all the material placed before us herein, and such application stoutly opposed, could such court or judge properly order rectification and, against the will of the shareholders, properly on the register, direct respondent's name to be entered thereon? I think not.

Much has been made of the issue by the president and secretary of certificates of shares to respondent, and of his signing, when asked, proxies to Pollock, the president, to vote.

Nothing is shewn of what (if any) use was made of such proxies beyond requesting and reporting them. I wholly disapprove of respondent's conduct in that regard and hope it can be attributed to nothing more than carelessness.

But testing the weight of such a series of acts, by the test I have suggested, as to the strength thereof, in supporting the supposed application on his part to be put upon the register, could he gain any support therefrom on such an application by the mere existence of such proxies and such report as made thereof?

I cannot think so unless much more were shewn to have been done.

It is, I repeat, the question of membership which I am keeping in view.

Moreover, the conditional nature of his subscription clearly pointed to its being, when accepted, in the informal way it was, a contract that could neither constitute him a member, nor be entered into in such a sense as to have that effect unless and until the condition had been fulfilled.

It was quite competent for the parties to have so contracted as respondent swears he thought the contract was, for him to pay ten thousand dollars to be used until the steel-making branch, among the objects for which the appellant was incorporated, had become practicable, and then be applied in payment of shares.

In this view it is unnecessary for me to follow the many well presented arguments on either side.

I may add, however, that I by no means assume that respondent could be so treated in the case of a winding-up of the company and by reason of insolvency the creditors' claims had to be met, and respondent had been placed on the list of contributories.

Nor if the case had been one of misrepresentation of which respondent had complained and he had acted in the same way, after the full disclosure to him thereof, do I think he could claim relief.

It is the contractual nature of that which was done, with presumably an honest purpose on either side which, so long as membership not created and the provisions thereof were competent to be entered into that induces me to hold that the purpose thereof ought not to be lightly set aside or defeated.

The lapse of time might, under other conditions than those springing from a war which forbade building

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unless demanded by dire necessity, have led to other inferences tending to defeat respondent.

I think the appeal should be dismissed with costs.

DUFF J.—I am of the opinion that this appeal should be allowed with costs.

ANGLIN J.—The plaintiff sues for the rescission of an agreement to take 100 shares of the capital stock of the defendant company, and for a return of the purchase price thereof, $10,000, paid by him in instalments, and, in the alternative, for damages. He bases his action on the non-fulfilment of a term of his subscription—that the company would proceed to erect a steel plant at the city of Medicine Hat. The learned trial judge dismissed the action on the ground that by becoming, and exercising rights of, a shareholder, the plaintiff had waived this condition of his subscription (1). This judgment was reversed in the Appellate Division (2), that court holding that the non-fulfilment of what was in its opinion a condition subsequent, which had not been waived, entitled him to the relief of rescission and a return of his money. The facts so far as not hereinafter stated may be found in the reports cited.

If the terms relied on by the plaintiff should be regarded as a condition precedent, I would be disposed to concur in the dismissal of the action upon the ground taken by the learned trial judge. But, while the language of the plaintiff's letter of subscription and of the defendants' letter of acceptance might be open to that construction, the conduct of the parties makes it perfectly clear that this was never intended to be its character, or, if it was, that by mutual consent it was

(1) [1917] 1 W.W.R. 1431. (2) 12 Alta. L.R. 445; 38 D.L.R. 488.

converted into a condition subsequent or a collateral agreement. Taking all the circumstances in evidence into account, my view of the legal effect of the arrangement made is that the term relied upon partook of the nature of a condition to the extent that if the erection of a steel plant should become impossible or if the company should definitely evince its purpose not to proceed with it while the contract was still *in fieri*—before the plaintiff had become a shareholder—he would be entitled to withdraw his subscription and demand a return of his purchase money, but that if such a state of facts should arise only after the plaintiff had acquired the status of a shareholder the term invoked would be enforceable, if at all, only as a collateral agreement by the company thereupon to accept a surrender of his shares and to return whatever money he had paid on account of their purchase.

At the close of the argument I was satisfied that the subscription of the respondent for shares in the appellant company was given subject to the term that the company would erect a steel plant, that it was so accepted and that there was never any abandonment by him of whatever rights the non-fulfilment of that term gave him. Its non-fulfilment is indisputable. The only defence which, in my opinion, calls for consideration is the contention that such repayment would involve an illegal depletion or reduction of the company's capital and therefore cannot be demanded—that because the term attached by the plaintiff to his subscription contemplated such a withdrawal of capital it is void as *ultra vires* of the company, and since he attained and acquiesced in his holding the position of a shareholder he must be treated as if his subscription had been absolute and unqualified. This defence involves two important questions of law: Did the

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respondent ever actually become a shareholder? If he did, is the condition attached to his subscription, which must in that event operate, if at all, as a collateral agreement, valid and enforceable?

The material facts bearing on the first question appear to be that although the sale of the shares in question, as part of a large quantity of stock, was authorised by the directors, there is no direct evidence of a formal allotment of shares to the respondent, nor of any notice of allotment having been sent to him. The sending of notices of meetings, however, probably supplied the latter omission. *Traders Trust Co.* v. *Goodman* (1). Moreover, the respondent's name was not entered in the list or register of shareholders kept and produced by the company. It appears, however, in a ledger account in the book which contains elsewhere what purports to be the list or register of shareholders. He is debited in this account with $10,000, the price of 100 shares, and is given credit for the several payments which he made, amounting in all to $10,000. While the share register was not kept in the form required by section 27 of the Companies Ordinance (1901, ch. 20; Con. Ord. N.W.T., 1915, ch. 61), its deficiencies would probably not be fatal to its evidentiary value. *East Gloucestershire Railway Co.* v. *Bartholomew* (2). Other authorities are collected in Lindley on Companies (6th ed.), p. 76.

By section 25 of the Companies Ordinance:—

> Every person who has agreed to become a member of the company under this ordinance and whose name is entered on the register of members shall be deemed to be a member of the company.

The statute does not proceed, however, as did the English Act, 19 & 20 Vict., ch. 47, sec. 19, to declare that no other person should be deemed to be a share-

(1) 37 D.L.R. 31, 43-47. (2) L.R. 3 Ex. 15.

holder. Under such an Act as this latter, or under an Act making the register conclusive evidence of membership or non-membership, registration would, of course, be essential. But by section 40 of the ordinance now under consideration the Supreme Court is empowered to correct the register even in winding up (*Winstone's Case* (1)), and by section 42 it is only made *primâ facie* evidence of any matters directed to be inserted therein. A person whose name appears on it may shew that it ought not to have been there (*Waterford, Wexford, Wicklow & Dublin Railway Co.* v. *Pidcock* (2)), and it may likewise be shewn that a person whose name does not appear on it was in fact a member. *Portal* v. *Emmens* (3); *Reese River Silver Mining Co.* v. *Smith* (4), *per* Lord Westbury. The inconsistent dictum of Fry L.J. in *Nicol's Case* (5), cited by Mr. Clarke, cannot be successfully invoked against such eminent authority.

Nicol's Case (5) was decided on the great lapse of time—

> fourteen years after the holders of all the shares (25,000) had been shewn on the register,

in which the names of the persons sought to be held as contributories did not appear. There had been a new allotment of shares from which they were excluded. *In re Macdonald, Sons & Co.* (6), also cited by Mr. Clarke, is likewise distinguishable. The persons whom it was there sought to hold as contributories were not only not registered but they had never

> done anything as shareholders, and the transaction was therefore never a completed transaction. It was in my opinion competent for the applicants,

says Lord Davey, at p. 107,

> to revoke the authority to place their names on the register.

(1) 12 Ch.D. 239 at p. 249.
(2) 8 Ex. 279.
(3) 1 C.P.D. 201, at page 212-3.
(4) L.R. 4 H.L. 64, at page 77.
(5) 29 Ch.D. 421, at page 447.
(6) [1894] 1 Ch. 89.

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An admission of a shareholder that he is such is in itself sufficient proof of his membership.

On the other hand, on the 26th of September, 1914, some four months after the respondent had made his final payment, three certificates—one for 25 shares, dated the 31st October, 1913, another for 25 shares dated the 31st December, 1913, and the third for 50 shares dated the 1st of February, 1914—were sent to him. They reached his office in his absence. While there is no evidence to shew how these certificates came to be issued or that the respondent actually received them, in view of the retention of them for two years and his other acts as a shareholder, the only reasonable inference seems to be that he knew of their existence and presence amongst his papers. Under section 36 of the statute a certificate is *primâ facie* evidence of the title of a *member* to the stock it represents. I do not overlook the fact that this section proceeds on the assumption that the holder named in the certificate is a member of the company. Although he never personally attended a meeting of the company, the respondent admits having received notices of such meetings accompanied by proxies which he filled in and sent to Mr. Pollock, the president and promoter of the company, who had obtained his subscription. He candidly states in his evidence that he regarded himself as a shareholder during 1914 and 1915 and up to August, 1916. He adds that he would have expected to be paid dividends had they been declared, but that he nevertheless thought that if the company decided to abandon the steel project it would cancel his shares or he could withdraw. Under these circumstances I have no doubt that he would have been made a contributory on winding up (*Levita's Case* (1); *Spackman* v. *Evans*

(1) 3 Ch. App. 36.

(1); *Fisher's Case* (2); *Challis's Case* (3)), and, notwithstanding the more favourable position which a person whom it is sought to hold as a shareholder occupies before there is a winding up, I think the plaintiff must be regarded as having become a shareholder. His retention of the share certificates and his giving of proxies to vote upon his shares are consistent only with his being a *de facto* shareholder. The condition annexed to his subscrip ion being not precedent but subsequent, it was his intention to become a shareholder *in presenti*. That he may have thought himself entitled to withdraw afterwards does not prevent his having acquired that status. *In re Railway Time Tables Publishing Co.* (4); *Re Jas. Pilkin & Co. Ltd.* (5). The case falls within the principle of *Bridger's Case* (6); *Elkington's Case* (7), and *Thomson's Case* (8), rather than within that of *Pellatt's Case*(9), or *Rogers' Case*(10). *Pellatt's Case* (9), appears to be the strongest authority in the respondent's favour on this branch of the case.

The register is only evidence of an application for shares and its acceptance, or of an allotment in the nature of an offer and its acceptance, constituting in either case membership: Lindley on Companies, 6th ed., p. 77. It is the contract that creates the membership not the registration. Allotment is no doubt essential in the ordinary case. But the entry of it in the directors' minutes is merely evidentiary. The absence of such an entry and of a formal notice of allotment are not conclusive against membership. The

(1) L.R. 3 H.L. 171, at page 208.
(2) 31 Ch.D. 120, at page 128.
(3) 6 Ch. App. 266, at page 271.
(4) 42 Ch.D. 98, at pages 112, 114, 117.
(5) 85 L.J. Ch. 318.
(6) 5 Ch. App. 305.
(7) 2 Ch. App. 511.
(8) 4 DeG. J. & S. 749.
(9) 2 Ch. App. 527.
(10) 3 Ch. App. 633.

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evidence they would afford may be supplied, as I think it was in this case, by the issue and delivery of share certificates and the sending of notices of meetings followed by the giving of proxies. *Fisher's Case* (1) was decided in 1885, two years before the House of Lords reversed the decision of the Court of Appeal in *Trevor* v. *Whitworth* (2), and the suggestion of Fry L.J., at p. 128, relied on by the respondent, can scarcely be regarded as now entitled to weight. The same observation applies to a remark of Giffard L.J. in *Crawley's Case* (3), decided in 1869.

My conclusion on this branch of the case is that under all the circumstances in evidence the plaintiff *de facto* became a shareholder of the defendant company. We must, therefore, proceed to consider the validity and effect of the term which he attached to his subscription and subject to which, as far as the directors could bind it to do so, the company accepted him as a shareholder.

As already stated, this term was not a condition precedent. The conduct of the plaintiff as well as of the company's officers makes this perfectly clear. If it were a condition precedent it would have been abandoned by the plaintiff's acceptance of membership. As a condition it ceased to be operative when the plaintiff became a shareholder. Thereafter it could operate, if at all, only as a collateral agreement entitling him to surrender his shares and demand the return of the money paid for them.

Is such an agreement *intra vires* of the defendant company? I think not.

In *Guinness* v. *Land Corporation of Ireland* (4), Lord Justice Cotton, after referring to section 38 of

(1) 31 Ch. D. 120.
(2) 12 App. Cas. 409.
(3) 4 Ch. App. 322, at page 330.
(4) 22 Ch. D. 349, at page 375.

the English "Companies Act" of 1862, corresponding to section 47 of the Consolidated Ordinance of 1915, said:—

> From that it follows that whatever has been paid by a member cannot be returned to him. In my opinion it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid.

This passage is quoted with approval in *Trevor* v. *Whitworth* (1), by Lord Herschell, at p. 419, and by Lord Macnaghten, at p. 433. The defendant company in accepting a surrender of the plaintiff's shares could have only one of two purposes, either to extinguish them—an unlawful reduction of capital, or to re-issue them—an unlawful trafficking in its shares, an illegal use of its capital.

The law on these points as laid down in *Trevor* v. *Whitworth* (1), has been consistently followed ever since. The Companies Ordinance contains very strict provisions as to the conditions on which and the methods by which the capital of a company subject to it may be reduced—sections 78 *et seq.* There is, of course, no pretence of compliance with these provisions. As put by Lord Macnaghten in a passage of his speech in *Trevor* v. *Whitworth* (1), at p. 437, quoted by Lord Herschell in *British and American Trustee and Finance Corporation* v. *Couper* (2):—

> When parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed.

In *Bellerby* v. *Rowland & Marwood's Steamship Co.* (3), it was held that:—

(1) 12 App. Cas. 409. (2) [1894] A.C. 399, at page 403.
(3) [1902] 2 Ch. 14.

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A surrender of shares in a limited company, the company releasing the shareholders from further liability in respect of the shares, is equivalent to a purchase of shares by the company and is therefore illegal and null and void on the principle of *Trevor* v. *Whitworth* (1).

The court was there dealing with shares partly unpaid. The surrender of fully paid-up shares with a return of the money paid therefor is, of course, equally obnoxious. Both alike involve reduction of capital. While a surrender of shares which involves no reduction of capital may be supported (*Rowell* v. *Jno. Rowell & Sons, Ltd.* (2)), a surrender involving such a reduction, not made under circumstances which would have justified a forfeiture, clearly cannot be unless effected under sections 78 *et seq.* of the Consolidated Ordinance. How strictly the right of forfeiture, and of surrender to take its place, is viewed is illustrated in the recent case of *Hopkinson* v. *Mortimer, Harley & Co. Ltd* (3).

If then a return of the capital subscribed by the plaintiff is *ultra vires* what is the result? I fear it must be the dismissal of this action. That the plaintiff made a mistake as to the legal effect of what he did cannot entitle him to relief. *Ex parte Sandys* (4); *Re James Pilkin & Co. Ltd* (5). Having paid his money as the purchase price of shares in the company and become a shareholder he cannot now require that the money so paid should be treated as a loan made to the company to be applied in the purchase of shares if and when it should erect a steel plant, or should it fail to do so, to be returned to him. That in effect is the position he seeks to take. But that was not his contract.

While it was the obvious purpose of the parties that

(1) 12 App. Cas. 409.
(2) [1912] 2 Ch. 609.
(3) [1917] 1 Ch. 646, at page 653.
(4) 42 Ch.D. 98, at page 115.
(5) (5) 85 L.J. Ch. 318, at page 320.

the stipulation invoked by the plaintiff should operate as a condition subsequent or collateral agreement, non-fulfilment of which would give rise to a right of withdrawal on his part, it was not their intention that the company should bind itself to erect a steel plant or to pay damages for its failure to do so. The plaintiff's evidence of his understanding that if the company should decide to abandon the steel project it could cancel his shares or he could rescind and withdraw puts that beyond doubt. Moreover, whether any damage actually resulted to him from that abandonment would seem to be a question so problematical as to be almost, if not quite, a matter of pure speculation. But it is not necessary to enter on that field. Breach of a contract to erect a steel plant entitling the plaintiff to damages has not been established. Breach of a collateral agreement that upon its failure to erect such a plant the company would accept a surrender of his shares and repay the money which it received from him undoubtedly has. But that agreement is unenforceable because *ultra vires*.

I would allow the appeal with costs in this court and in the Appellate Division and would restore the judgment of the learned trial judge.

BRODEUR J.—I would allow this appeal for the reasons given by my brother Anglin.

Appeal allowed with costs.

Solicitors for the appellant: *Laidlaw, Blanchard & Rand.*

Solicitors for the respondent: *Short & Fraser.*

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THADÉE DUCHAINE (DEFENDANT). . APPELLANT;

AND

THE MATAMAJAW SALMON CLUB (PLAINTIFF)..... } RESPONDENT.

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

Fishing right—Riparian owner—Personal servitude—Real right—Perpetual or temporary—"Profit à prendre"—Registration—Articles 405, 479, 2172 C.C.

Under Quebec law, the grant of fishing rights by a riparian owner confers no title to the bed of the river in which this right is exercised. Such right is one of enjoyment only, essentially temporary in its nature and does not endure beyond the life of the grantee. Idington and Cassels JJ. dissenting.

The right to catch fish *in alieno solo* cannot be assimilated to the "profit à prendre," a term found in the common law of England but unknown to the civil law of France and Quebec. Idington and Cassels JJ. dissenting.

Per Anglin and Mignault JJ.—The renewal of the registration of a right to fish after the official cadastre was put in force, was not required by article 2172 C.C.: *La Banque du Peuple* v. *Laporte.* 19 L.C. Jur. 66. followed. Brodeur J. *contra.*

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the Superior Court, District of Rimouski, and maintaining the plaintiff's action.

The material facts of the case are fully stated in the judgments now reported.

Ferdinand Roy K.C. and *Charles Angers K.C.* for the appellant.

John Hall Kelly K.C. for the respondent.

IDINGTON J. (dissenting).—I think this appeal should be dismissed with costs. Agreeing, as I do in

*PRESENT:—Idington, Anglin, Brodeur and Mignault JJ. and Cassels J. *ad hoc.*

the substantial parts thereof with the reasons of Mr. Justice Pelletier in the court below, I need not elaborate or needlessly repeat or indicate in detail minor matters of little importance wherein I might differ therefrom. I only desire to make clear in connection therewith my own point of view.

It seems to me this appellant's argument fails, as I have so often had occasion to remark in other cases, to recognise what the parties concerned in the several transactions in question were engaged in, or to realize the nature of the business they were about.

If we would first fully comprehend the facts relevant thereto and then seek for the relevant law properly applicable thereto, we should have some hope of reaching a correct conclusion.

We have presented here an exchange deed whereby one Blais ceded to Sir George Stephen all the rights of fishing in the river Metapedia opposite a certain lot, and got therefor from him an irregularly shaped but definite piece of land, bounded as described and a right of drainage thereof or therefrom.

I should have much preferred to have been told something of the value of that so given rather than much of that elementary law which is assumed as of course to be applicable.

If one knew the value of what was so given, then he might be able to appreciate properly what the parties in truth intended by a deed which may possibly be of doubtful import.

Seeing that Sir George Stephen, 18 months later, for then he had become Lord Mount Stephen, sold what he had got from Blais together with the like rights on three other lots got from another man for thirty-five thousand dollars according to the deed in the record and I am inclined to suspect it was not a

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mere personal right for the life of Mount Stephen that was being bargained for.

This circumstance, of course, is of no value in aiding in the interpretation or construction of an ambiguously worded deed. I only use it to illustrate the possibilities that lay in an accurate and yet comprehensive knowledge of the basic facts in question and the need, or at least desirability, of being seized thereof.

If the said deed from Blais was only intended and can only be held in law to convey a personal right of use, then it is clear no more can be claimed.

But because such rights or personal servitudes do exist in law and cease with the life of the grantee that is no reason for holding and determining that in law a proprietor of land, or river, or stream, is restricted to the limitations of such a personal grant in bargaining for the sale of a fishery to whomsoever he pleases. There is no prohibition in law against his dismembership of his property in any way or shape he chooses. Some prohibitions against the creation of a particular form of tenure which has been found to work injuriously to society in general have been enacted in divers countries.

I am unable to find any such prohibition in this country or in the law of Quebec in relation to an owner dealing in any way he sees fit with the proprietorship of the whole or part of a private stream non-navigable and non-floatable as the one in question is.

The sole question in this appeal save that of the possible want of conformity with the registry laws, is whether or not Blais intended to convey and did convey rights of fishing in perpetuity.

It is difficult to say why, if he did not, the exchange deed should contain the following:—

Au moyen de quoi les parties se déssaisissent respectivement de ce que dessus par elles cédé en échange et en contre échange et s'en saisissent réciproquement, ainsi que leurs représentants légaux.

But for the mode of thought which appellant's factum presents I should have said there could be no doubt of the reciprocal intention which this evidences by each grantor to vest in the other a right of property in perpetuity and hence that Sir George Stephen was getting something much more than a personal servitude.

As to the registration question which only becomes important by virtue of holding that it was a *jus in re* that passed to Stephen, I may add to what has already been said below, that it does not occur to me that the widow Blais purchased or sold to appellant "the same property" (that is within the meaning of art. 2098 C.C.) as appellant now claims when he attempts to reach out and become possessed of the fishery gone forever to another.

The article, so far as necessary to consider herein, reads as follows:—

2098. All acts *inter vivos* conveying the ownership of an immovable must be registered at length, or by memorial.

In default of such registration, the title of conveyance cannot be invoked against any third party who has purchased the same property from the same vendor for a valuable consideration and whose title is registered.

Registration has the same effect between two donees of the same immovable.

All he got was what the curator of the Blais bankrupt estate had acquired and was authorized to sell, and that was bereft of the rights of fishing. He could sell no more than the insolvent possessed and passed to him.

And the purpose of that conveyance was made evident by the express exceptions made in the first paragraph descriptive of the properties being passed, which reads as follows:—

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Mais sauf les parties déjà aliénées par baux emphytéotiques ou autrement avant la faillite du dit R. A. Blais.

This exception is used again in the deed from Mr. Blais to the appellant and hence he never got anything more than the curator had.

What can it mean but the exception of that right of fishing which is now in dispute?

And why, if anything else, is the like exception not made in regard to the next three parcels conveyed by the same deed to her?

More than that it is to me most significant that the notary drawing it should have thought of an emphyteusis or such like form of lease. True that does not, perhaps, with absolute accuracy in all the details express the legal nature of what was given Sir George Stephen, but much more accurately than does the personal servitude conception of which we have heard so much.

The draftsman hit more nearly the mark by the whole phrase

par baux emphytéotiques ou autrement avant la faillite

than anything we have heard argued as being expressive of what the parties concerned had in view.

The late Chief Justice of Quebec, in his judgment, seemed to assume that for all practical purposes the appellant had failed and hence he leaves in doubt the result of the distinction he makes.

His opinion is, therefore, not necessarily in conflict with the conclusions reached by Mr. Justice Pelletier, which in light of the formal judgment of the court must be held to have been concurred in by others and, I suspect, by all.

I cannot see why we should reverse a result so accordant with common sense and good law as I conceive to be the correct interpretation and construction of the deeds in question.

ANGLIN J.—I have had the advantage of reading the judgments to be delivered by my brothers Brodeur and Mignault, and I concur in their opinion and the reasons on which they base it that the grant of fishing rights to Sir George Stephen (now Lord Mount Stephen), although effectively assigned to the respondent club, cannot endure beyond his lifetime. If this case had arisen in one of our provinces where the English law of property prevails I should probably have reached the same conclusion as my brothers Idington and Cassels. But I share my brother Mignault's view that this case must be determined by the civil law of the Province of Quebec and that recourse to English authorities dealing with fishing rights *in alieno solo* as *profits à prendre* is apt to be more misleading and confusing than helpful. At all events English cases cannot properly be invoked as authorities until it is first established that the principles of the English law bearing upon the subject under consideration are the same as those of the civil law of Quebec. That may not be assumed.

Unlike the *profit à prendre* of the English law—a term which, notwithstanding its obvious Norman origin, is unknown to the civil law of France and Quebec—the right of fishing in streams non-navigable and non-floatable, which belongs to the riparian owner, whose title extends to the middle of the stream, *MacLaren* v. *Attorney-General for Quebec* (1), cannot be severed in perpetuity from the alveus of the river of which it is *une dépendance indivisible*; Fuzier Herman Rep. Vbo Pêche Fluviale, Nos. 25 and 26. An indefinite grant of fishing rights in such a stream must therefore be treated either as a lease (*Bourgeois* v.

(1) [1914] A.C. 258; 15 D.L.R. 855; 46 Can. S.C.R. 656; 8 D.L.R. 800.

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Bourdin) (1), or as creating a restricted usufruct or *une servitude personelle et à titre de droit d'usage restreint*; 6 Baudry Lacantinerie et Chauveau (1905) "Des Biens," pp. 806-7. It can never constitute a real servitude. 3 Aubry et Rau (5 éd.), 109-10. Compare Fuzier Herman, Rep. (1902), Vbo Pêche Fluviale, Nos. 114-118, 125, 127. Indeed there is some authority for the view that the right created is not even a personal servitude but a mere right of enjoyment—a restricted use or usufruct. 44 Pand. Fr. Vbo Pêche Fluviale, No. 131. Planiol (Droit Civil vol. 1. p. 527 (1901)) makes this statement:—

> Il est généralement admis que le droit de chasse et le droit de Pêche, qui ne peuvent pas constituer des servitudes prédiales, peuvent être établis, non-seulement au moyen d'une location, mais comme droits réels au profit d'une personne; ils forment alors une sorte particulière d'usages viagers. Aubry et Rau, II., p. 61 texte et note 5; Demolombe T. XII, No. 686; D. 91, 2, 48.

But whether it be regarded as purely a right of enjoyment (restricted usufruct or use) or as a personal servitude, the right of fishing (*séparé du fonds*) is essentially temporary (*viager*) and, if no shorter term for its duration be fixed by the instrument creating it, must come to an end with the life of the person on whom it is conferred. Pothier (Bugnet), vol. 1, Introduction au Titre XIII "Des Servitudes Réelles," art. 1, Nos. 1 & 2; 4 Huc, Nos. 165 & 253. The French legislation of 1898 which established the rights of riparian owners in the alveus of non-navigable and non-floatable streams in nowise affected the indivisibility of the right of fishing from the property (*fonds*). Labori, Rep. Enc. Supp. vol. 2 Vbo. Pêche Fluviale, No. 3, p. 514.

No doubt the concession of the fishing rights now held by the respondent club carries with it as an

(1) D. 85. 1. 348; S. 85. 1. 223.

accessory such enjoyment of the bank and bed of the stream belonging to the grantor as may be necessary to their exercise. Arts. 459, 552 and 1499 C.C. No grant of the alveus is therefore necessarily implied in the conferring of these fishing rights and as none is expressed in the deed to Sir George Stephen none passed by it. Mr. Justice Pelletier conceded that unless the grantee took title to the alveus he acquired merely *un droit d'usage*.

Although the issues raised by the defendant's plea are confined to averments of the non-transferability of the right granted to Sir George Stephen, that that right existed only as against the grantor and does not bind transferees of his property, who took title without reservation, and that it cannot affect them because not duly registered, the argument of counsel for both parties was chiefly addressed to the nature and duration of the right granted to Sir George and both seemed desirous that we should determine these questions with which the provincial courts had dealt. Moreover, one of the *considérants* of the judgment of the Superior Court which declared that the plaintiffs held

a real right or right of property in the nature of a *profit à prendre*

was not explicitly set aside by the judgment of the Court of King's Bench. I say this in explanation of my discussion of an issue not directly raised on the pleadings and perhaps not necessarily involved in the disposition of the present action.

With my brother Mignault, I fear that such confusion and uncertainty as to titles would result from any departure from the construction put upon art. 2172 C.C. by the judgment of the Court of Queen's Bench in *La Banque du Peuple* v. *Laporte* (1), that we should not now hold that renewal of registration of the

(1) 19 L.C. Jur. 66.

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rights asserted by the respondent was required by that article.

Nor does the statute of 1881 (44 & 45 Vict. ch. 16) in my opinion affect it. That Act is intituled,

> An Act to provide for the registration of customary dowers and servitudes in certain cases not provided for by law:

The grant of the right of fishing to Sir George Stephen, because a restricted right of use or usufruct rather than a servitude, is probably not within the Act at all. It is certainly not a real servitude and therefore not within sec. 5 prescribing original registration of real servitudes. Notwithstanding the striking difference of the language in section 7, which has to do with renewal of registration, I cannot but think that it also was intended to deal with real servitudes only. The use of different terms in the same statute to describe the same subject is an all too familiar instance of unskilful draftsmanship.

In my opinion while the judgment maintaining the action should be upheld it should be modified by inserting a declaration that the rights of the respondent will terminate on the death of Lord Mount Stephen.

BRODEUR J.—Il s'agit dans cette cause de savoir si le droit de pêche jusqu'à l'eau médiane dans la Rivière Métapedia vis-à-vis le lot "C" du premier rang de Causapscal est la propriété du défendeur appelant ou du demandeur intimé.

En 1890, Lord Mount Stephen achetait d'un nommé R. A. Blais, qui était alors propriétaire du lot "C" ce droit de pêche. Cet acte de vente était enregistré.

En 1892, il vendait ce droit de pêche au "Restigouche Salmon Club;" et cet acte de vente était également enregistré.

En 1905, le "Restigouche Salmon Club" cédait à son tour plusieurs droits de pêche au "Matamajaw Salmon Club," l'intimé en la présente cause, et entr'autres, les droits de pêche qui avaient été acquis par Lord Mount Stephen vis-à-vis du lot "C."

Ce dernier acte fut enregistré, mais par une erreur assez singulière, la partie de l'acte qui décrivait le droit de pêche du lot "C" ne fut pas transcrite.

Dans l'intervalle, savoir en 1899, le cadastre avait été fait et mis en force dans cette division d'enregistrement suivant les dispositions des articles 2166 et suivants du Code Civil.

Le Club Matamajaw n'a renouvelé l'enregistrement de son titre d'acquisition qu'en juin 1915, c'est à-dire plus d'un an après que le défendeur appelant eût acheté la propriété en question (le lot "C") et eût régulièrement fait enregistrer son titre.

En 1905, savoir plusieurs années après avoir cédé son droit de pêche à Lord Mount Stephen, R. A. Blais faissait cession de ses biens; et ses curateurs vendaient à Madame Blais toute la propriété "C" sans en exclure les droits de pêche; et, en 1914, Mde. Blais vendait à l'appelant en la présente cause la même terre, sans en exclure non plus les droits de pêche. Ces titres étaient régulièrement enregistrés.

Nous avons alors à décider si le défaut de renouvellement de l'enregistrement du titre d'acquisition des droits de pêche fait perdre à l'intimé ces droits au bénéfice du défendeur appelant.

Afin de décider cette question, il faut déterminer quelle est la nature d'un droit de pêche dans un cours d'eau qui, comme la Rivière Métapédia, n'est ni navigable ni flottable.

Le demandeur intimé prétend que c'est un droit de propriété absolu qui peut être aliéné à perpétuité et

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dont il n'est pas nécessaire de renouveler l'enregistrement.

Le défendeur appelant, au contraire, prétend que c'est un droit d'usufruit ou de servitude personnelle qui s'éteint à la mort de l'usufruitier et dont l'enregistrement après la mise en force du cadastre doit être renouvelé.

La Cour Supérieure a maintenu l'action du club, mais n'en a pas accordé cependant toutes les con-, clusions. En effet, il demandait à être déclaré non seulement propriétaire du droit de pêche, mais aussi du lit de la rivière; et il n'a obtenu gain de cause que pour le droit de pêche. Comme il n'y a pas eu d'appel quant à la propriété du lit de la rivière, il y a sur ce point *res judicata.*

La Cour d'Appel n'a pas accepté les motifs du jugement de la Cour Supérieure, mais elle en a tout de même confirmé le dispositif en décidant que le droit de pêche concédé à Lord Mount Stephen était transférable et que le renouvellement de l'enregistrement du titre n'était pas nécessaire. Mais la cour n'a pas cru devoir décider si ce droit de pêche pouvait être transféré à perpétuité ou s'il était simplement viager; ou, en d'autres termes, s'il constituait un droit de propriété ou un droit d'usufruit.

Les juges de la Cour d'Appel étaient évidemment divisés sur ce dernier point; car le regretté Juge-en-Chef, Sir Horace Archambeault, était d'avis que c'était un droit d'usufruit, qu'il était viager, et qu'en conséquence il ne devait subsister que pendant la vie de Lord Mount Stephen. L'Hon. Juge Pelletier était d'opinion, au contraire, que la vente à Lord Mount Stephen était une aliénation de propriété immobilière comportant la cession d'un droit de co-propriété dans le lit de la rivière.

Les autres juges n'ont pas écrit d'opinion sur cette importante question.

J'en suis venu à la conclusion que le droit de pêche est un droit d'usufruit; et, en celà, je concours dans l'opinion exprimée par Sir Horace Archambeault; mais je diffère cependant d'avec lui sur la nécessité du renouvellement de l'enregistrement.

Il m'est alors impossible de me rallier aux vues de l'Honorable Juge Pelletier. D'abord, le demandeur ayant accepté le jugement de la Cour Supérieure sur la question de la propriété du lit de la rivière, et, cette question étant définitivement jugée, la Cour d'Appel ne pouvait plus le déclarer co-propriétaire du lit de la rivière. De plus, les droits d'usufruit, d'usage et d'habitation sur des immeubles donnent à leurs détenteurs le pouvoir d'en recueillir les fruits; et dans l'exercice de ces droits, ils sont obligés de passer sur la propriété. Il ne s'ensuit pas, cependant, qu'ils aient des droits de propriétaire dans la nue-propriété. Demolombe, vol. 9, No. 526. Fuzier Herman, vol. 3, verbo Pêche No. 25.

Une personne qui a le droit de cueillette de certains fruits ou bien le droit de couper du bois dans une forêt a bien des droits d'usufruit ou d'usage; mais ces droits ne sauraient lui donner un titre à la propriété de l'immeuble sur lequel elle a ces droits de cueillette ou de coupe. A raison de cela, je ne puis partager l'opinion de l'honorable Juge Pelletier.

Voici maintenant, suivant moi, les principes qui doivent nous guider dans la décision de cette cause.

Les droits que nous avons sur ou dans une chose se divisent en trois grandes catégories; ou a sur les biens ou un droit de propriété, ou un simple droit de jouissance, ou seulement des servitudes à prétendre (art. 405 C.C.).

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Un immeuble comprend les cours non navigables ni flottables qui les traversent; et s'il est simplement riverain d'un de ces cours d'eau, alors il comprend le lit de ces cours d'eau jusqu'à l'eau médiane (usque ad medium filum aquæ). Ce principe est formellement admis par les parties en cause.

Le droit de propriété d'un immeuble situé sur un de ces cours d'eau comprend par droit d'accession tous les fruits du lit de la rivière (art. 409 C.C.) parmi lesquels se trouvent, suivant moi, le droit de pêche.

Proudhon, au vol. 2 de l'Usufruit, p. 457, après avoir déclaré que les fruits naturels sont ceux que la terre produit spontanément et que le produit des animaux entre dans la même classe, ajoute:—

> Ainsi le produit des ruches à miel, celui d'une garenne, celui d'un colombier, la pêche d'un étang sont également des fruits naturels aux termes de la loi.

Certaines expressions relevées dans les auteurs français ont contribué à créer dans cette cause beaucoup de confusion et une certaine incertitude, parce qu'on n'a pas toujours tenu compte de la législation qui régissait la matière à l'époque où ils écrivaient. Un court résumé de cette législation pourrait nous être utile pour bien comprendre ces auteurs et la portée de leurs expressions.

Avant la révolution française, les seigneurs avaient, en général, sur les cours d'eau non navigables ni flottables, soit un droit de propriété, soit au moins un droit de haute justice. La révolution a supprimé ces droits comme entachés de féodalité (Dalloz, Répertoire Pratique, vbo. Eaux, No. 677). Mais le Code Napoléon, qui devenait en force quelques années plus tard, évitait de dire à qui ces cours d'eau appartiendraient; et alors les auteurs se sont divisés: les uns prétendant que les cours d'eau étaient *res nullius*; d'autres

disant qu'ils appartenaient aux propriétaires riverains; d'autres enfin désignant l'Etat comme propriétaire.

En 1898, on a mis fin à cette différence d'opinion en décrétant que les lits des rivières appartiendraient aux riverains par droit d'accession.

La question était tranchée: mais elle a dans tout le siècle dernier donné lieu à beaucoup de discussions.

Le droit de pêche dans les cours d'eau avait été réglé par la loi de 1829, qui avait décrété qu'il était une dépendance de la propriété riveraine. La situation était assez peu claire. Vous aviez, en effet, le lit de la rivière qui, jusqu'en 1898, était généralement reconnu comme *res nullius*, tandis que le droit de pêche était un accessoire de l'héritage riverain. La situation était plus claire dans la province de Québec comme je le démontrerai plus loin.

Je remarque que l'Honorable Juge de la Cour Supérieure déclare que le droit de pêche doit être considéré comme un droit réel de propriété de la nature du *profit à prendre du sol.*

L'expression *profit à prendre* du droit anglais ne se trouve pas dans nos lois et il est toujours dangereux de recourir à une législation étrangère pour déterminer les principes de notre propre législation. D'ailleurs, le *profit à prendre* du droit anglais serait une servitude (Halsbury, vol. 11, p. 336) et l'enregistrement d'une servitude, ainsi que son renouvellement, sont requis par nos lois. Il vaut donc mieux alors se baser sur notre jurisprudence et notre loi dans les cas surtout où les lois étrangères sont différentes. Voyons notre loi.

Cette question de savoir si les lits des rivières non-navigables appartenaient aux propriétaires riverains avait été tranchée dans la province de Québec par la décision de la Cour Seigneuriale qui avait déclaré que

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les héritages bordant les cours d'eau non-navigables ni flottables s'étendaient jusqu'au milieu de ces cours d'eau. Questions 28 et 30.

Dans une cause de *Boswell* v. *Denis*, jugée par la Cour d'Appel en 1859 (1), il avait été décidé que les rivières non-navigables et non-flottables sont la propriété privée des propriétaires riverains et que ces derniers ont le droit exclusif d'y faire la pêche. Vide *Tanguay* v. *The Canadian Electric Light Co.* (2); *McLaren* v. *Attorney-General* (3).

Ces décisions consacrent le principe que le propriétaire d'un immeuble riverain est en même temps le propriétaire du lit de la rivière; et, comme accessoire, en tant que propriétaire du lit de la rivière, il a la propriété du dessus et du dessous (arts. 409 & 414 C.C.) et a droit aux fruits qui s'y trouvent, et notamment au poisson. Il pourrait vendre et aliéner le lit de la rivière; et alors le droit de pêche, comme accessoire, passerait à l'acquéreur. Ce serait là une aliénation à perpétuité.

Mais si, comme dans le cas actuel, il ne concéde que le droit de pêche, alors il ne dispose que d'un droit accessoire, que d'une partie des fruits que la propriété produit; mais il demeure toujours propriétaire du fonds. C'est un droit d'usufruit qu'il cède à un tiers; et ce dernier doit en jouir conformément aux droits des usufruitiers.

A ce sujet une question se présente de savoir si un usufruit peut toujours durer.

L'usufruit est le droit de jouir d'une chose dont un autre a la propriété. Il n'y a pas de doute que, dans l'ancien droit français et sous le Code Napoléon, l'usufruit prend fin par la mort de l'usufruitier.

(1) 10 L.C.R. 294. (2) 40 Can. S.C.R. 1.
(3) [1914] A.C. 258; 15 D.L.R. 855.

Nos codificateurs nous déclarent qu'ils ont suivi l'ancienne jurisprudence française et les règles adoptées par le Code Napoléon (DeLorimier, vol 3. p. 584); et ils nous renvoient pour l'étude des principes qui gouvernent cette matière à Marcadé, aux Pandectes françaises et à Maleville.

Ces auteurs nous enseignent comme principe élémentaire que l'usufruit est essentiellement temporaire.

Marcadé, au volume 2, no. 545, p. 529, dit:—

L'usufruit finit souvent avant la mort naturelle de l'usufruitier; mais il ne peut jamais durer audelà et ne peut pas être transmissible aux héritiers de cet usufruitier. C'est qu'en effet l'usufruit anéantissant pendant sa durée la propriété du bien * * * ne pouvait pas être permis perpétuellement ou pour une trop longue durée. En conséquence, le Code, conformément aux principes de l'ancienne jurisprudence et du droit romain, ne l'autorise que pour la durée de la vie de l'usufruitier; et l'usufruit qu'on aurait constitué pour une personne et ses héritiers n'en serait pas moins restreint à la vie de cette personne.

Nos codificateurs, en rédigeant l'article 479 C.C., se sont guidés sur le Code Napoléon; mais il ont ajouté trois mots qui ont donné lieu à une divergence d'opinion.

Le Code Napoléon dit (art. 617):—

L'usufruit s'éteint par la mort naturelle et par la mort civile de l'usufruitier; par l'expiration du temps pour lequel il a été accordé.

Le Code civil de Québec dit (art. 479):—

L'usufruit s'éteint par la mort naturelle de l'usufruitier *s'il est viager*; par l'expiration du temps pour lequel il a été accordé. * * *

Ces mots "*s'il est viager*" ne veulent pas dire que l'usufruit est perpétuel s'il n'y a pas de date fixée, car cela serait absolument contraire à la nature de l'usufruit. Mais les codificateurs ont probablement eu en vue la discussion qui se faisait alors en France sur la portée du Code Napoléon quant au droit du créateur de l'usufruit de fixer une date qui dépasserait la vie de l'usufruitier. Mais je crains que l'addition des mots

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"s'il est viager" n'ait pas rendu la situation plus claire. De fait, les commentateurs de notre Code sont également partagés d'opinion. Langelier, vol. 2, p. 228 et Mignault, vol. 2, p. 624. Ces commentateurs sont cependant unanimes à dire que s'il n'y a pas de temps de fixé pour la durée de l'usufruit, il s'éteint à la mort de l'usufruitier.

Suivant mon opinion, le droit de pêche accordé à Lord Mount Stephen étant un droit d'usufruit ne doit pas dépasser sa vie. Il en serait autrement si le lit de la rivière avait été vendu en même temps. S'il y avait eu un terme stipulé, la question pourrait se présenter de savoir s'il durerait même après sa mort, pourvu que le terme ne fût pas expiré. Il n'est pas nécessaire de décider ce point parce qu'il ne se présente pas. La référence dans le contrat à ses représentants légaux ne saurait avoir pour effet de rendre l'usufruit perpétuel, vu que ce serait une stipulation contraire aux principes élémentaires qui régissent la matière. Marcadé, vol. 2, p. 524.

Le droit de pêche étant un droit d'usufruit accessoire du lit de la rivière, il s'ensuit qu'il ne peut être perpétuel; et dans le cas actuel il s'éteindra au décès de l'usufruitier.

Mais je vais plus loin; et je suis d'opinion que ce droit ne peut pas être invoqué contre l'appelant parce que l'enregistrement de l'acte d'acquisition n'a pas été renouvelé.

Pothier, Edition Bugnet, vol. 1, p. 312, dit:—

> Il y a deux principales espèces de servitudes; les personnelles et les réelles.
>
> Les droits de servitudes personnelles sont ceux qui sont attachés à la personne à qui la servitude est due, et pour l'utilité de laquelle elle a été constitutée, et finissent par conséquent avec elle. Les droits de servitudes réelles qu'on appelle aussi servitudes prédiales sont ceux qu'a le propriétaire d'un héritage sur un héritage voisin, pour la commodité du sien. On les appelle réelles ou prédiales parce qu'étant

établies pour la commodité d'un héritage, c'est plutôt à l'héritage qu'elles sont dues qu'à la personne.

Les servitudes personnelles requièrent et une personne pour en jouir et un fonds servant. Dans le cas de servitudes réelles il faut et un fonds dominant et un fonds servant (art. 499 C.C.).

Je me fais concéder le droit de passer sur une propriété sans que j'aie de propriété dans le voisinage; c'est là une servitude personnelle. Je suis propriétaire d'une terre et pour l'exploiter j'ai besoin de passer chez mon voisin; c'est là une servitude réelle, parceque mon fonds devient le fonds dominant; et comme la servitude est établie pour son usage, il devient perpétuel sans enregistrement dans le cas où il serait apparent (2116a C.C.).

Notre code ne parle pas des servitudes personnelles. Il a été entrainé dans cette voie à la suite des rédacteurs du Code Napoléon qui, au sortir de la révolution; n'osaient pas mentionner le nom de servitudes personnelles.

Tout de même, les servitudes personnelles existent dans notre droit, comme elles ont continué d'exister dans le droit français; et parmi ces servitudes personnelles se trouvent les droits d'usufruit, d'usage et d'habitation.

Baudry Lacantinerie, après avoir dit qu'il y a deux espèces de servitudes, les réelles et les personnelles, dit au No. 431, Des Biens:—

La servitude personnelle est celle qui existe sur une chose au profit d'une personne déterminée. Attachée à la personne elle meurt avec elle et parfois avant elle. La servitude personnelle est donc temporaire. . . . La servitude réelle est celle qui existe sur un fonds au profit d'un autre fonds. La servitude réelle crée un rapport entre deux fonds, aussi de sa nature est-elle perpétuelle comme les fonds dont elle est inhérente.

[Notre code indique trois servitudes personnelles: l'usufruit, l'usage et l'habitation.]

Au No. 1070, il dit:—

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En pratique, la difficulté s'est élevée à l'occasion des droits de chasse et de pêche.

Ces droits peuvent, sans aucun doute, être établis comme droits personnels et faire l'objet d'un bail; c'est même l'hypothèse la plus habituelle. Mais rien n'empêche, croyons-nous, de les consentir comme servitudes personnelles, et à titre d'usages restreints.

Laurent, au vol. 7, no. 147, dit:—

Il ne peut y avoir d'autres servitudes personnelles que celles que le Code maintient sous le titre d'usufruit, d'usage et d'habitation.

Aubry & Rau, 5ème édition, vol. 3, p. 110; Duranton, vol. 4, p. 292; Pardessus, vol. ler, no. 11; Demolombe, vol. 9, p. 626; Marcadé, art. 686, Nos. 1 & 2; Toullier, vol. 3, No. 382, énoncent tous le même principe.

Ces servitudes personnelles d'usufruit, d'usage et d'habitation doivent-elles être enregistrées, et leur enregistrement doit-il être renouvelé?

Par l'article 2172 C.C., il est déclaré que l'enregistrement de tout droit réel sur un lot de terre doit être renouvelé après la mise en force du cadastre. La Cour d'Appel en 1874 a décidé dans une cause de *La Banque du Peuple* v. *Laporte* (1) —

That the renewal of registration of any real right required by art. 2172 of the Civil Code has reference only to hypothecs or charges on real property and not to the rights in or to the property itself.

Cette cause avait été décidée par une majorité de la Cour seulement et elle n'a pas paru avoir été accueillie bien favorablement, car on voit qu'on a refusé de la suivre dans les causes de *Poitras* v. *Lalonde* (2), et de *Despins* v. *Deneau* (3).

La égislature est elle-même intervenue en 1881 pour déclarer que l'enregistrement des servitudes réelles, contractuelles, discontinues et apparentes devrait être renouvelé. Statuts de Québec, 44 & 45 Vict. ch. 16, sec. 15. Dans la section 7 du même statut, on a

(1) 19 L.C. Jur. p. 66. (2) 11 R.L. p. 356.
(3) 32 L.C. Jur. p. 261.

décrété formellement que dans les deux ans de la mise en force du cadastre et dans les deux ans de l'adoption de cette loi, l'enregistrement de toute servitude conventionnelle doit être fait et renouvelé.

La disposition de l'article 5 de ce statut de 1881 a été incorporé dans le Code Civil par les Commissaires de la Refonte des Statuts en 1888 et forme maintenant l'article 2116a C.C. La section 7 qui avait trait à la servitude conventionnelle n'a pas été reproduite dans le code. Mais par contre elle n'a jamais été rappelée et elle est encore en force (S.R. Québec, 1888, Appendice A. p. X).

Toute servitude conventionnelle doit donc être enregistrée et on doit en faire le renouvellement lorsque le cadastre devient en force.

Il était donc du devoir de Lord Mount Stephen ou du club intimé de renouveler l'enregistrement de son droit de pêche. Alors Duchaine, qui a un titre valable à toute la propriété lot "C" peut invoquer ce défaut de renouvellement et réclamer qu'il est propriétaire de toute la propriété, y compris le droit de pêche ou le droit d'usufruit qui avait été originairement cédé à Lord Mount Stephen.

L'appelant doit donc réussir à faire renvoyer l'action du demandeur intimé.

Son appel devrait être maintenu avec dépens de cette cour et des cours inférieures.

MIGNAULT J.—This appeal raises very important questions of law which have received my most serious consideration. A short statement of the facts concerning which there is no dispute, will be more intelligible if presented in chronological order.

By a writing dated the 22nd April, 1889, Joseph Pinault sold to Rodolphe Alexandre Blais

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tous les droits, titres, intérêts et réclamations qu'il a et peut prétendre tant en loi qu'en équité, ou qui pourraient lui écheoir et appartenir à l'avenir dans et sur tout le terrain ci-après désigné, situé dans le comté de Rimouski, contenant en superficie 90 acres, plus ou moins, et consistant en le lot lettre "C" dans le premier rang du canton Causapscal.

This lot "C" fronts for a distance of four or five acres on the Metapedia river, admitted to be a non-navigable and non-floatable river, and it is common ground between the parties that, under the law of the Province of Quebec, the title of the owner of this lot extends to the centre of the stream.

On 6th September, 1890, Blais and Sir George Stephen, Baronet (now Lord Mount Stephen), entered into a deed of exchange before Napoléon Michaud, notary, whereby, in exchange for a certain piece of land, Blais ceded to Sir George Stephen

tous les droits de pêche dans la rivière Métapédia vis-à-vis le lot du cédant, situé au premier rang du canton Causapscal et connu sous la lettre "C," tel qu'il appert au plan de John Hill, Ecr., arpenteur, lequel reconnu véritable par les parties et signé d'elles et de nous dit notaire *ne varietur* reste annexé aux présentes pour en faire partie et y avoir recours en tout cas de besoin, avec droit par le dit Sir George Stephen de passer sur le dit lot, tant à pied qu'en voitures, pour l'exercise du dit droit de pêche.

At the close of this deed of exchange it is stated:

Au moyen de quoi les parties se dessaisissent respectivement de ce que dessus par elles cédé en échange et contre-échange en s'en saisissant réciproquement, ainsi que leurs représentants légaux.

It should be observed, however, that this general clause does not really add anything to the rights of the parties under this deed, for they must be held to have stipulated for themselves, their heirs and legal representatives, unless the contrary is expressed, or results from the nature of the contract (art. 1030 C.C.). Whether the rights in question would go to the heirs of Sir George Stephen, in other words, whether their duration is restricted of the li e of Sir George Stephen, is the principal question invo ved under this appeal.

This deed of exchange was duly registered on the 1st October, 1890.

By deed passed before M. de M. Marler, notary, on the 3rd March, 1892, and duly registered on the 20th March, 1892, Lord Mount Stephen sold to the Restigouche Salmon Club, a body politic and corporate, among other things:—

> All the fishing rights in the said river Metapedia opposite the lot letter "C" in the first range of the township of Causapscal and the rights of passage over said lot acquired by the vendor under a deed of exchange between him and Rodolphe-Alexandre Blais, passed before N. Michaud, notary, on the 6th of September, 1890, registered in the said registry office on the 1st of October following, under No. 3918.

By indenture made in duplicate on the 31st May, 1905, the Restigouche Salmon Club sold to the Matamajaw Salmon Club Ltd., the respondent, among other things, the above described fishing rights, the sale being made without warranty of any kind, the purchaser accepting the lands, property, fishing rights and rights of way, easements, privileges and franchises at its own risk and without recourse against the vendor for restitution of money for any cause.

This deed was registered on the 6th November, 1905, but in transcribing it the clause relating to the fishing rights opposite lot "C" was omitted, although the deed itself was entered in the index to the immovables. The Restigouche Salmon Club having—to satisfy a requirement of its charter—obtained the approval of the Lieutenant-Governor of the Province of Quebec in Council of its purchase of the fishing rights from Lord Mount Stephen, entered into a deed with the respondent, dated 10th June, 1915, J. A. Dorais, notary, whereby it confirmed its sale to the respondent of 31st May, 1905, and so far as necessary sold these rights to the respondent. This deed was duly registered on 16th June, 1915.

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Prior to the last mentioned deed, Rodolphe Alexandre Blais had become insolvent, and Messrs. Lefaivre & Taschereau had been appointed curators to his estate, and on the 30th December, 1905, the curators sold with judicial authority, by deed passed before M. P. Laberge, notary, to Dame Laura Brochu, widow of Raoul Mathias Blais, among other properties, lot "C" du cadastre officiel du rang sud du canton de Causapscal, tel que le tout est actuellement, circonstances et dependances, mais sauf les parties déjà alienées par baux emphytéotiques ou autrement avant la faillite du dit R. A. Blais.

This deed was registered on the 27th January, 1906.

On 25th April, 1914, by deed before the same notary, the appellant, described as being a farmer residing in the parish of Saint Gédéon du Lac Saint Jean, purchased from Mrs. Blais the above mentioned lot "C,"

mais sauf la partie de la dite terre déjà vendue à Joseph Brassard et les parties louées à Xavier Bacon, Joseph Simard, N. Fiché et fils et un nommé Benoit et leurs représentants.

It does not appear whether these parts of lot "C" were those described in the deed to Mrs. Blais as

les parties déjà aliénées par baux emphytéotiques ou autrement avant la faillite du dit R. A. Blais,

nor does it appear what emphyteutic leases had been granted. The appellant alleges that this deed was registered on 2nd June, 1914.

The appellant, having by a protest served on the respondent on 15th June, 1916, disputed the latter's right to fish opposite his property, the respondent instituted this action against the appellant praying for a declaration that the respondent is the sole legal and lawful proprietor of all that part of the Metapedia river that fronts upon and flows on, over and opposite lot "C," and of the bed thereof, which forms part of

said lot, and for a declaration that the respondent is the owner of the fishing rights therein and that the appellant be condemned to give up the possession thereof to the respondent.

The appellant contested this action, alleging that Sir George Stephen had acquired no more than a personal servitude, not assignable, and which could only be set up against R. A. Blais. He admitted that he had fished and allowed others to fish opposite his lot, but asserted that he had the right to do so, being the owner of the bed of the stream to the middle thereof. He also claimed that the respondent's title could not be set up against him for want of proper registration and also because its registration had not been renewed since the official cadastre came in force.

The evidence shews that there is a valuable salmon pool in the Metapedia river opposite lot "C." The membership of the respondent's club is restricted to ten members, but each member has the right to bring one guest. The fishing lasts continuously from 1st June to 15th August.

The Superior Court (Mr. Justice Roy) maintained the respondent's action, holding that the fishing rights acquired by Sir George Stephen were real rights and rights of ownership

de la nature d'un profit à prendre du sol sur lequel coulent les eaux.

The learned judge also holds that the registration of the respondent's title did not require renewal after the official cadastre came into force, and that the sale from Sir George Stephen to the Restigouche Salmon Club had been properly registered. The judgment, therefore, grants the prayer of the respondent that it be declared owner of the fishing rights in the river Metapedia opposite lot "C" and condemns the appel-

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lant to restore the possession of these rights to the respondent, with costs.

On an appeal by the appellants to the Court of King's Bench, the latter court confirmed the judgment of the Superior Court for the reason that the fishing rights sold by Blais to Sir George Stephen were assignable, that the deeds of sale by the latter to the Restigouche Salmon Club, and by that club to the respondent, were legal and valid contracts, and transferred the said fishing rights to the Restigouche Salmon Club and to the respondent, and that the registration of these deeds of sale did not require to be renewed after the official cadastre was put in force in this registration division.

I have carefully read and considered the learned and elaborate opinions of Mr. Justice Roy in the trial court and of Mr. Justice Pelletier and Sir Horace Archambault Chief Justice in the Court of King's Bench.

Mr. Justice Roy, as I have said, held that the fishing rights in question were real rights and rights of ownership

de la nature d'un profit à prendre du sol sur lequel coulent les eaux.

May I say, with deference, that, notwithstanding its French name, there is nothing similar, in the law of the Province of Quebec, to the *profit à prendre* of the common law of England, which is defined as the right to take something off the land of another person, or the right to enter the land of another person and to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right. It is considered as an interest in land and may be created for an estate in perpetuity. Halsbury, Laws of England, verbis Easements and Profits à Prendre, Nos. 656, 665, 667.

May I add that the use of such a term, in connection

with a controversy arising under the law of Quebec, is confusing even though it may be thought that there is a certain analogy between one right and another. There are, of course, real servitudes in the Quebec law, but they can be granted only in favour of an immovable and not of a person, and whether the right acquired by Sir George Stephen could or could not be considered as a *profit à prendre* under the law of England, it is certain that it is not a real servitude under the Quebec law. To assimilate it, therefore, to the *profit à prendre* is, to say the least, misleading.

Art. 405 of the Civil Code describes the rights which can be acquired with regard to property in the Province of Quebec.

> 405. A person may have on property, either a right of ownership, or a simple right of enjoyment, or a servitude to exercise.

The right acquired by Sir George Stephen must be brought under one of these three heads. I am of the opinion that it is not a right of ownership. Sir George Stephen purchased no part of the river bed, although he could, no doubt, make use of it in so far as necessary for the exercise of his right of fishing, but this is a mere right of enjoyment. He did not acquire a right of servitude, by which art. 405 means a real servitude, for that is

> a charge imposed on one real estate for the benefit of another belonging to a different proprietor (art. 499 C.C.).

The only remaining real right (*jus in re*) which he could acquire is the right of enjoyment, and this is the very most that can be found in his title.

I am not unmindful of the fact that Sir George Stephen and his assigns have the right to pass over lot "C" for the exercise of their fishing rights. But this is a mere accessory of the latter rights, and is not a real servitude, for it is a right acquired by a person and not by an immovable, and thus does not come

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within the definition of art. 499 C.C. for want of a dominant property.

In the Court of King's Bench, Mr. Justice Pelletier expressed the opinion that Sir George Stephen acquired from Blais a sort of co-ownership with the latter in the river bed, because the fishing rights could not be exercised without using the bed of the river, but the answer seems to be that Sir George Stephen could use the river bed by virtue of the right of enjoyment granted him, so that it is not necessary to treat him as being a co-owner with Blais.

Chief Justice Archambault, on the contrary, expressed the opinion that what Sir George Stephen acquired was a right of usufruct. This would bring it under the second species of rights mentioned by art. 405 C.C., the right of enjoyment, and I agree that this wide term, right of enjoyment, would comprise any right obtained by Sir George Stephen, which, of course, excludes the right of ownership on the one hand and the right of real servitude on the other. The grant to a person of fishing rights in a non-navigable and non-floatable stream, by a riparian owner whose title extends to the centre of the stream, confers, under the authorities, a restricted right of use or usufruct (Baudry Lacantinerie, Biens, No. 1074; Pandectes Françaises, verbis Pêche Fluviale, No. 131; Fuzier Herman, verbis Pêche Fluviale, Nos. 114, 115, 118; Aubry et Rau, 5 ed., vol. 3, p. 110), which Demolombe (vol. 12. No. 686) calls "un usage irrégulier," but such a right is not and cannot be a real servitude. (See the same authors and an interesting decision, with regard to hunting rights, of La Cour de Cassation in Sirey, 1891, 1, 489; Dalloz, 1891, 1, 89, with special reference to the "rapport" of conseiller Sallantin and the "conclusions" of the avocat général Reynaud contained in the judg-

ment.) There is no doubt that a right of usufruct can be restricted to certain fruits or products of a property by the title granting it (Demolombe, vol. 10, No. 265).

But the important question that dominates the whole controversy, and which was argued at great length at the hearing by both parties is this: Granting that Sir George Stephen acquired a right of enjoyment or of usufruct, will this right last beyond the life of Sir George Stephen? A further question is whether this right is one that could be assigned.

I have no doubt that it was an assignable right, for a right of enjoyment, other than the right of use and habitation (arts. 494 and 497 C.C.), can be assigned to others. See art. 457 C.C. for usufruct and art. 1638 C.C. as to the contract of lease.

But I am equally convinced that it was essentially a temporary right, for the right of enjoyment, as distinguished from the right of ownership or the right of real servitude, cannot be granted in perpetuity.

If we take the type and the most important form of the right of enjoyment, the right of usufruct, it is entirely elementary to say that it is essentially a temporary right, and if no other term be specified, it ends at the death of the usufructuary.

Art. 479 C.C. says:—

> Usufruct ends with the natural death of the usufructuary, if for life; by the expiration of the time for which it was granted. * * *

The words "if for life" do not mean that unless the usufruct be created for the life of the usufructuary, it will last for ever. The Code evidently contemplates that the usufruct may be created for life or for a term. In the former case, it ends with the life of the usufructuary, in the latter case, on the expiration of the term, and the reasonable construction of this article is

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that if no term for its duration be fixed, usufruct ends with the life of the usufructuary.

This is shewn by art. 481 C.C. which states:—

A usufruct which is granted without a term to a corporation only lasts thirty years.

The reason for this is evident. A corporation has generally a perpetual existence and succession (art. 352 C.C.), and therefore the law fixes a term in the silence of the contract for the duration of the usufruct.

Where it is granted to a person, then unless a term be expressly stipulated, and it cannot be stipulated in perpetuity, the usufruct does not extend beyond the life of the usufructuary.

The whole policy of the law is against the indefinite duration of such a right.

Toullier, one of the earliest commentators of the Code Napoléon, says, in his second volume, No. 445:—

Si l'usufruit pouvait être pour toujours séparé de la propriété, elle ne serait plus qu'un vain nom, et deviendrait parfaitement inutile. On a donc voulu qu'il ne pût être perpétuel, et qu'il s'éteignît par divers moyens, les uns tirés de la nature des choses, les autres de la disposition de la loi.

And Huc, one of the most recent of the commentators, gives the reason why all rights of enjoyment are necessarily temporary.

Tout démembrement de la propriété portant sur le *jus utendi* et le *jus fruendi* est essentiellement temporaire, car s'il était perpétuel il serait destructif du droit lui-même de propriété, ainsi réduit à n'être qu'un vain mot. Commentaire du Code Civil, vol. 4, No. 240.

This has always been the law, and from the time of Rome, the institutes of Justinian declaring expressly *finitur autem usufructus morte usufructuarii.*

Pothier, in his treatise on Dower, No. 247, says:—

L'usufruit de la douairière s'éteint par toutes les manières dont s'éteint celui de tous les autres usufruitiers.

1o. Il s'éteint par la mort naturelle de la douairière: finitur usufructus morte usufructuarii. Inst. tit. de Usufr., s. 4.

Also Guyot, Répertoire, Vo. Usufruit, vol. 17, p. 402:—

> La propriété ne serait qu'un vain nom et qu'un droit illusoire, si elle était toujours séparée de l'usufruit; les lois ont prévénu cet inconvénient, en attribuant à plusieurs causes l'effet de les réunir et de les consolider.
>
> La première est la mort de l'usufruitier.

My conclusions, therefore, on this branch of the case are:—

1. That Sir George Stephen acquired under the deed from Blais no rights of ownership over the bed of the river.

2. That he did not acquire a servitude over the bed of the river, nor did he even get a real servitude of passage over any part of lot C.

3. That he obtained from Blais a right of enjoyment or usufruct, which right will come to an end when he dies.

The mere sale of fishing rights, or of hunting rights, confers no title to the river bed or land where these rights are exercised, but only the right to use the same for the purpose of fishing or hunting, which is nothing more than a right of enjoyment, and therefore essentially temporary in nature.

So far, therefore, as the respondent's action merely claims the right to fish and seeks to prevent the appellant from interfering with this right, its action is, in my opinion, well founded, but the appellant's right to resume full possession of the river and its bed opposite lot "C" at the death of Lord Mount Stephen should be carefully safeguarded, which was not done in the courts below.

I have not yet dealt with the defence of the appellant based on the alleged lack of proper registration of the sale from the Restigouche Salmon Club to the respondent in 1905, and on the failure of the latter to

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renew the registration after the official cadastre was put in force.

I am, however, of the opinion that this defence fails. The imperfect registration of the respondent's title from the Restigouche Salmon Club is immaterial, because, long before the appellant purchased lot "C," the sale from Lord Mount Stephen to the Restigouche Club was duly registered, and the respondent is entitled to avail himself of this registration as against the appellant.

And as to the failure to renew the registration, it suffices to say that ever since the decision, in 1874, of the Court of Appeal in the case of *La Banque du Peuple* v. *Laporte* (1), it is settled law in the Province of Quebec that the renewal of registration of any real right, required by art. 2172 of the Civil Code, has reference only to hypothecs or charges on real property and not to rights in or to the property itself.

The appellant has referred us to a statute passed by the Quebec Legislature in 1881, 44 & 45 Vict., ch. 16, which requires the registration of customary dowers created before the Civil Code came into force and of real, discontinuous and unapparent servitudes. He especially insists on section 7 of the statute ordering the renewal of the registration of conventional servitudes affecting any lot of land.

It seems to me sufficient to answer that the right acquired by Sir George Stephen was not a conventional servitude but a right of enjoyment, as to which right no question of the necessity of renewal of registration can arise in view of the decision in the case of *La Banque du Peuple* v. *Laporte* (1). To dispute now the authority of *La Banque du Peuple* v. *Laporte* (1), which,

(1) 19 L.C. Jur. 66.

as I have said, is settled law in Quebec, would imperil a great number of vested rights which rest on the authority of this decision. The statute of 1881 is, therefore, without application in this case, and I do not feel called upon to express any opinion as to the construction of section 7.

On the whole, my opinion is that the appeal should be allowed to the extent of declaring in the judgment that the fishing rights now exercised by the respondent in the Metapedia river, between the middle of the stream and lot "C," in the first range of the township of Causapscal, and also the right of passage over lot "C," will come to an end at the death of Sir George Stephen, now Lord Mount Stephen. As this was the principal question discussed before this court, I would give the appellant his costs here. I would also give him his costs before the Court of King's Bench, because he was right in appealing from the judgment of the Superior Court, the latter judgment treating the fishing rights as being rights of ownership. In the Superior Court, I think the appellant should pay the respondent's costs for the reason that he illegally interfered with the respondent's fishing rights, and thus forced the latter to take proceedings against him.

CASSELS J. (dissenting).—I have carefully considered the reasons for judgment of the trial judge and the reasons for judgment of Mr. Justice Pelletier and the other judges in the Court of King's Bench.

I have also had the benefit of a perusal of the opinions of my brother judges, Mr. Justice Brodeur and Mr. Justice Mignault.

The case is of such importance that I have deemed it necessary to give extra consideration to it. A num-

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ber of titles to valuable properties are dependent upon the decision to be arrived at in this case.

With considerable diffidence, having regard to the knowledge of the French law possessed by my learned brothers from the Province of Quebec, I have come to the conclusion that the judgment in the court below should not be disturbed.

Mr. Justice Mignault, in very carefully prepared reasons, has set out in a clear manner the facts of the case. It is unnecessary for me to repeat them.

I have come to the conclusion that the reasons of Mr. Justice Pelletier in the court below are correct and I agree with the conclusions he has arrived at.

The owner of the lots has title to the bed of the river to the middle of the stream. The river is neither navigable nor floatable. This, I think, is beyond question having regard to the present state of the law in the Province of Quebec.

I think also there is no question as to the right of the owner of the bed of the river to separate the right of fishing from the right of the soil. The law of the Province of Quebec in this respect is similar to the English law. In the reasons for judgment of the trial judge, the language of Sir W. J. Ritchie, of Sir Henry Strong and of Gwynne J., in the case of *The Queen* v. *Robertson* (1) are quoted.

The late Chief Justice Sir W. J. Ritchie, at p. 115, states:—

> A right to catch fish is a profit *à prendre*, subject no doubt to the free use of the river as a highway and to the private rights of others.

He states, at p. 124:

> Unquestionably the right of fishing may be in one person and the property in the bank and soil of a river in another.

Sir Henry Strong puts it as follows at p. 131:—

> It results from the proprietorship of the riparian owner of the soil in the bed of the river that he has the exclusive right of fishing in so

(1) 6 Can. S.C.R. 52.

much of the bed of the river as belongs to him, and this is not a riparian right in the nature of an easement but is strictly a right of property.

Gwynne J. states at p. 68:—

The right of fishing, then, in rivers above the ebb and flow of the tide, may exist as a right incident upon the ownership of the soil or bed of the river, or as a right wholly distinct from such ownership, and so the ownership of the bed of a river may be in one person, and the right of fishing in the waters covering that bed may be wholly in another or others.

The late case *The Attorney-General for British Columbia* v. *Attorney-General for Canada,* decided by the Privy Council (1) is to the same effect.

In the Lower Canada Reports of Seigniorial question, vol. A, at p. 69a, is the answer to the following question:—

On seigniories bounded by a navigable river can the seignior legally reserve the right of fishing therein?

The answer of the court is as follows:—

On seigniories bounded by a navigable river or stream the seignior could have reserved to himself the right of fishing therein.

I find no difference between the law of the Province of Quebec and the law of England in this respect. I am quite in accord with the view of my brother judges that when a question has to be decided arising in the Province of Quebec and governed by the laws of the Province of Quebec such a case should be decided by the laws of that province; but I fail to see why the decisions of the courts of England or of the United States should not be referred to as guides to arriving at the correct interpretation of such laws.

The reasons for judgment of Mr. Justice Pelletier are so clear and the citations of authorities both in the judgments of the trial judge and of Mr. Justice Pelletier so ample that it would be a mere repetition to repeat what these learned judges have so clearly expressed.

(1) [1914] A.C. 153; 15 D.L.R. 308.

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It is conceded that the grant to Sir George Stephen was not a mere personal grant. All agreed that the grant extended at all events to the life of Lord Mount Stephen.

It is not a personal right, it is a right capable of assignment.

The point in litigation is whether or not this right is a mere right of usufruct terminable on the death of Lord Mount Stephen or whether it is an estate vested in him and his heirs capable of transmission. I agree with Mr. Justice Pelletier that the estate is not one in usufruct but that it is a conveyance of property. I also agree with him that the exclusive right of fishing carried with it the right to the soil or bed of the river during the term of the fishing season.

I refer to one or two additional authorities in support of this proposition.

The case of *Tinicum Fishing Co.* v. *Carter* (1), was decided by the Supreme Court of Pennsylvania. It is stated:—

> That a fishing-place may be granted, separate from the soil, may be considered as settled in this State.

On page 39, the following statement of the law occurs:—

> If the easement consists in a right of profit à prendre, such as taking soil, gravel, minerals and the like from another's land, it is so far of the character of an estate or interest in the land itself that if granted to one in gross, it is treated as an estate and may therefore be for life or inheritance.
>
> * * *
>
> A right to take fish is a *profit à prendre in alieno solo.* It requires for its use and enjoyment exclusive occupancy during the period of fishing. It implies the right to fix stakes or capstans for the purpose of drawing the seine and the occupancy of the bank at high tide as well as the space between high and low water marks as far as may be necessary and usual. The grantee in the nature of things must have exclusive possession for the time he is fishing and for that purpose; the grantor at all other times and for all other purposes.

(1) 61 Penn. St. 21, at p. 38.

And in Massachusetts, in the Supreme Court, a case of *Goodrich* v. *Burbank* (1), deals with the question. The judgment of the court is as follows:—

In the case of rights of *profit à prendre* it seems to be held uniformly that, if enjoyed in connection with a certain estate, they are regarded as easements appurtenent thereto, but if granted to one in gross they are treated as an estate or interest in land, and may be assignable or inheritable.

In *Muskett* v. *Hill* (2) it is pointed out

that a right to hunt and carry away game is a grant and held to be an assignable right.

So in Brooms' Legal Maxims, 8th ed. (1911), p. 367, it is stated:—

That by the grant of fishing in a river is granted power to come upon the banks and fish for them.

Citing Shep. Touch. p. 98.

I refer to those authorities in addition to the authorities cited in the courts bleow as confirming the propositions mentioned by Mr. Justice Pelletier in his reasoned judgment.

I think the question of whether *profit à prendre* is known to the law of the Province of Quebec or not is a mere question of language. The fact exists that the right in this particular case, by whatever name you choose to call it, is a right of property. It is a right that passed by the grant and became vested in Sir George Stephen and his heirs and assigns as a right of property and not a mere right of enjoyment.

It has always been held that a right granted by the King of France to the seigniors in Lower Canada of fishing in the St. Lawrence was something greater than a mere right during the lifetime of the seignior.

A number of valuable rights have been granted in the River St. Lawrence. It has never been doubted that these rights extended beyond the life of the

(1) 12 Allen (Mass.) 459, at p. 461. (2) 5 Bing. N.C. 694.

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seignior, nevertheless it never could be suggested that the soil of the river was vested in the seignior. If the decision of this court is to the effect that the granting of the fishing rights in question to Lord Mount Stephen is a mere right of personal enjoyment during the life of Lord Mount Stephen, by reason of its being only a right of usufruct, a number of rights which have heretofore never been questioned would be destroyed.

I am unable to arrive at such a conclusion as I have stated. I am of opinion the right in question is not one of usufruct but one of property and capable of being transmitted.

I think the judgment of the court below should not be interfered with. This appeal should be dismissed and with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Charles Angers.*
Solicitor for the respondent: *John Hall Kelly.*

CLAUDE L. DE VALL (PLAINTIFF).... APPELLANT;

AND

GORMAN, CLANCEY & GRINDLEY LIMITED (DEFENDANT)..... } RESPONDENT.

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*Feb. 11, 12.
*Mar. 3.

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

Contract—Deceit—Ingredients of—Finding of trial judge—Principal and agent—Total purchase-price paid into bank—Right of agent to money.

A finding by the trial judge, that "the misrepresentations as to condition and capacity" of a log-hauler "which induced the plaintiff to purchase were at least made with reckless carelessness as to their truth" is a finding of fraud sufficient to sustain an action of deceit; and such finding brings this case within the rule laid down in *Derry* v. *Peek*, (14 App. Cas. 337). Brodeur J. dissenting.

G., as agent of C., sold to D. a log-hauler for $750 more than the price fixed by C.—D. deposited the total purchase-price in a bank to be paid to C. who disclaimed all right to the $750.

Held, that the $750 were the property of D. Brodeur J. dissenting.

Judgment of the Appellate Division, 13 Alta. L.R. 557; 42 D.L.R. 573; [1918], 3 W.W.R. 221, reversed. Brodeur J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing in part the judgment of the trial judge, Ives J., and dismissing the plaintiff's action.

The material facts of the case are fully stated in the judgments now reported.

C. C. McCaul K.C. for the appellant.

S. B. Woods K.C. for the respondent.

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

IDINGTON J.—The appellant complains that respondent, acting as agent for the owner of a steam log-

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 13 Alta. L.R. 557; 42 D.L.R. 573; [1918] 3 W.W.R. 221.

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hauler, had induced him by false and fraudulent representations to buy same at the price of $6,625. The learned trial judge held that he had been so induced and entered judgment accordingly directing an assessment of damages by a referee. That judgment the Court of Appeal for Alberta set aside and dismissed the action.

The owner had offered the outfit in question for $5,000, cash and then raised the price, owing to some slight addition of sleighs to the outfit as originally offered, to $5,875, which included a commission to respondent of 5% on the actual price the owner was getting on the basis of that increased price.

The purchase-money was to be paid into the Northern Crown Bank at Red Deer.

The respondent, not satisfied with such gain, conceived the idea of getting $750 more from the appellant as purchaser.

An involved history of negotiations with others brought about by respondent as part of the scheme I need not enter upon.

The result of the misrepresentations so found to have been false and fraudulent was that the appellant, before he ever saw, or had any one for him see, the outfit, agreed to pay and did pay, the $6,625 into the Northern Crown Bank, which was a condition precedent to the removal of the outfit from the place where situate.

The property in question was forty miles away from any railway. The appellant and respondent were dealing in Edmonton, a considerable distance further than the railway station nearest to the place where the property was. The appellant of necessity had to rely upon the knowledge of someone else, as respondent well knew, or go to the expense of going all that distance

with an outfit capable of testing the truth of the representations made by respondent.

Having deposited the said price as required, the appellant went with the necessary help to take possession of his purchase and, on attempting to drive it by means of the power it was represented to possess, found that he had been deceived not only in that regard but in many other respects as to the condition of the outfit.

Having been thus induced to go to the place where the machine and outfit were, and moved it part of the way before realising how badly he had been deceived, he had no alternative except to abide by his purchase or recover from the respondent the amount which he had by virtue of its misrepresentations been thus defrauded of. Such, at least, is the effect in plain language of the findings of the learned trial judge.

Under the peculiar circumstances in evidence the appellant had no right of action against the owner, who had never authorised such misrepresentations to be made as the learned trial judge finds *were* made.

I am not disposed to think that the law is so impotent that there is no remedy to be found for such a condition of things.

By no means do I think there is anything improper in an agreement between an owner of lands or goods and a sales agent providing for the latter getting all beyond a named price as his reward or part of his reward for bringing about a sale.

I do suggest, however, that when we find an agent given such an opportunity and he has availed himself of it to the extent of obtaining a bargain with a purchaser at a cash price exceeding by one-fifth that which the owner—to the knowledge of such agent—was willing to accept in cash, we naturally ask how that

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came about? And when a learned trial judge finds as a fact that the misrepresentations of such an agent respecting the quality and conditions of the article sold were an inducing cause of such remarkable success, and that they were made in such manner as to induce the belief that they were founded upon and made from the knowledge of those making them, we are bound to ask ourselves whether or not they had been honestly made.

When we find it distinctly stated that no such personal knowledge existed or had been procured on behalf of the agent, or any assurances of such a nature given by the principal, or authority given by him to make representations so false and fraudulent as found by the learned trial judge, what is the inevitable inference to be drawn but that of some dishonest representations having been made?

It is quite apparent from the absolutely conflicting evidence of the appellant with that of those he accuses who acted for respondent that the learned trial judge who alone had the best opportunity of deciding between them must, from what he has expressed, have found the former reliable and the latter not so reliable.

Are we to discard such an important finding of fact? Or must we not rather accept it and apply it so far as practicable to guide us in trying, if possible, to fit it into the other admitted surrounding facts and circumstances and apply the relevant law, even if he may have failed to state same as fully and accurately as we might desire? This is not the case of a trial where, as sometimes happens, there are ourstanding circumstances of evidential force which conflict with the finding and relying thereon we can say the learned trial judge must have failed to recognize the force thereof and set aside his finding of fact and its consequences.

The misrepresentations charged all bore directly or indirectly upon the value of the outfit offered for sale, and the findings of fact by the learned trial judge relative thereto cannot be attributable to anything else.

It seems to me the inevitable conclusion that to the extent at least of the $750 added to the price named by the owners, conversant as the respondent well knew with the value and condition of that offered at half its original cost, there was no possible justification for so adding to the price asked, and that there existed no foundation of fact for the misleading description given by respondent. How can such false representations made under such attendant circumstances be held as conceivably made in an honest belief in their truth?

And that seems amply confirmed by the refusal of the owner to touch the $750.

That also carries with it a finding that the money in the Northern Crown Bank was not money belonging to the respondent, but money fraudulently procured by it to be deposited in said bank by the appellant.

The result must be in that way of looking at the case presented, that there never was any ground for an issue; that the respondent should pay the costs of that issue, both of the Northern Crown Bank and of the appellant, throughout, and, as another consequence, I think should be made to bear the entire costs herein. The whole litigation has been caused directly or indirectly by reason of the devious course of conduct the respondent saw fit to pursue.

The appeal to that extent should be allowed and the costs paid by the respondent throughout.

ANGLIN J.—The plaintiff appeals from an adverse judgment in two actions—one, an action for deceit;

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the other, an action to determine the ownership of a sum of $750 on deposit with the Northern Crown Bank which comes before us in the form of an interpleader issue. The judgment of the Appellate Division of the Supreme Court of Alberta is reported (1).

After carefully reading the entire evidence it is apparent to me that the learned trial judge intended by the opening paragraph of his judgment to inform an appellate court, without bluntly saying so, that he disbelieved the evidence given on behalf of the defendants and that his unfavourable opinion of their veracity was largely based upon his observation of them in the witness box. I need only say that the reading of their testimony—especially that of Gorman, Edwards and McPhee—is not calculated to lead one to think that the learned judge made a mistake.

He then proceeds, without putting his conclusion in a form unnecessarily harsh or offensive, to find that the plaintiff bought the log-hauler and sleighs in question on the faith and under the inducement of misrepresentations fraudulently made by Edwards, and strengthened by Gorman, in such a way as led, and, I take it, in his opinion was intended to lead

> the plaintiff to believe that they were made from the knowledge of Edwards and Gorman of themselves,

by which the learned judge no doubt meant knowledge gained from the inspection on their behalf which De Vall states they represented had been made. Several of the representations, most material in character, were false in fact. Admittedly neither Gorman nor Edwards had any personal knowledge of the condition or capacity of the log-hauler, nor had any inspection been made of it on their behalf. According to De Vall's testimony, accepted by the learned judge, he was induced to pur-

(1) 42 D.L.R. 573; (1918) 3 W.W.R. 221.

chase without making the personal inspection which he had contemplated by Edward's assurance that the time spent on such an inspection would be wasted—that the "outfit" was as he represented it.

The finding of fraud necessary to sustain an action of deceit might, no doubt, have been made more explicit. The success of the defendants before the Appellate Division indicates that in cases such as this it is probably better "to call a spade a spade" in plain language. Short, however, of stating in direct terms that the defendants had induced the plaintiff to purchase the log-hauler and sleighs by wilfully and dishonestly making material misrepresentations known to them to be untrue, the learned judge could scarcely have made more clear his intention to convict them of deliberate deceit. He adds that

> the misrepresentations as to condition and capacity, which induced him (the plaintiff) to purchase, were at least made with reckless carelessness as to their truth.

He obviously meant to make a finding which would bring this case within the alternative ground of liability pointed out in *Derry* v. *Peek* (1)—that the misrepresentations were made without real belief in their truth and with reckless indifference as to whether they were true or false. I cannot place any other construction on the phrase

> with reckless carelessness as to their truth.

With profound respect I am unable to accept what I understand to be the view of the learned Chief Justice of Alberta, concurred in by the other appellate judges, that the trial judge misdirected himself as to the essentials of the action of deceit or failed to make the necessary finding of absence on the part of the representors of an honest belief in the truth of their representations.

(1) 14 App. Cas. 337.

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The learned judge allowed damages under two heads; as to the first—the difference between the actual value of the log-hauler and sleighs as they were and where they were when purchased and the sum of $6,625 paid for them by the plaintiff—I think it may not unfairly be assumed that the latter figure represents what would have been the saleable value of the property at Coal Camp if in the condition and of the capacity represented by the defendants, and that no substantial wrong will be done the plaintiff by allowing this portion of the judgment of the trial court to stand. In the second head of damage, however, there seems to be a duplication. When allowed the difference in value as above, the plaintiff is already awarded the reasonable cost of repairs necessary to put the engine into the condition represented. His recovery under this head should be restricted to the expenses of the first futile trip from Edmonton to Coal Camp, including wages of men and an allowance for his own time, except so much of them as were incurred in making repairs necessary to move the log-hauler and sleighs into Olds, *i.e.*, he is entitled to recover so much of these expenses as is not included in the cost of necessary repairs. They were thrown away as the direct result of the defendants' misconduct.

The earning of profits on the tie contract undertaken by the plaintiff, however, was too uncertain and speculative to afford a basis for a further allowance of special damages. The learned judge properly refused to entertain this claim.

The judgment of the trial court in the action for deceit should, in my opinion, be restored with the modification indicated.

As to the $750 involved in what has been termed the minor action it must be borne in mind that the

question at issue in it is not whether the plaintiff is liable to pay such an amount to the defendants as the price of their interest in the property which he purchased or otherwise, but whether the sum of $750 paid into the Northern Crown Bank by the plaintiff as part of the purchase price payable to the Great West Lumber Company is the property of the plaintiff or that of the defendants. The object of the interpleader issue on which the question is presented is to determine the ownership of this specific sum of money remaining on deposit—who is entitled to demand and receive it from the Northern Crown Bank? The issue as defined by the order directing it makes that clear. The statement of claim properly followed it. The statement of defence, in my opinion, improperly sought to alter and enlarge it. *Canadian Pacific Railway Co.* v. *Rat Portage Lumber Co.* (1).

This money forming part of a larger sum deposited with the bank was the money of the plaintiff. He parted with it to the bank solely for the purpose of its being paid to the Great West Lumber Company as the purchase-price of its property bought by him. The Great West Lumber Company might, no doubt, have taken the whole sum paid in from the bank and paid over $750 of it to the defendants, or it might have directed the bank to pay that sum to them. It declined to do either, and disclaimed all right to, or over the disposition of, the $750. The defendants have obtained no title to it either from the plaintiff or from the Great West Lumber Company. It seems clear that, whatever other legal rights (if any) the defendants may have against the plaintiff as a result of the transaction under consideration, the money now in question is not their property. On the issue ordered

(1) 5 Ont. W.R. 473, at page 476.

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to be tried it should be declared to be the property of the plaintiff upon a resulting trust in his favour arising from the partial failure of the trust on which he deposited the larger sum, of which it formed a part, with the Crown Bank.

But, as the learned trial judge points out, in that event the $750 cannot be treated as part of the purchase-money paid by the plaintiff and his damages in the deceit action must be based on the payment of $5,875, not $6,625, as purchase-money. In the result it is really not material, except possibly on the question of costs of the minor action, whether the plaintiff recovers the $750 as his property in that action or as part of his damages in the deceit action, the fund being held to answer *pro tanto* the judgment in the latter. I therefore agree with the disposition made of this part of the case by the learned trial judge.

BRODEUR J. (dissenting).—I am satisfied that if there had been no dispute as to the $750 issue the action of deceit which has been instituted by the appellant would never have been taken.

It appears that the Great West Lumber Company were the owners of a log-hauling outfit for several years, and that they had used it only for a very short time (about four months) from 1912, when they bought it, until 1917, when it was sold to De Vall. In December, 1916, a man named McFee, who had a large tie contract with the Canadian Northern Railway Co., tried to acquire that outfit in order to carry out more expeditiously and more economically his tie contract. Those negotiations were carried out partly by him and partly by the respondent, which seemed to be a respectable firm doing business in Edmonton.

McFee went with an engineer and a boiler

inspector, to visit the outfit which was in a lumber camp at a great distance from Edmonton. He seemed to be satisfied that the price which was quoted for the machine was a reasonable one and, in fact, the Great West Lumber Company were willing to sell the machine for 50% of its original cost. McFee, however, did not seem to be able to raise the money.

It appears, however, at the same time, that Mr. Ewing, a reputed barrister of Edmonton, was interested in some way in McFee's contract; and as he had a case for De Vall he suggested to the latter the idea of purchasing the outfit or advancing the money to McFee to purchase it; and he advised him to go and see a man named Edwards, sales agent of the respondent company.

Edwards described to him the machine, told him the work it could carry out and told him that the machine had been recently inspected by the boiler inspector and by an engineer.

There is a dispute here as to whether Edwards stated that it was their own engineer, namely, the engineer of the respondent firm, or some independent engineer. De Vall, in his evidence, repeats frequently that Edwards represented to him that the inspection had been made by their own engineer. However, in cross-examination, he was asked:—

Q. When he (Edwards) talked to you about having their engineer or the boiler inspector there, you did not understand that by their engineer he meant himself, but you understood it meant someone else?

A. It sounded as if they had sent someone else, an engineer, down there, and the boiler inspector.

There is no doubt that an engineer had gone there with McFee and the boiler inspector to inspect the engine. There is no doubt either that this expedition was organized to a certain extent by the respondent company and it did not matter very much

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whether the engineer sent at that time was paid by the company itself or by McFee. There is one fact very sure and it is that an engineer had been sent and that his report seemed to be favourable.

There is also some statement made by Edwards in this conversation with De Vall to the effect that the hauling power of the engine could be increased by some dome being put on it.

Interviews then took place between the father of De Vall and De Vall himself with Mr. Gorman, the principal partner in the respondent company; but the latter did not say anything more than repeat what had been said by their sales agent, Edwards. The plaintiff was informed that the respondent company had an option upon the outfit; and the price mentioned was $6,625. Then De Vall saw McFee and they agreed to form a partnership for the purchase of the machinery.

It was agreed, however, that the machine would be purchased by De Vall himself and that when McFee would have made enough money out of his tie contract, and out of the use of the machine, to reimburse his share, then the machine would become the property of both. De Vall then discovered that the Great West Lumber Company were the real owners of the property, and on the 24th January, 1917, he deposited with the Northern Crown Bank, who were the bankers of the Great West Lumber Company, the sum of $6,650, which was to be handed over to the Great West Lumber Company when the delivery would have taken place and when the bill of sale would have been properly drawn and De Vall then started for the camp to view the machine and to take delivery of it, and he was accompanied by a representative of the Great West Lumber Company.

After much trouble he saw the machine, saw in

what condition it was, and as he had an engineer and man with him, he started to raise the steam and to make it run. It appears, however, that the horse-power did not seem sufficient to make it run, so he telephoned to Edmonton and got the authorization from the authorities to raise the steam pressure and he succeeded in loading up the machine at the next station and sent it to Edmonton to get it properly fitted up and absolutely repaired.

In the meantime, he seemed to be dissatisfied with the test which he had made, because he gave instructions to his solicitor to write the bank not to give the money; but later on he gave a release and gave permission to the bank to hand over the money and he began to work with the machine when, after a few days, a shaft broke.

In the meantime, it was discovered that the Great West Lumber Company did not sell the machine for $6,625, but only $5,875, leaving a balance of $750 which the Great West Lumber Company declined to claim as belonging to them. The respondent company wanted to have this sum and stated that as they had an option for the sale of that machinery that sum really belonged to them. The money then was deposited into court by the bank and the court directed an issue to have it determined to whom that money would belong, whether to De Vall or to Gorman, Clancey & Grindley.

It looks to me as if De Vall had been greatly dissatisfied on finding out that the respondent company were not only being paid a commission of 5% on the purchase-price but that they were also getting $750 above the purchase-price stipulated by the Great West Lumber Company. He thought, I suppose, that it was not very fair on the part of the respondent com-

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pany to get a sum of $750 above the purchase-price, so he entered an action to get that sum of $750, as he had been directed by the court to do, and started a big action in damages for $14,000 for deceit. He alleges that this sale was made through the false and fraudulent representations of Gorman, Clancey & Grindley and that they should be held liable to that extent.

The trial judge gave judgment in favour of the plaintiff on account of the false representations and he said in his judgment that

> the representations made to him (De Vall) as to the condition and capacity of that machine, which induced him to purchase, were at least made with reckless carelessness as to their truth,

and he maintained the action of deceit instituted by the appellant De Vall but dismissed plaintiff's action as to the $750 and declared that that money belonged to the respondents.

The Court of Appeal reversed that decision and dismissed the two actions.

A great deal depends in this case upon the construction of the findings of the trial judge. The law on the question is to be found in the case of *Derry* v. *Peek* (1), where it was held that:—

> In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.
>
> A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement being made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit.

The trial judge speaks of the carelessness with which some statements were made by the respondent company as to the truth of those statements. But it had to be also demonstrated that the statements were

(1) 14 App. Cas. 337.

made in the belief that they were not true. There is no such finding in the reasons of judgment of the trial judge. Besides, I do not see anything in the evidence, which I have read very carefully, to shew that there were such fraudulent statements as were required to maintain the action of deceit.

The machine was represented as having been in use only for a short time, and it is true. It was represented that it had been inspected by an engineer, and it is true; it does not matter very much by whom the engineer was paid. As a question of fact, it was inspected. It was represented that it had been visited by a government boiler inspector and it is true. The plaintiff says that it was represented to him that it was brand new, that there was no scratch. Well, he saw the thing himself and became aware himself of the condition in which it was.

Now, having himself inspected the machine, having seen it, having accepted and paid for it, I do not see how he could take this action for deceit. My conclusion is that it was the result of an afterthought when he heard that the company was making $750 above the price mentioned.

Now, as to this $750, I agree with the trial judge that this money belongs to the respondent company.

The appeal, therefore, should be dismissed with costs of this court.

MIGNAULT J.—With great respect I am of the opinion that the learned Chief Justice of Alberta has misconstrued the findings of fact of the trial judge. The latter said that he thought

> that the representations made to him (the plaintiff) as to the conditions and capacity of that machine which induced him to purchase it were at least made with reckless carelessness as to their truth.

This finding of fact, in my opinion, brings the

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present case within the rule laid down by the House of Lords in *Derry* v. *Peek* (1), where it was held that in an action of deceit the plaintiff must prove actual fraud, and that fraud is proved when it is shewn that a false representation has been made knowingly, or recklessly without belief in its truth, or without caring whether it be true or false. (See also *Angus* v. *Clifford* (2)). The evidence here fully justifies the finding of the learned trial judge, and would even shew that the respondents made a false representation knowingly, to wit, that their engineer had examined the machine which they were endeavouring to sell to the appellant. This is emphatically a case where the appreciation of the oral testimony by the trial judge should not be lightly disturbed. I think, therefore, that the main action, by which I mean the action for deceit, should be maintained, and I concur in the opinion of my brother Anglin, concerning the damages which should be granted to the appellant.

In the other action, that for $750, I think the appellant should succeed. This sum, which the real vendors of the machine absolutely refused to accept as being in excess of the price for which they were selling the log-hauler, is the property of the appellant, and the attempt made by the respondents to have it paid over to them is on a par with their conduct in making the fraudulent misrepresentations of which the appellant complains.

The appeal should, therefore, be allowed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *Geo. C. Valens.*
Solicitors for the respondent: *Griesbach, O'Connor & Co.*

(1) 14 App. Cas. 337.
(2) [1891] 2 Ch. 449.

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ARNOLD LARSON (DEFENDANT).....APPELLANT;

*Feb. 20, 21.
*Mar. 3.

AND

GEORGE D. BOYD AND ANDREW N. BOYD (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Procedure — Evidence — Irrelevancy — Objection — Proper time — New trial.

When irrelevant evidence has been received by the trial judge, though subject to objection, if he has not disclaimed its having had any influence on his mind, a new trial must be had, because such evidence may have adversely influenced his opinion. Idington J. dissenting.

Per Idington J. dissenting.—Under the circumstances of this case, the failure by the respondent to object to the evidence promptly and at the proper time is fatal to any application for a new trial.

Judgment of the Court of Appeal (11 Sask. L.R. 324; 42 D.L.R. 516; [1918], 2 W.W.R. 1069), affirmed, Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of Bigelow J. and ordering a new trial.

The material facts of the case and the questions in issue are fully stated in the judgments now reported.

George A. Cruise for the appellant.

J. A. Allan K.C. for the respondent.

THE CHIEF JUSTICE.—I think this appeal must be dismissed and the judgment of the Appeal Court granting a new trial confirmed with costs.

The wrongful evidence admitted at the trial, relating to the sale by the respondent plaintiffs of the Tuxedo lands and of the representations made by the

*Present:—Sir Louis Davies C.J. and Idington, Anglin and Mignault JJ. and Cassels J. *ad hoc*.

(1) 11 Sask. L.R. 324; 42 D.L.R. 516; [1918], 2 W.W.R. 1069.

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respondents to the Tuxedo purchasers, was to my mind clearly inadmissible and should have been rejected by the trial judge. It is impossible to say what weight that evidence may have had on the mind of the trial judge in delivering his judgment in a case where the plaintiff and the defendant gave directly conflicting evidence as to the material representations alleged by the defendant to have been made to him and which induced him to enter into the contract now sought to be specifically enforced.

IDINGTON J. (dissenting).—The appellant was induced on the 12th July, 1912, to enter into an agreement for the purchase of two lots described therein as lots "Nos. 39 and 40 in block two in Tuxedo sub-division in North Battleford."

In the statement of claim the respondents sue for the balance of price of "lots 39 and 40 in block two in the City of North Battleford."

The counsel for appellant admitted the agreement, and also by another admission admitted that the respondent had title to the land mentioned in the statement of claim, but seemed to avoid any express admission that the land named in the agreement was the identical land referred to in the statement of claim.

At the close of the plaintiff's case thus assumed to be established, appellant's counsel took the objection that there was nothing to shew that the land described in the statement of claim was the land mentioned in the agreement.

Instead of counsel for plaintiff at once asking leave to amend his statement of claim or adduce proof of identity he did nothing, but allowed the learned trial judge to so reserve the point without objecting.

I cannot say that that was a very satisfactory dis-

position of the point. Nor can I say that I should have reached the same conclusion as the learned trial judge without giving an opportunity to amend or adduce further proof.

The court below having taken the view that it did of that part of the trial, and found from what, to my mind, is not quite unreasonable, the inference of identity, though I might not have drawn it, I certainly should not disturb that part of the judgment appealed from.

The whole question is only worth considering as illustrative of the course of the trial.

The main ground of appeal is that the court below erred, as I think it did, in granting a new trial on the ground of improper reception of evidence.

The appellant had pleaded as a distinct defence the following:—

> 3. In the alternative the defendant says that on or about the 12th day of July, 1912, the plaintiffs falsely and fraudulently represented to him that the plaintiffs were the owners of lots 39 and 40, in block 2, in a certain sub-division in North Battleford known as Tuxedo Park, that the said lots were good city lots, that the town was built to within two blocks of them, that the Canadian Pacific Railway was building on the section just beyond the said lots, and that the said lots were worth more than the price of $825.00 which the plaintiffs were asking for them, and were within one-quarter of a mile of the Canadian Northern Railway station in the city of North Battleford.

His own evidence, if believed, established these allegations of fact. Then, hoping no doubt, to prove the fraudulent intent of such misstatements, he called Mrs. Tracksell, who had been present at a sale to her deceased husband by the defendants, in January, 1912, of a lot in same survey, and next or near to the lots in question. Counsel for respondent at once, upon her being sworn, objected to her evidence. No ground for the objection was stated or appears in the case.

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Her evidence really amounts to nothing more than that there was such a sale, and it seems to me inconceivable how or why its admission can be made ground for a new trial.

This was followed by evidence of another Tracksell relative to another sale of a lot in same survey by respondents to him in November, 1912. This witness testified to representations made to him on that occasion very similar in character to those charged in the above paragraph from the appellant's statement of defence.

His evidence was given, not as the court below in error states, under or subject to objection.

Not a word of objection thereto was uttered till after it had all been given, and then counsel for respondents said: "I have the same objection to this evidence." And then he proceeded to call his clients in reply to the defence made.

I cannot understand why such an utter disregard of the established principles governing the conduct of parties at a trial requiring them promptly and properly to object, if they have any reason to complain of the conduct thereof, should be tolerated as a basis of granting a new trial.

I observe from the respondents' factum that the appellant was not represented at the hearing of the appeal in the court below, and suspect this feature of the case was not observed by the members of that court.

Apart from any other considerations I think the failure to object at the proper time should have been held fatal to any application for a new trial upon the ground it is rested upon.

In the view I take relative to the possibility of such like evidence being admissible in support of a

charge of fraud of such a character as set up, there is absolutely no ground for granting it.

Assume that the defendant had in mind the purpose of establishing a highly fraudulent scheme of the kind, in which beyond a doubt, as illustrated by the judgments in the case of *Blake* v. *The Albion Life Assurance Co.* (1), and *The Queen* v. *Rhodes* (2), and cases cited therein, evidence of what had transpired between him accused and others than those immediately concerned, would be admissible and the attempt to do so failed by reason of the evidence falling short of what was expected, would that be any ground for granting a new trial?

The charge made, which I am for purposes of illustration thus assuming to have been of such a nature as to permit the evidence to go so far as to have been highly prejudicial to the party attacked and then failed, how could he, who lost on another ground other issues entirely, claim as the defendant does by reason thereof a new trial?

I incline to think the pleading I have quoted wide enough to let in evidence of any fraudulent scheme unless limited by specific particulars which should have been demanded if any limitation claimed to be put upon the inquiry.

There is in the next paragraph of the defence a charge of representation of the same facts in a way entitling appellant to relief which did not in order to get same necessarily involve such gross fraud as first charged.

On this the court below seemed to think, if the learned trial judge saw fit to proceed thereon he could rightly have found, as he did, but because he did not expressly repudiate being affected by the evidence

(1) 4 C.P. D. 94. (2) [1899] 1 Q.B. 77.

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adduced on the other issue, therefore there must be a new trial.

I must respectfully submit that is not a proper ground upon which to grant a new trial.

To hold so implies, that in every case wherein other issues may have been tried than those in which the plaintiff succeeds, the learned trial judge must by express language exclude all possibility of his mind having been prejudicially affected by having heard evidence on the other issues and in default of his doing so a new trial must be granted.

The presumption surely is that a learned trial judge has not misdirected himself unless he gives some indication of it other than apparent herein.

The evidence of George Boyd seems to me far from satisfactory and may have appeared more so to the learned trial judge.

I think the appeal should be allowed with costs and the learned trial judge's judgment be restored.

ANGLIN J.—The evidence of similar misrepresentations made by the plaintiff to other prospective purchasers might have been admissible if his intent in making the misrepresentations to the defendant on which the latter relies in answer to this action of specific performance had been material to any issue in it which the court was called upon to determine. *Blake* v. *Albion Assurance Society* (1), chiefly relied on by the appellant, was such a case. See too *Brunet* v. *The King* (2).

The issues in the present action were whether the alleged misrepresentations had in fact been made, their truth or untruth, their materiality, and whether the defendant had been induced by them to purchase. To

(1) 4 C.P.D. 94. (2) 57 Can. S.C.R. 83; 42 D.L.R. 405.

none of these issues could the proof of false representations by the defendant made months afterwards to other persons, however similar in character, be relevant. It would not tend to establish the probability of the defendant's case upon any of them. It would be quite as relevant to attempt to prove that the plaintiff's reputation for veracity was bad with a view to establishing that he was a person likely to make false representations when it should be to his interest to do so. The unnecessary and immaterial allegation of the defendant in his plea that the misrepresentations on which he relied had been made fraudulently cannot, in my opinion, render relevant evidence otherwise irrelevant to the real issues presented for trial. I agree with the view of the Court of Appeal that the testimony here in question was improperly received.

While without it there may have been sufficient evidence to warrant the judgment dismissing the action, it is impossible to say that the testimony objected to may not have adversely influenced the trial judge's opinion as to the credibility of the plaintiff and thus occasioned a substantial wrong in the trial. Having received it, though subject to objection, and not disclaimed its having had any effect upon his mind, it is not unreasonable to assume that the learned judge treated it as admissible and that it, in fact, had what would seem to be its probable effect upon his decision. *Allen* v. *The King* (1); *Loughead* v. *Collingwood & Co.* (2); *Hyndman* v. *Stephens* (3).

In view of the absence from the statement of defence of any allegation that the land described in the agreement for sale was not the same as that described in the statement of claim and of the unqualified

(1) 44 Can. S.C.R. 331. (2) 16 Ont. L.R. 64; 12 Ont. W.R. 697.
(3) 19 Man. R. 187.

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admission of the plaintiff's title to the latter made by counsel for the defendant at the opening of the trial, which the learned judge appears to have then accepted as conclusive on that branch of the case, the action should not, in my opinion, afterwards have been dismissed because of an unexplained discrepancy between the two descriptions.

I would affirm the judgment directing a new trial and dismiss this appeal with costs.

MIGNAULT J.—The Court of Appeal of Saskatchewan has decided that the appellant introduced irrelevant evidence of false representations made by the respondent to other persons to whom he endeavoured to sell lots. It ordered a new trial because, in its opinion, such evidence may have influenced the trial judge in deciding that the respondent had made to the appellant (which he denied) false representations concerning the lots sold to the appellant. The learned counsel for the appellant has not convinced me that the judgment appealed from is clearly wrong. The evidence complained of was certainly irrelevant and it may have influenced the result. I would, therefore, dismiss the appeal with costs.

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

Appeal dismissed with costs.

Solicitors for the appellant: *Cruise, Tufts & Lindal.*
Solicitors for the respondents: *Gold, Stockan & Company.*

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*Feb. 24.
*Mar. 3.

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT)..... } APPELLANT;

AND

WILLIAM HOWARD HAY (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Railway — Liability — Injury to passenger — Negligence — Moving train—Jumping off—Under guidance of brakesman.

The plaintiff, an experienced traveller, wishing to alight at a flag station, instead of insisting on the train being stopped, assented to a suggestion of a brakeman that, if it should be merely slowed down, he might jump off, and he was injured in doing so.

Held that he took all the risks of alighting from the moving train and could not recover.

Judgment of the Court of Appeal (11 Sask. L.R. 127; 40 D.L.R. 292; (1918), 2 W.W.R. 233), reversed.

APPEAL from the judgment of the Court of Appeal (1), reversing the judgment of Elwood J. at the trial (2), and ordering a new trial. The trial judge had dismissed the action with costs.

The respondent, who was a passenger on appellant's train travelling from Swift Current to Piapot, changed his mind as to his destination and got off the train at Cardell and was injured. According to evidence, the appellant knew that the train would not stop at Cardell being told so by the brakesman; but the latter added that he would slow up the train and that the respondent could jump off. When respondent was ready to get off, the brakesman told him not to do it until he told him to; then respondent waited a short time until the brakesman told him to jump and he did so. The trial

*Present:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 11 Sask. L.R. 127; 40 D.L.R. 292; (1918), 2 W.W.R. 233.

(2) (1917), 2 W.W.R. 1106.

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judge has found that the train was then travelling at the rate of about twelve miles an hour.

W. N. Tilley K.C. for the appellant.
W. E. Knowles K.C. for the respondent.

THE CHIEF JUSTICE.—In my opinion this appeal must be allowed.

The plaintiff respondent in jumping off the car at the time and under the circumstances he did clearly did so "taking a chance" and at his own risk. Even if his statement as to having done so with the actual concurrence of the brakesman of the car and at the latter's suggestion to jump when the brakesman told him to is accepted that will not absolve the plaintiff from blame or remove the case from the category of contributory negligence. He was a man 28 years of age, experienced in travelling and knew well the risk he was running as he stated the train was going at the rate of from eight to ten miles an hour when he jumped off. It was a foolhardy thing to have done, and he must be taken to have assumed the risks which such an action inevitably involved.

I would allow the appeal with costs throughout and dismiss the action.

IDINGTON J.—I cannot say as a matter of law that a man in jumping from a train going at the rate of eight or ten miles an hour is doing what a reasonably prudent man should permit himself to do, much less so if going at twelve miles an hour. The former rate of speed is respondent's own guess of rate in question. The latter rate is the finding of fact by the learned trial judge.

The respondent seems to have been an experienced traveller and had the advantage of daylight to guide

him in making an estimate of the rate of speed and of his chances in doing what he did.

There are many circumstances evident in this case which should appeal to another court (either that of Parliament or its delegate the Board of Railway Commissioners) to supply for the public an efficient protective remedy in such like circumstances as respondent was placed, if the contentions set up on behalf of appellant are well founded.

The one feature I have referred to in respondent's case seems an insuperable barrier in his way in this court and in this case.

Therefore I can see no good to be gained by directing as the court below has done, a new trial. If respondent is entitled to succeed the proper disposition of the case would be to so adjudge.

On the facts as found by the learned trial judge he suffered a wrong, but took a risky remedy when induced by the appellant's brakesman to jump, and an equally risky one when he launched this suit. *Grand Trunk Railway Co.* v. *Mayne* (1), where plaintiff had a much stronger case but failed, must stand as a warning to travellers trusting brakesmen.

ANGLIN J.—The proper conclusion from the plaintiff's own evidence, in my opinion, is that he assented to a suggestion of the brakesman that instead of the train being stopped at Cardell (a flag station and not the destination for which he had bought his ticket), to let him off, it should be slowed down and he might jump off. His story is that he asked the brakesman if he would stop the train at Cardell to let him off and when the brakesman replied that he would not but that he would slow up the train and the plaintiff could jump off, he, the

(1) 56 Can. S.C.R. 95; 39 D.L.R. 691.

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plaintiff, answered "all right." He adds that he was prepared to do that and elsewhere he says that he did not want to insist on the train stopping, as he knew he was entitled to, because he "thought it would be all right." Upon such a state of facts I find it extremely difficult to hold that there was any breach of duty or negligence imputable to the defendant company. I think there was not.

But assuming that there was breach of duty on the part of the brakesman for which the defendant should be held responsible in failing to stop the train at Cardell to permit the plaintiff to alight, his act in knowingly jumping from the moving train, even if running only at 8 or 10 miles an hour, as he says it was (other witnesses place its speed at from 12 to 22 miles per hour), was not thereby excused. He certainly assumed the risk of being injured in doing so. Although by no means of the opinion that the mere fact of stepping or jumping off a train in motion is always to be regarded as contributory negligence *per se*, under the circumstances of this case I am satisfied that the plaintiff's admitted act amounted to such negligence—if indeed it was not the sole negligence—and his recovery is thereby debarred.

The appeal should be allowed and the judgment dismissing the action restored with costs here and in the Court of Appeal, if the defendant should see fit to ask them.

BRODEUR J.—I concur with my brother Anglin.

MIGNAULT J.—I concur with my brother Anglin.

Appeal allowed with costs.

Solicitors for the appellant: *Begg & Hayes.*

Solicitors for the respondent: *Buckles, Donald, MacPherson, Thomson & McWilliam.*

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*Feb. 14.
*Mar. 3.

EDMOND D. C. THOMSON (DEFENDANT) ..... } APPELLANT;

AND

THE MERCHANTS BANK OF CANADA (PLAINTIFF)..... } RESPONDENT.

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

Principal and agent—Trust—Money deposited by agent—Cheque sent to payee—Right of payee to fund.

C. bought from the assignor of M. a parcel of land, the purchase price being payable in instalments and transferred half of his interest to E. Later E. sent to C. his accepted cheque for half of the amount of an instalment falling due, which cheque was deposited to the credit of C.'s account in the Bank of Montreal. Then C. drew a cheque of the same amount on the above account and sent it to M. with a statement that it was for his own share of the instalment. Payment of the cheque was refused by the Bank of Montreal on the ground that C. was in the hands of a receiver. M. brought an action asking that it be declared that the money standing to the credit of C. in the Bank of Montreal was the property of M., as being trust money in the possession of C. for the specific purpose of paying E.'s indebtedness to M.

Held, Davies C.J. and Idington J. dissenting, that the transaction was not impressed with a trust in favour of M.

Per Anglin and Brodeur JJ.—C. merely assumed, as agent of E., a personal liability towards M. whose right of action is one of damages against C. for breach of contract.

Per Anglin and Brodeur JJ.—The receipt of C.'s cheque by M. and its presentation, upon which it should have been accepted and paid, is not equivalent to a payment of the money itself to M.

Per Mignault J.—The money paid by E., being due by him to C. and not to M., was the property of C. and was not trust money in the possession of C. for a specific purpose.

Judgment of the Appellate Division, 39 D.L.R. 664; [1918], 1 W.W.R. 972, reversed, Davies C.J. and Idington J. dissenting.

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

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 39 D.L.R. 664; [1918], 1 W.W.R. 972.

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judgment of the trial judge, Hyndman J., and maintaining the plaintiff's action. The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

W. N. Tilley K.C. and *H. C. Macdonald* for the appellants.

S. B. Woods K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—The reasons for the judgment of the Appeal Court in this case stated by Justices Beck and Stuart, from which judgment the present appeal has been taken, so fully and fairly represent my own views that I feel there is little or nothing I can add to them. I am satisfied to adopt these reasons as my own and would dismiss this appeal.

Mr. Tilley, however, for the appellant, pressed very strongly the argument that both Evans and Cairns paid these moneys in dispute before they were compellable to pay them and that their only liability was to the Canadian Agency and not to the Merchants Bank, the assignee of the Eby agreement. He contended there was no evidence of any trust having been created, or of any intention to create a trust, on the part of the agency in receiving the moneys.

I am of opinion that this argument is based upon an incorrect appreciation of the evidence and of all the facts. We should not look to the form but rather to the substance of the transaction, and I think in so doing we must reach the conclusion that a trust was created when the moneys of Evans and Cairns were paid over to the Canadian Agency before they were due under the agreement, and that trust was to transmit these moneys to the plaintiff respondent, the Merchants Bank, in payment of their share of the

instalment of the purchase money of the lands Eby had sold to Biggar and which instalments of purchase money had been assigned by Eby to the bank and one of which fell due the following day.

Biggar had executed a declaration of trust that he had purchased in trust for the agency, but as a fact there was no assignment of the agreements of sale to Canadian Agency, Limited.

The Canadian Agency, on whose behalf Biggar had purchased these lands, had assigned 50% of their interest in them to one Cairns, who in turn assigned 10% interest to Evans subject in each case to payment of a proportionate share of the purchase-price.

During the years 1911, 1912 and 1913, payments of principal and interest were made by the Canadian Agency to the vendor Eby and his assignee the respondent bank, and Evans and Cairns (the latter through the Western Mortgage Company) had paid through the Canadian Agency their 10% and 40% respectively of these instalments.

In 1913 Eby assigned his vendor's interest in the lands and unpaid purchase moneys to the bank respondent. On the 7th June, 1914, an instalment of principal and interest, $8,554.90, was due to the respondent bank by Biggar, the purchaser from Eby.

Evans at the time filled the dual positions of manager of the Canadian Agency in Alberta and of president of the Canadian Mortgage Company, and on 6th June, the day before the above instalment fell due, he made out his own personal cheque for $855.49 in favour of the Canadian Agency, being his 10% share of the instalment and interest, the cheque stating on its face that it was for

share Eby payment due 7th June, 1914,

and as president of the Western Canada Mortgage

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The Chief Justice.

Company directed its cheque to be drawn and issued in favour of the Canadian Agency for the sum of $3,421.09, the cheque stating on its face

that it was in payment of 40% due to S. Eby on the 7th June.

The two together made up $4,277.45, the 50% of the instalment due the following day on the Eby agreement. Instead of forwarding these two cheques to the Merchants Bank direct indorsed by Canadian Agency, Evans sent that bank a cheque of the Canadian Agency for the whole sum of $4,277.45 enclosed in a letter which misrepresented the true facts, and two days later the personal cheque of Evans and that of the Canada Mortgage Company were deposited in the Canadian Agency's general account in the Bank of Montreal to its credit.

When the cheque in favour of respondent was presented for payment the Bank of Montreal refused payment on the wrongful ground that a receiver for the assets of the Canadian Agency had been appointed in England by the court.

Under the state of facts proved at the trial beyond dispute, I do not doubt that the Canadian Agency received the two cheques, Evans' personal one and the Canada Mortgage Company's cheque in trust to forward them to the plaintiff the Merchants Bank, the assignee of the Eby agreement, and to whom the instalment of the purchase money was payable.

The fact that the general manager of the security company misrepresented the facts for the purpose of concealing the critical financial position of the Canadian Agency Company, Limited, is established.

But that misrepresentation cannot in any way alter or change the substance and essence of the transaction as proved by the oral and written evidence at the trial which were that the moneys were paid to the Canadian

Agency, Limited, the day before an instalment of the purchase money due on the Eby agreement fell due, by the Canadian Mortgage Company on behalf of Cairns and by Evans personally to transmit to the Merchants Bank, the assignee of the Eby agreement, in payment of 40% of that instalment due by Cairns and 10% due by Evans and for no other purpose.

For these reasons I would dismiss the appeal and confirm the judgment of the Appeal Court.

IDINGTON J. (dissenting).—The Canadian Agency, Limited, rested under a double obligation to pay respondent the money in question. First, as the purchaser bound to pay the entire purchase money for lands bought by others as its trustees, and secondly, as the actual recipient from Evans and Cairns, to whom it had resold a half interest of their shares, of the half of the instalment of purchase money then falling due, and which shares in the respective proportions of 10% and 40% had been so paid it for the express purpose of the transmission thereof to respondent as the assignee of the obligation that the Canadian Agency, through its trustee, had given Eby, the vendor in question.

Moreover, it owed a duty to its own trustee who had so bought for it and had been indemnified by it against the covenants he had on its behalf entered into with the vendor Eby.

Not one of these several parties thus concerned ever interposed to prevent the payment of the cheque in question unless the dubious letter of Evans can be said, on his behalf, to savour of such interposition.

The cheque, however, was for the exact sum of the total which was paid the agency for the express purpose of remitting to respondent in order to discharge such obligations, and became the property of respondent

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upon and by virtue of which it was entitled to receive the money from the Bank of Montreal.

No matter how much of falsehood the letter accompanying it may have contained, the agency had parted with the symbol of control of property which entitled the respondent thereby to get the money, and it was entitled to have the agency and all others enjoined from executing any fraudulent purpose that may have been involved in the attempted misdirection and misappropriation of the money.

If the money had been received by the respondent on its presentation of the cheque, as admitted now, it should have been, and applied as originally destined, could the agency company or any of its creditors have insisted on the terms of such a letter being observed under all the circumstances in question?

On such a state of facts as disclosed in the evidence I have no doubt the judgment below is right.

And quite apart from the view I thus present, even if there had never been any cheque sent, there exist in the maze of interrelated obligations so many grounds upon which the respondent could, as assignee of Eby, have enforced some of the several obligations of trusteeship which constituted the fund a trust and bound the Canadian Agency to apply the money in the way it was destined to be applied, the moment it was received by it, that I have no doubt it could not, nor could its liquidator, lawfully apply it otherwise than by paying it to respondent.

The appeal should be dismissed with costs.

ANGLIN J.—Mr. O. M. Biggar, nominally on his own behalf, but in reality as trustee for Canadian Agency, Limited (as evidenced by a declaration of trust), bought a parcel of land from one Eby, the purchase

money being payable in instalments. Eby assigned his interest in the agreement to the plaintiff, the Merchants Bank (Battleford branch). Canadian Agency transferred 40% of its interest to one Cairns, and 10% to one Evans, who was its Alberta manager and was also president of the Western Canada Mortgage Company. Cairns and Evans undertook to furnish money as required to meet, or to recoup Canadian Agency for their proportion of Biggar's liability to the vendor, and the Western Canada Mortgage Company agreed to make advances to meet Cairns' payments.

An instalment of purchase money with interest, amounting in all to $8,554.90, fell due on the 7th of June, 1914. Of this sum, while Canadian Agency owed it all, it was entitled to be recouped by Cairns $3,421.96 and by Evans $855.49. In the case of earlier instalments the whole amounts thereof had in fact been paid by Canadian Agency, Cairns and Evans recouping it for their shares. In June, 1914, Canadian Agency was short of money. Evans' personal cheque for $855.49, and a cheque on the Western Canada Mortgage Company's account for $3,421.96, both good, were handed to Canadian Agency on the 6th of June in order that it should pay these sums by its own cheque to the Merchants Bank to cover Cairns' and Evans' shares of the instalment due on the 7th. The two cheques were deposited, as undoubtedly was intended, to the credit of Canadian Agency's current account in the Bank of Montreal at Edmonton on the 8th of June. On the 6th, a cheque of Canadian Agency drawn on that account for $4,277.45 was sent to the Merchants Bank at Battleford, but accompanied by a letter written by Evans stating in unmistakable terms that it was a payment on behalf of Canadian Agency itself and intended to cover its share of the instalment due

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on the 7th and that its co-owners had not provided funds to meet their shares of that obligation. Whatever may have been the purpose of this falsehood, it at least does not lessen the difficulty in which the Merchants Bank and Cairns and Evans now find themselves.

On presentation by the Merchants Bank payment of Canadian Agency's cheque was refused by the Bank of Montreal on the ground that a receiver had been appointed in England of the assets of the company; and, so far as this record shews, it still remains unpaid. An order for the winding-up of Canadian Agency has since been made and the liquidator defends this action, to which the Bank of Montreal is also a party defendant. But for some reason not disclosed the trial proceeded against the liquidator alone, and he as appellant and the Merchants Bank as respondent are the sole parties to this appeal.

The liability of Canadian Agency to the plaintiff as payee of its dishonoured cheque is not questioned. The object of this action, however, is to obtain the fund itself in the hands of the Bank of Montreal, the relief prayed for being

> a declaration that of the sums now standing to the credit of the defendant, the Canadian Agency Limited, No. 1 account, in the defendant, the Bank of Montreal, at Edmonton, $4,277.45 is the property of the plaintiff.

The evidence establishes probably with sufficient clearness that the $4,277.45 on deposit with the Bank of Montreal, at the time that the dishonoured cheque was presented, to the credit of the account on which it was drawn, was the proceeds of the Cairns' and Evans' cheques, and I shall assume that payment of it was wrongfully refused. *Re Maudslay Sons and Field* (1).

(1) [1900] 1 Ch. 602.

The plaintiff's claim on the fund is based on two grounds—that the money was impressed with a trust of which Canadian Agency was the trustee and it (the Merchants Bank) the *cestui que trust*; that, since the Bank of Montreal should have paid Canadian Agency's cheque on presentation and equity will treat that as done which ought to have been done, the position is the same as if the proceeds of the Cairns' and Evans' cheques had actually reached the Merchants Bank through the Bank of Montreal or had been sent to it directly by Canadian Agency.

On the second hearing of this appeal Mr. Tilley strongly pressed the argument, not before presented, that, having regard to the terms of the agreement of the 25th of May, 1911, between Canadian Agency, Cairns and the Western Canada Mortgage Company, the payments in question by Cairns and Evans to Canadian Agency should be regarded not as payments of money by principals to their agent to be forwarded on their account but as payments by debtors to their creditor actual or about to be. If this view be correct, the case of the appellant is, in my opinion, unanswerable. But facts which militate against it are that Evans was not a party to the agreement of the 25th of May, 1911, that he knew the financial position of Canadian Agency when he handed the cheques for the Cairns' and Evans' payments to it, and that the agreement contains no express covenant by Cairns, and, of course, none of any kind by Evans, who was not a party to it, to pay respectively 40% and 10% of the instalments of purchase money due to Eby. This much, moreover, seems to be clear—that it was contemplated by the parties that Canadian Agency should place the Cairns' and Evans' cheques to its own credit and should make the payment in question to Eby (the

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Merchants Bank) on its own account and in fulfilment of the contractual obligation of its trustee, Biggar, against which it was bound to indemnify him. Cairns and Evans were under no contractual obligation either to Eby or to Biggar. Payment was made by them, not as Eby's debtors, but under a contractual obligation with Canadian Agency to make it.

I prefer, however, to deal with the question on the assumption that Evans intended, when he gave to Canadian Agency the cheques for his own 10% and Cairns' 40% of the instalment falling due to Eby, to put that company in funds to pay Cairns' and Evans' share of the instalment as their agent. Mr. Woods' contention, as I understand it, was that Canadian Agency received the Cairns' and Evans' cheques in the capacity of their agent to forward the proceeds, with Canadian Agency's own share of the instalment due, to the vendor's assignee, the Merchants Bank. How did this initial agency for Cairns and Evans develop into the trust for the Merchants Bank which Mr. Woods argued it became, and which he must establish in order to succeed? There is not a vestige of intention on the part of Cairns and Evans or either of them to create a trust, or on the part of Canadian Agency to assume the position of trustee. That an agent directed by his principal to pay to a third person money sent to him for that purpose (the direction or authority not amounting to an assignment of or charge upon the fund), is not, in general, responsible to such third person should he fail to execute his mandate is trite law. He may become so by assenting to the direction and communicating his assent to the intended payee or by undertaking with him to pay the money to him or to hold it for him. The law on these points is conveniently collected in 1 Hals. L. of E., par. 469; see, too, cases

cited in Bowstead on Agency, 5th ed., 426, and Godefroi on Trusts, 4th ed., pp. 62-3. But even then the agent does not become a trustee for the intended payee nor the latter a *cestui que trust*; nor is the fund impressed with a trust so that it becomes in equity the property of the intended payee as it would be if the relation of trustee and *cestui que trust* were established. The prayer of the statement of claim that the fund be declared the property of the plaintiff recognizes this to be the necessary result of the creation of a trust. But the agent so undertaking merely assumes a personal liability to the intended payee. His obligation is contractual or quasi contractual. The payee's right is legal, not equitable. In the event of default by the agent the payee's right of action against him is not to recover the fund but for damages for breach of contract.

The distinction between trusts for the payment of the settlor's creditors *generally* and trusts for the payment of one or more named creditors, properly insisted upon by Mr. Woods in distinguishing the authorities cited by counsel for the appellant (*Johns* v. *James* (1), and *Synnot* v. *Simpson* (2)), is well established. See Underhill on Trusts, 7th ed., p. 36. *New, Prance and Garrard's Trustee* v. *Hunting* (3), is a comparatively modern illustration of the application of the rule stated by Turner V.C. in *Smith* v. *Hurst* (4), that a trust for *particular* creditors is effective and irrevocable without communication to or assent by them. But the foundation of a trust, whether expressly so termed, or arising from the apparent intention to create a trust, as distinguished from a mere contractual agency, is present in both classes of cases alike. The trust for creditors generally is sometimes compared to an agency, Lewin

(1) 8 Ch.D. 744.
(2) 5 H.L. Cas. 121.
(3) [1897] 2 Q.B. 19.
(4) 10 Hare 30, at p. 47.

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on Trusts, 12th ed., 607. It resembles agency in that it is revocable until communication and that such communication is essential to give the creditor a status to make a claim against the agent in the one case, or against the trustee and upon the trust fund in the other. But in the absence of any evidence of intention to create a trust, I find nothing to support the respondent's contention that what was clearly established as an agency became a trust.

Nor can I regard the giving to, or the receipt of, the cheque by the Merchants Bank, followed by a presentation upon which it should have been accepted and paid as equivalent in legal or equitable effect to a transfer or payment of the money itself to that bank. To do so would be, in my opinion, to give to the dishonoured cheque the effect and operation of an assignment of money in the drawee's hands belonging to the drawer, or at least of a charge upon it. It has neither. Its wrongful dishonour gives no right of action to the payee against the drawee either for the money itself or for damages for such wrongful dishonour. *Schroeder* v. *Central Bank* (1); *Hopkinson* v. *Forster* (2). There can be no charge in equity without an intent to charge. The cheque is merely a bill of exchange payable at the banker's. The giving of it implies neither an intention to assign the drawer's money in the banker's hands nor an intention to charge it. Unless the cheque be treated as amounting to an assignment of, or constituting a charge upon, these moneys, I cannot understand on what footing it can be successfully urged that its receipt and presentation and dishonour would produce the same legal situation as would result from the receipt of the money itself by the payee or a declaration

(1) 34 L.T. 735. (2) L.R. 19 Eq. 74.

by the banker that such money would be held in trust for him.

The maxim that

equity looks upon that as done which ought to have been done,

though of very extended, is certainly not of universal application. Equity will not thus consider things in favour of all persons, but only of those who have a right to pray that the thing should be done. *Burgess* v. *Wheate* (1); Story's Equity, 13th ed., p. 68. The Merchants Bank was not in that position. The Bank of Montreal owed no duty to it out of which there might arise an equity entitling it to pray that the Bank of Montreal should be made to accept and pay the dishonoured cheque. The banker's only obligation in respect of a cheque drawn on him is to his customer, the drawer, and it arises out of their contractual relations. The drawer alone, if interested in collateral consequences and incidents, may invoke the maxim under consideration. *Re Anstis, Chetwynd* v. *Morgan* (2); *Re Plumptre's Marriage Settlement* (3). With deference, wholesome and useful as this doctrine of equity undoubtedly is within the sphere of its legitimate application, it cannot be invoked here. If it could the money in the Bank of Montreal to the credit of the drawer must be deemed to have become the property of the Merchants Bank just as if it had been actually paid to it on the presentation of the cheque, which would thus be given the effect of an assignment of that money by the drawer to the payee—which it certainly cannot have. *Schroeder* v. *Central Bank* (4). Another equitable maxim, which, although likewise by no means of universal application, may not be ignored, is

(1) 1 Eden 177, at p. 186.
(2) 31 Ch. D. 596, at pages 605-6.
(3) [1910] 1 Ch. 609, at p. 619.
(4) 34 L.T. 735.

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that "equity follows the law." It is not a consequence of the dishonour of the Canadian Agency's cheque having been wrongful that the payee's rights in equity are the same as if that cheque had been paid.

That neither Canadian Agency nor the Bank of Montreal was a trustee, that there was no trust fund and that the Merchants Bank was not a *cestui que trust* is, I think, indubitable. Neither did the latter ever attain a position in any sense equivalent to what it would have occupied had the money itself actually reached its hands whether on payment by the Bank of Montreal of Canadian Agency's cheque or directly from that company.

Whatever rights of control Cairns and Evans may have as principals over the disposition of the fund to their agent's credit in the Bank of Montreal, the Merchants Bank has none. Cairns' and Evans' rights, too, are subject to all equities of set-off as between them and the Canadian Agency and its creditors. These rights are not in question here.

I would for these reasons, with respect, allow this appeal and dismiss this action as against the liquidator with costs throughout.

BRODEUR J.—I concur with my brother Anglin.

MIGNAULT J.—So far as they need be stated, the pertinent facts are as follows:—

In June, 1911, Mr. O. M. Biggar purchased from one Eby certain lands in the Province of Saskatchewan for the price of $47,134.50 on account of which he paid $11,783.62, and the balance was payable by instalments of $7,070.17 on the 7th June, 1912, 1913, 1914 and 1915, and the remaining balance in 1916, with interest at 7 per cent. to be paid with each instalment. This purchase was made by Mr. Biggar on behalf of

the Canadian Agency, Limited, a corporation having its head office in London, England, which furnished the cash payment made to Eby, and Mr. Biggar, on 15th July, 1911, executed a declaration of trust in its favour.

The rights of Eby under his sale to Mr. Biggar now belong to the respondent to whom they were assigned by Eby.

At some date subsequent to this purchase an agreement, incorrectly dated of the 25th May, 1911, was entered into between the Canadian Agency, Limited, one J. F. Cairns of Saskatoon, and Western Canada Mortgage Company, Limited, a corporation having its head office in Edmonton, Alberta, whereby it was stated that it had been agreed between the Canadian Agency, Limited, and Cairns that the latter should take and hold an undivided one-half interest in the lands purchased from Eby and in some other lands acquired from other individuals, Cairns to pay one-half of the costs thereof and of the expenses incurred in connection with the same. It was also stated that Cairns had conveyed one-fifth of his one-half interest to Mr. H. M. E. Evans, who was the manager at Edmonton of the Canadian Agency, Limited, and also the president of Western Canada Mortgage Company, Limited. The agreement was that the Canadian Agency, Limited, should hold the lands in trust for the owners thereof as follows: the Canadian Agency, Limited, an undivided five-tenths interest; Cairns, an undivided four-tenths interest; and Evans, an undivided one-tenth interest in the said lands. It was further agreed that the Canadian Agency, Limited, should on its own behalf pay one-half of the cost of the said lands and of the expenses of surveying, grading, improving, advertising and developing, and all taxes

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and assessments, and should collect from Evans 10% of the cost of the said lands and of such expenses, Cairns being bound to pay or cause to be paid 40% of the cost of the lands and expenses. It was also stipulated that the Canadian Agency, Limited, should do all acts, matters and things required for the improving, developing, advertising and placing upon the market of the said lands and should, on behalf of itself and Cairns, advance all moneys that should be required and should immediately apply to the Western Canada Mortgage Company, Limited—which was financing the venture for Cairns—for the 40% share thereof payable by Cairns.

The instalments and interest on the purchase price were paid in 1912 and 1913, these payments, as I read the evidence, being made by the Canadian Agency, Limited, Cairns and Evans paying, or causing to be paid, their shares to the latter company. On 7th June, 1914, another instalment of $7,070.17 and of $1,484.73 of interest, in all $8,554.90 came due, and it is in connection with this payment that the controversy has arisen.

Taking now the different documents relating to the 1914 payment in the order in which we find them in the case, there is first a cheque, dated 6th June, 1914, to the order of the Canadian Agency, Limited, for $855.49, signed by Mr. Evans, for his tenth share of the 1914 payment.

Next there is a cheque dated 6th June, 1914, of the Canadian Agency, Limited, to its own order, for $3,421.96, drawn on its account No. 3, which is said to have been the account of Western Canada Mortgage Company, Limited. Both of these cheques were deposited to the credit of the Canadian Agency, Limited, in the Bank of Montreal at Edmonton.

An order dated 6th June, 1914, was addressed to the accountant of the Canadian Agency, Limited, for the issue of a cheque signed "Western Canada Mortgage Co., per H. M. E. Evans."

Then there is a letter to the Merchants Bank of Canada, Battleford, Sask., dated 6th June, 1914, and signed by the Canadian Agency, Limited, per H. M. E. Evans. This letter is as follows:—

The Merchants Bank of Canada, 6th June, 1914.
Battleford, Sask.
Dear Sirs:—

Re W. S. Eby.

Enclosed please find our cheque for $4,277.45. This is just half the amount which is due to Mr. Eby on June 7th and which you have given notice to Mr. O. M. Biggar has been assigned to you. It is really a syndicate that is interested in this property and the owners of the half interest in that syndicate have not yet put us in funds to meet their share of the payment. We presume you will grant us a reasonable extension while we are communicating with them on the subject.

Yours faithfully,
THE CANADIAN AGENCY, LIMITED,
Per H. M. E. EVANS.

Then we have the cheque here in question, drawn on 6th June, 1914, by the Canadian Agency, Limited, on its account No. 1 (which was the account of its own moneys), to the order of the Merchants Bank of Canada, Battleford, for the sum of $4,277.45, one-half of the payment of $8,554.90 due to the Merchants Bank as assignee of Eby. Payment of this cheque was refused by the Bank of Montreal, a receiver having been named in England to the Canadian Agency, Limited.

Finally, there is an exhibit dated 8th June, 1914, purporting to be a receipt by the Canadian Agency, Limited, to the Western Canada Mortgage Company for $3,421.96, "40% of payment due W. S. Eby."

The questions now to be decided are: (1) whether the cheque for $4,277.45, sent by the Canadian Agency, Limited, to the respondent represents moneys belong-

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ing to the Canadian Agency, Limited, in so far as the funds drawn on and the proceeds of the cheques of Evans and the Western Canada Mortgage Company are concerned? Or (2) whether these funds are funds belonging to Cairns, or the Western Canada Mortgage Company, Limited, and Evans personally, and subject, in the hands of the Canadian Agency, Limited, to a trust in favour of the respondent? The judgments rendered by the two courts below amount to an affirmative answer to the second question and to a negative answer to the first question.

With all possible respect, and inasmuch as there is no dispute as to the facts, and the only question is with regard to the inference to be drawn therefrom, the judgments of the Alberta courts are open to review —I think the answer should have been in the negative to the second question and in the affirmative to the first. There is certainly no express trust here and, in my opinion, no trust can be implied from the circumstances I have stated above. The letter written by Mr. Evans to the appellant, above quoted, no doubt contained a false statement, but it certainly would shew that Mr. Evans did not treat the cheques of $855.49 and $3,421.96 as having been given to the Canadian Agency, Limited, for a specific purpose or as trust moneys, although the former cheque mentioned that it was for "share Eby payment due 7th June, 1914." Moreover, the instalment of $8,554.90 due to the appellant on that date, was the debt of the Canadian Agency, Limited. The latter had sold an undivided one-half interest in the Eby lands to Cairns, and Cairns had sold one-fifth of his interest to Evans. Whatever Cairns or Evans paid to the Canadian Agency, Limited, on account of these lands was money due by them to this company and not money due by

them to Eby or to his assignee, the respondent. Therefore the moneys paid by them to the Canadian Agency, Limited, and represented by these cheques, were moneys belonging to this company and not trust moneys which came into its possession for a specific purpose.

The appeal should consequently be allowed with costs throughout, and the respondent's action dismissed.

Appeal allowed with costs.

Solicitors for the appellant: *Short, Cross, Maclean Ap'John & Macdonald.*

Solicitors for the respondent: *Woods, Sherry, Collison & Field.*

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*Feb. 7, 11.
*Mar.

ADOLPH LUMBER COMPANY (DEFENDANT) ..... APPELLANT;

AND

MEADOW CREEK LUMBER COMPANY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Construction—Ambiguity—Cancellation—Acquiescence.

M., respondent, contracted to supply lumber to A., appellant, and to make "shipping regularly." Owing to slow shipments, A. wrote cancelling the contract. M. merely acknowledged receipt of the letter; but its manager, later on during a visit to A.'s mill, made no protest, according to evidence accepted by the trial judge.

Held, Idington J. dissenting, that the cancellation of the contract by A. was accepted by M.

Judgment of the Court of Appeal (25 B.C. Rep. 298), reversed, Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Clement J. (1), and maintaining the plaintiff's action.

The appellant and the respondent entered into an agreement in October, 1915, whereby the respondent was to supply 2,000,000 feet of lumber and load it on cars from its mills for shipment. It was agreed that the respondent was to "continue shipping regularly." Later on, the shipments being slowly made, the appellant wrote the respondent cancelling the contract. The respondent's manager acknowledged receipt of the letter; and going afterwards to the appellant's estab-

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 25 B.C. Rep. 298; [1918] 2 W.W.R. 466.

lishment, he declared to two of appellant's employees, according to evidence accepted by the trial judge, that he could not blame the appellant for cancelling the contract. On the same occasion, the respondent asked the appellant to take nevertheless three carloads of lumber he had on hand, which was agreed to. Some months after, the respondent claimed damages for breach of the contract in the sum of $4,985.

Tilley K.C. for the appellant.
Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—In my opinion the contract on which this action was brought was so ambiguously worded that it was almost impossible to determine from its language what the parties really intended and meant to express.

In these circumstances we have the right and the duty, as by their subsequent conduct the parties have themselves put a construction upon the contract, to adopt and apply that as the proper construction.

I think the trial judge has reached the right conclusion that there was a cancellation of the contract by consent of the parties or, to put it in another way, that the cancellation by the appellant was accepted and approved of by the respondent company.

The learned trial judge says:—

> I think the matter may be put in either one of two ways: either that what took place was a cancellation by consent or that the plaintiff company is estopped from denying that the cancellation or repudiation by the defendant company was justified. I think myself that at the time both parties were contented to drop the contract and did so by mutual consent.

The contract being ambiguous in its terms and a construction having been placed upon it by the conduct and language of the parties, that construction will be accepted by the court as the true one. That con-

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struction justified the cancellation of the contract and the acceptance by the respondent company of the lumber Murphy's company had on the cars at Gateway was a concession to Murphy made, as the trial judge finds, at his solicitation, after he had expressed himself as being under the circumstances unable to blame the appellant company for cancelling.

The appeal should be allowed and the judgment of the trial judge restored with costs.

IDINGTON J. (dissenting).—Having regard to the fact that the respondent refused to be bound to a regular shipment of a specific quantity of lumber per day, and that both parties agreed to adopt instead thereof the ambiguous term of "shipping regularly" without defining either the length of time over which the contract was to run, or the quantities contained in each shipment so long as shipped in car loads of not less than twenty-five thousand feet in a car, I do not think the appellant was entitled under the circumstances in evidence abruptly to cancel the contract.

I think the judgment appealed from is right for the reasons assigned by the Chief Justice and Mr. Justice Gallagher respectively.

The appeal should, therefore, be dismissed with costs.

ANGLIN J.—I would allow this appeal and restore the judgment of the learned trial judge substantially for the reasons assigned by him and by McPhillips J.A. I incline to think that, having regard to the circumstances known to both parties necessitating punctuality in deliveries, there was such substantial default by the plaintiff as entitled the defendant to cancel the contract between them. But, if not, I am satisfied that the plaintiff's representative, Murphy,

believed this to be the defendant's legal right. The trial judge's acceptance of the evidence of Morrow and Griffiths puts that practically beyond question. Counsel for the plaintiff frankly admits his client's urgent need of inducing the defendant to accept the two cars of lumber shipped to it after its notice of cancellation and of obtaining money from it to meet pressing obligations. Moreover, Mr. Murphy expected to dispose more advantageously of the greater part of the lumber which he had contracted to sell to the defendant. Under these circumstances, it seems to me quite probable that he was prepared to, and did in fact, acquiesce in the cancellation of his company's contract by the defendant upon receiving the assurance that it would take and pay for the two cars of lumber then standing on its railway siding. At all events, I am, with respect, convinced that the finding of the trial judge to that effect is so well supported by the evidence that it should not have been set aside. The delay in bringing this action makes it reasonably certain that it was an afterthought.

BRODEUR J.—The first question is concerning the right of the Adolph Lumber Company to cancel the sale of timber which the Meadow Creek Co. had agreed to deliver. It was stipulated in the contract that the vendor would start shipping by the 10th of November, 1915, and would "continue shipping regularly." The vendor started to deliver in due time; but his mill required repairs and he had to stop for a few days to have those repairs made. He had, however, taken the necessary steps to procure the logs from its own lumber limits and from some others and he had shipped six cars, when, on the 30th November, the purchaser, without any previous notice and

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without inquiry, cancelled the contract on the ground that the vendor had not shipped the quantity contemplated by the agreement.

The contract in that respect is somewhat indefinite. When the negotiations took place, the purchaser wanted to stipulate a car a day, but the vendor would not agree to that because his mill was small and had not been in operation for two years, that in cold weather it was impossible to have such a small mill run at its full capacity, that the trains sometimes only ran three times a week and that the cars might not be billed out or picked up for days after they were loaded, all circumstances well known to the purchaser.

The lumber, after being sawn at the Meadow Creek Co's. mill at a thickness of two inches, had to be finished at the purchaser's planing mill, which was rather large and which, in order to be run properly, had to be supplied with a much larger quantity than the vendor's saw mill, even running at its full capacity, could supply. The purchaser had then a supply of lumber which came from some other mills but the supply of this became exhausted on the 27th of November. He had been in negotiation with some other saw mill owners in the vicinity to buy from them, but he was unsuccessful; so he was, on the 30th of November, getting short of the quantity of lumber to run his planing mill properly, even if the respondent had delivered 20,000 feet a day, viz., the whole quantity that his saw mill could cut, because the planing mill of the appellant had a capacity of 50,000 feet a day.

The way the Adolph company proceeded in cancelling the contract without giving to the vendor notice of its intention to do so and without making any inquiry as to whether the vendor could fulfil his contract proves to me conclusively that the motive which

determined the purchaser to cancel the contract was not due to the insufficient delivery by the vendor but to the fact that he could not get the necessary supply of lumber from other contractors to keep his mill running.

Suppose there had been a breach on the part of the vendor, it would not be such a breach as would justify the purchaser to rescind. The non-performance goes only to a part of the contract and it must imply a virtual failure of consideration to authorize the rescission.

This is a contract providing for delivery at certain intervals. In the event of breach of one of them the general rule is that the remedy must be by action unless the parties expressly agree that breach of a single shipment shall entitle the other party to treat the contract as abandoned or unless the party shews by his acts an intention to no longer be bound by his contract. *Freeth* v. *Burr* (1); *Withers* v. *Reynolds* (2); *Simpson* v. *Crippin* (3); *Honck* v. *Muller* (4).

In the case of *Mersey Steel & Iron Co.* v. *Naylor* (5), Lord Blackburn said that:—

> The rule of law * * * is that where there is a contract in which there are two parties, each side having to do something * * * if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going to perform my part of it."

In the present case, there is nothing to shew that it went to the root of the matter and I fail to see how the defendant company could be justified in cancelling the contract, as it has done.

The trial judge, who decided in favour of the Adolph Lumber Company, on another ground, stated

(1) L.R. 9 C.P. 208.
(2) 2 B. & Ad. 882.
(3) L.R; 8 Q.B. 14.
(4) 7 Q.B.D. 92.
(5) 9 App. Cas. 434.

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positively that the cancelling letter was absolutely unjustifiable.

The other question at issue is whether the respondent company acquiesced in the cancellation and released the purchaser from any liability arising out of the cancellation.

The trial judge has come to the conclusion that the plaintiff company acquiesced. It is true that after the notice of cancellation was received, the manager of the respondent company went to see the appellants to induce them to take delivery of two cars which had been shipped; and later on to obtain payment of the money which was due to him. In his evidence, that manager says that in those interviews the cancellation has not been discussed.

On the other hand, the witnesses of the defendant company say that the question of cancellation was taken up and that the manager of the respondent company stated that he could not blame the appellants for cancelling the contract. The trial judge accepts the evidence of the appellant company's witnesses. It is a question of credibility; and in that respect I should concur in the finding of the trial judge who saw the witnesses and could form a better opinion as to their veracity than a Court of Appeal.

On this ground I would reverse the judgment of the Court of Appeal and restore the judgment of the trial judge.

The appeal should be allowed with costs throughout.

MIGNAULT J.—That this is a case where there is room for doubt is shewn by the equal division of opinion among the learned judges who have so far dealt with it. The trial judge dismissed the respondent's action and his judgment was reversed by the Court of

Appeal with two dissenting judges. While I have not felt entirely free from doubt, I have nevertheless come to the conclusion that the judgment of the learned tria judge should be restored, for I cannot think that under any reasonable construction of the contract the respondent made regular shipments to the appellant.

It seems also difficult to hold under all the circumstances of the contracting parties, well known to each other, that this stipulation of regular shipments was not of the essence of the contract, and Mr. Murphy, the respondent's manager, frankly admitted that he was to ship to the appellant the entire cut of his mill, which amounted to 20,000 feet, or substantially one carload, per day. This he lamentably failed to do up to the date of cancellation.

But what entirely satisfies me is Murphy's conduct after the cancellation. He acknowledged receipt of the letter of cancellation without a word of complaint, he went to the appellant's establishment and declared to two of the appellant's employees, whose testimony the learned trial judge believed, that he could not blame the appellant for cancelling the contract, but he asked them to take nevertheless three carloads he had on hand, which they agreed to do. Subsequently Murphy went to Fernie to get some money from Mr. Adolph, the appellant's manager, to pay a note, and he does not think that he said anything about the cancellation of the contract, having then, he explains, a deal on with another concern covering a million feet of lumber, and finally, it is only on the 8th of February that his solicitor wrote to the appellant threatening suit. I cannot help thinking that, even if the appellant has not (and I believe it has) made out a case for the exercise of the right of cancellation, it has at least shewn that the respondent fully acquiesced in the can-

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cellation of the contract. Viewing all the circumstances of the case, I have come to the firm conclusion that the Court of Appeal should not have disturbed the findings of the learned trial judge.

The appeal should, therefore, be allowed with costs here and in the court below and the judgment of the trial court restored.

Appeal allowed with costs.

Solicitors for the appellant: *Herchmer & Martin.*
Solicitors for the respondent: *Lawe & Fisher.*

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*Feb. 13, 14.
*Mar. 17.

GRAND TRUNK PACIFIC RAILWAY COMPANY AND BITHULITIC AND CONTRACTING LIMITED (PLAINTIFFS)..... APPELLANTS.

AND

JOHN DEARBORN (DEFENDANT)..... RESPONDENT.

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

Statute—Construction—Chattel mortgage—Ordinary creditor—Execution creditor—Goods under seizure but not sold—Priority between mortgagee and creditor—The Bills of Sales Ordinance, s. 17 (N.W.T. Cons. Ord. c. 43).

The mortgagee, under a chattel mortgage given by E., failed to renew its registration within the delay mentioned in section 17 of the Bills of Sales Ordinance (N.W.T. Cons. Ord. c. 43). The mortgage, therefore, as provided in that section, "ceased to be valid as against the creditors" of E. G. obtained judgment against E. and caused a writ of execution to be placed in the sheriff's hands against his goods. A month before, a distress warrant was placed by the mortgagee in the hands of the same sheriff with instructions to take possession of and sell the goods covered by the mortgage. Pursuant thereto, the sheriff's officer, after taking an inventory of the goods, left them on the premises in charge of the tenant.

Held, Idington and Anglin JJ. dissenting, that the word "creditors," as used in section 17 of the Bills of Sales Ordinance, means all creditors of the mortgagor and not merely the execution creditors. *Parkes* v. *St. George* (10 Ont. App. R. 496) and *Security Trust Co.* v. *Stewart* (12 Alta. L.R. 420; 39 D.L.R. 518; [1918] 1 W.W.R. 709) overruled.

Per Davies C.J., Anglin and Mignault JJ.—The goods, being only under seizure and not yet sold when the writ of execution was placed in the hands of the sheriff, were still held under a mortgage which had become invalid as against the execution creditor; and the latter acquired a right to have the goods seized and disposed of for his benefit in priority to that of the mortgagee.

APPEAL *per saltum* from the judgment of the Supreme Court of Alberta, Ives J. dismissing the plaintiff's action with costs.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault.

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The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

H. C. Macdonald for the appellant.
S. B. Woods K.C. for the respondent.

THE CHIEF JUSTICE.—This appeal comes to us by way of appeal *per saltum* from a judgment of Mr. Justice Ives delivered on the trial of an interpleader issue in which the Grand Trunk Pacific Railway Co. was directed to be the plaintiff and the respondent Dearborn defendant for the purpose of testing the validity of a chattel mortgage given on the 29th day of January, 1914, by the Edmonton Gravel Co. Ltd. in favour of the Northern Trust Co., of which chattel mortgage the respondent Dearborn had become assignee.

On the 16th day of April, 1917, the Grand Trunk Pacific Railway Co. obtained judgment against the Edmonton Gravel Co. in the sum of $7,808 and costs, and on the 4th of May, 1917, a writ of *fi.-fa.* for the amount of the judgment and costs was placed in the sheriff's hands with instructions to levy the amount thereof on the goods and chattels of the Edmonton Gravel Co.

On the 5th of April, 1917, a distress warrant was placed in the hands of the sheriff by the defendant Dearborn as assignee of the mortgage bill of sale from the Edmonton Gravel Co. with instructions to take possession of and sell the goods and chattels set out and assigned in the said mortgage and pursuant thereto the sheriff did actually seize and take possession of the said chattels. A portion of them were actually sold by the sheriff and the remainder held by him

subject to the order of the court on the interpleader issue.

The learned trial judge held that the facts did not constitute a delivery of possession by the mortgagor, and also held that while he agreed personally with the contention of the plaintiff and the dissenting judgment of Chief Justice Harvey in the case of *The Security Trust Co. Ltd.* v. *Stewart* (1), that failure on the part of the mortgagee of the bill of sale or its assignee to file the renewal statement required by the statute

made void the mortgage against all creditors and that there was no sufficient justification for qualifying the term "creditors"

in section 17 of the Ordinance respecting the registration of Bills of Sale so as to read "execution creditors," he was nevertheless bound by the judgment of the court in that case and precluded from giving effect to his own opinion.

In this appeal the question is squarely raised before this court, which is, of course, not bound by any provincial judgments, whether under the Bills of Sales Ordinance, ch. 43 of the Consolidated Ordinances of the N.W. Territories, the defendant's mortgage, not having been renewed on or before the 18th of January, 1917, as required by section 17 of the Ordinance, had in the words of the Ordinance "ceased to be valid" as expressed in section 6 or had become "absolutely null and void" as expressed in section 11 against the creditors of the mortgagor, and whether the courts should limit the meaning of the term "creditors" in the section to execution creditors only.

The Ordinance in question is substantially a copy of the Ontario statute upon the same subject before it was amended by enacting that the word "creditors"

(1) 12 Alta. L.R. 420; 39 D.L.R. 518; [1918] 1 W.W.R. 709.

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should not be limited to "execution creditors" as it had been by the judgments of the courts of Ontario.

Upon this question, as to the meaning of the word "creditors" in the section as originally enacted by the Ontario Legislature and substantially copied by the Ordinance of the N.W. Territories, there has been a great difference of judicial opinion.

In *Holmes* v. *Vancamp* (1), Ch. J. Robinson, delivering the judgment of the court, says at p. 515:—

It is established clearly that he (Vancamp) was in fact a creditor (of the mortgagor) when this mortgage was given, and when he shews that, he compels us to hold the mortgage void as against him from the first and not merely from the time his judgment was entered.

In a case in the Chancery Division of *Barker* v. *Leeson* (2), it was held by Chancellor Boyd that

a chattel mortgage which has expired by effluxion of time under R.S.O. ch. 119, sec. 10, and has not been renewed or refiled, ceases to be valid as against all creditors of the mortgagor then existing.

The Chancellor, in giving judgment, said at p. 117:—

The language of the statute is, that every mortgage shall cease to be valid as against *the creditors* of the person making the same after the expiration of one year from the filing thereof, unless there be a statement of renewal filed, as provided in the 10th section of the Act: R.S.O. ch. 119. Why should this be read as meaning judgment or execution creditors?

The recovery of judgment merely facilitates the proof of the party who is the creditor, but he is as much a creditor before as after judgment. The object of the Act is plainly, by means of registration, to inform everybody that goods apparently in the possession and ownership of A. are not in truth his, but are held by him subject to the claim of B. under a chattel mortgage or bill of sale. The object of the Act is to enforce a visible and actual transfer of possession upon every change of ownership, or to compel the recording of the instruments which manifest the change of property. The intent is, that persons who are about to become the creditors of others by parting with money or money's worth, may, by searches in the public office, obtain information for their guidance; and that the ostensible owners of chattels may not gain fictitious credit on the faith of property which is either encumbered or belongs to other people. By the statute then, where the mortgagee has not renewed his security by refiling at the year's end, and is not in possession of the chattels, his mortgage ceases to be valid against creditors.

(1) 10 U.C.Q.B. 510. (2) 1 O.R. 114.

The case chiefly relied upon by the respondent was that of *Parkes* v. *St. George* (1). There the appeal court held (Patterson J. dissenting) that a creditor who is not in a position to seize or levy on an execution on the property cannot maintain an action to have the instrument declared "invalid," and that holding was, of course, followed in the Ontario courts in a series of decisions until the Act was amended eight years afterwards by declaring that the word "creditors" in the statute should not be limited to execution creditors.

In the Province of Alberta, in the case of the *Security Trust Company Ltd.* v. *Stewart* (2), the court, Harvey C.J. dissenting, followed the Ontario decision of *Parkes* v. *St. George* (1), and limited the word "creditors" in the Act to

such as were either execution or attaching creditors.

I agree fully with the dissenting Chief Justice Harvey in his statement (2), that he could see

no sufficient reason for concluding that when the legislature said that a mortgage would cease to be valid as against the creditors of the mortgagor, it meant anything different from what it said. To prefix the word "execution" before the word "creditors" would be a perfectly legitimate amendment but it is only the legislature that has the right to make such amendment.

See also judgment of Walsh J. in *Graf* v. *Lingerell* (3).

The same question came before this court in the case of *Clarkson* v. *McMaster* (4). Chief Justice Strong, in his judgment, referring to the decision of the Ontario Court of Appeal in *Parkes* v. *St. George*, above referred to (1), and the cases which followed it, said at p. 100:—

If it were necessary now to determine whether this construction was or was not correct I am compelled to say, with great respect for the opinions referred to, that I should find great difficulty in agreeing with

(1) 10 Ont. App. R. 496.
(2) 12 Alta. L.R. 420; 39 D.L.R. 518; [1918] 1 W.W.R. 709.
(3) 7 Alta. L.R. 340, at p. 342. 16 D.L.R. 417
(4) 25 Can. S.C.R. 96.

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these decisions. First, I see no reason why the words creditors should be restricted to a particular class of creditors, viz., judgment creditors. Why should the same word receive a different construction in this Act from that which it has received as used in the statute of the 13th Elizabeth? I see no reason for any such distinction. It is true that equitable execution as consequential on the avoidance of a transaction under the 13th Elizabeth could not, under the old system of separate jurisdictions for law and equity, have been obtained by any but judgment creditors, but the deed was nevertheless held to be void as against simple contract creditors.

And again at p. 101:—

Then, there are reasons which, in my opinion, require a liberal construction of the word "creditors," derived from the manifest policy of the "Chattel Mortgage Act." Registration or possession were required manifestly for the protection, not only of actual creditors, but of those who might become creditors, relying on the visible possession of property by their debtor, and the absence from the appropriate registry of any charge upon that property; and this for the protection of those who had not had the opportunity of recovering judgment, creditors payment of whose claims might be deferred, or who had not had time to get judgment.

I have no hesitation myself in putting the construction upon the section of the Ontario Legislature, from which the Ordinance was substantially copied, adopted by Chief Justice Robinson in *Holmes* v. *Vancamp* (1), Chancellor Boyd in *Barker* v. *Leeson* (2), and Patterson J. in *Parkes* v. *St. George* (3), and also by Chief Justice Strong in *Clarkson* v. *McMaster* (4), and, upon the N.W. Ordinance which is a substantial copy of the Ontario enactment, by Chief Justice Harvey, dissenting in the Appeal Court and Simonds J., the trial judge, in *Security Trust Company* v. *Stewart* (5), and by Walsh J. in *Graf* v. *Lingerell* (6), on the N.W. Ordinance before us.

I cannot admit the right of the courts where the language of a statute is plain and unambiguous to practically amend such statute either by eliminating

(1) 10 U.C.Q.B. 510.
(2) 1 O.R. 114.
(3) 10 Ont. App. R. 496.
(4) 25 Can. S.C.R. 96.
(5) 12 Alta. L.R. 420; 39 D.L.R. 518; [1918] 1 W.W.R. 709.
(6) 7 Alta L.R. 340, at p. 342, 16 D.L.R. 417.

words or inserting limiting words unless the grammatical and ordinary sense of the words as enacted leads to some absurdity or some repugnance or inconsistency with the rest of the enactment, and in those cases only to the extent of avoiding that absurdity, repugnance and inconsistency.

I think the word "creditors" as used in this Ordinance means just what it says and embraces all creditors and not merely execution creditors. Such a construction has in scores of cases in the English and in our courts been put upon the same word "creditors" in the Statute of Elizabeth.

I think the object and purpose of the legislation being construed was to compel either registration of a mortgage or other bill of sale from the owner in possession of the chattels to a mortgagee or the visible and actual transfer and possession of the chattels to him so that persons might not be entrapped or misled into advancing moneys or credits to others in ostensible possession of chattels and goods under the belief that they were the owners of the goods. It was intended to prevent the ostensible owner of goods from obtaining undeserved credit on the faith of his being the real owner of property which was either encumbered by secret bills of sale or belonged to other people. It does not require an actual change in the ostensible possession of property but it does require, if there is no such change of possession, that the security taken upon the property should be recorded in a public office; and it further requires that from time to time, as specified in the Act, such security should be renewed on the registry so as to conform with the actual existing facts. These requirements were not enacted surely for the benefit of execution creditors merely. They were so enacted for the benefit and protection of all who were

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or might become creditors before there was an open, visible change of actual possession of the goods and chattels or a registration in a public office of a mortgage of such goods. It comes down to this, that either registration and renewal or actual transfer of possession were required for the protection as well of existing as for future creditors who might rely upon such possession and the non-registration or non-renewal of charges in the proper registry.

Being a remedial statute to prevent fraud and protect honest dealers it should rather be construed, if its language is doubtful, liberally and to advance the object the legislature clearly had in view.

For these and other reasons I will not stop to enlarge upon, I would allow the appeal and direct judgment as prayed for in the statement of claim.

If a majority of the court does not agree with my construction I would still allow the appeal upon the second ground that the plaintiffs appellants having become execution creditors, and the goods not having been sold when the execution was placed in the hands of the sheriff, they were still held under the mortgage which had become invalid as against the plaintiffs as execution creditors and that as such these latter had priority over the claimant under the void chattel mortgage.

IDINGTON J. (dissenting).—I agree with the construction adopted herein by the court below, of the Bills of Sale Ordinance Act in question. Even if I had grave doubts (which I never had) of the correctness of that construction having been well founded, when adopted long ago by the courts of Ontario in applying the Act from which that now in question seems to have been copied, I should not feel at liberty at this late day

to upset all that which now rests upon the adoption of such construction, supposed to have been settled so long ago.

There have been many interesting questions suggested in the course of the argument which, when connected with charges of fraud, might be well worth considering, but raises nothing herein when such charges are not made. Therefore I pass no opinion but upon the single point raised and dealt with above.

I think the appea' should be dismissed with costs.

ANGLIN J.—The defendant having failed to renew the registration of his chattel mortgage on or before the 18th January, 1917, as required by section 17 of the Bills of Sales Ordinance (Con. Ord. N.W.T., ch. 43), it "ceased to be valid as against the creditors" of the mortgagor. The plaintiff, the Grand Trunk Pacific Railway Co., was then a simple contract creditor of the mortgagor. It became an execution creditor on the 4th of May, 1917. Meantime, on the 5th of April, the defendant had caused what he asserts was a seizure to be made of the goods covered by his chattel mortgage and they were, formally at least, still under such seizure when the plaintiff company's execution was lodged with the sheriff on the 4th of May and when he was directed, on the 19th of October, to hold the chattels or proceeds of the sale thereof to meet it.

Upon these facts, Ives J. following, as he was bound to do, the decision of the Appellate Division of the Supreme Court of Alberta in *Security Trusts Co. Ltd.* v. *Stewart* (1), (although he expressed his personal preference for the dissenting opinion of Harvey C.J.), dismissed the plaintiffs' claim to have the chattel mortgage declared void as against them and for pay-

(1) 12 Alta. L.R. 420; 39 D.L.R. 518; [1918] 1 W.W.R. 709.

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ment over to them of the proceeds of the sale of the goods in question (made without prejudice under an arrangement with the parties) by the sheriff in whose hands they are. From that judgment the plaintiffs appeal to this court—*per saltum* by consent.

The appeal rests on two distinct grounds: (1) that the word "creditors," in section 17 of the Bills of Sales Ordinance, means all or any creditors of the mortgagor and not merely "execution creditors," as was held by the Appellate Division in the *Stewart Case* (1); (2) that the goods being only under seizure and not yet sold when the first execution was placed in the sheriff's hands, they were still held under the mortgage, which had become invalid as against the plaintiffs, if not before, at least immediately upon their attaining the status of execution creditors, and that as execution creditors they acquired a right to have the goods in question seized and disposed of for their benefit superior to that of the defendant as chattel mortgagee.

On the first point, notwithstanding Mr. Macdonald's very able argument and the powerful judgment of the late Chief Justice Strong in *Clarkson* v. *McMaster* (2), by which he supported it, I am of the opinion that the word "creditors" in the Bills of Sales Ordinance has been properly held to mean execution creditors—creditors whose claims are in such a form as gives them a lien on the property and entitles them to seize it—creditors having rights in respect of the goods to the exercise of which the security to be avoided would, if valid, present an obstacle. The judgments in *Parkes* v. *St. George* (3), have convinced me that the legislature cannot have meant to give a simple contract creditor what would be tantamount to execution before

(1) 12 Alta. L.R. 420; 39 D.L.R. 518; [1918] 1 W.W.R. 709.

(2) 25 Can. S.C.R. 96.

(3) 10 Ont. App. R. 496.

judgment. It would be useless at the suit of such a creditor to set aside a mortgage which (subject to the statute against fraudulent preferences) could be at once replaced (no creditor having acquired a right to seize the goods covered by it and no subsequent purchaser or mortgagee having intervened) unless such goods should be held to meet the suitor's claim when he should have recovered judgment against his debtor. On this branch of the case, however, I merely desire respectfully to express my concurrence in the judgment in *Parkes* v. *St. George* (1), and the numerous decisions which have followed it.

But upon the other aspect of the case, I think the appellants are entitled to succeed on the ground on which *Heaton* v. *Flood* (2), was decided in favour of the execution creditor. I express no decided opinion upon the question whether there must be what is tantamount to "a delivery or new transfer by the mortgagor" to render the taking of possession effectual to cure the defect in the mortgagee's title due to non-compliance with the requirements of the statute. The mortgagee certainly took such possession as he obtained by virtue of his mortgage upon a suggestion that a seizure by him under it would "cure the defect" due to its non-renewal. He continued to hold solely under whatever right the defective mortgage gave him—a right good as against the mortgagor but which had "ceased to be valid" as against his execution creditors. There had been no sale of the goods such as was held in *Meriden Co.* v. *Braden* (3), and *Cookson* v. *Swire* (4), to vest in the purchaser a title not dependent on the continued subsistence of the chattel mortgage and good as against the subsequent execution creditor. There

(1) 10 Ont. App. R. 496.
(2) 29 O.R. 87.
(3) 21 Ont. App. R. 352.
(4) 9 App. Cas. 653.

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was nothing which amounted, or was equivalent, to a delivery or new transfer by the mortgagor—nothing which took the transaction out of the Bills of Sale Ordinance (*Smith* v. *Fair* (1)), *per* Patterson J.A., if an act of the mortgagor tantamount to delivery was requisite. The view that "the remedial effect of possession depends upon the act of the mortgagor" was taken at an early date in a case arising under the Bills of Sale Ordinance now under consideration by Wetmore J., *Adams* v. *Hutchings* (2).

But whether this view be or be not correct the evidence, in my opinion, to quote the language of Meredith C.J. in *Heaton* v. *Flood*, (3) does not

establish any change of possession, or anything more than a mere formal delivery

to the sheriff's officer as the mortgagee's bailiff,

without any real change of the possession being intended or effected.

The apparent possession continued as before. The goods covered by the chattel mortgage were found by the sheriff's officer lying in or about a barn on a tenanted farm. After taking an inventory the officer left them on the place just as he found them in charge of the tenant, without pay, merely with instructions to "see that nobody took the stuff." In my opinion, even in the absence of a statutory provision expressly prescribing that the change of possession be open and reasonably sufficient to afford public notice thereof (*Hogaboom* v. *Graydon* (4)), what took place did not constitute the "actual and continued change of possession" requisite to dispense with a mortgage duly registered in conformity with the Bills of Sales Ordinance, and only such possession would enable the mortgagee to hold as against execution creditors of the

(1) 11 Ont. App. R. 755, at p. 758.
(2) 3 Terr. L.R. 206, at. p 216.
(3) 29 O.R. 87.
(4) 26 O.R. 298, at p. 302.

mortgagor. *Scribner* v. *Kinlock* (1), *per* Patterson J.A. at p. 378 and per Rose J. at p. 380. *Heaton* v. *Flood* (2); *Steele* v. *Benham* (3). To hold otherwise would open the door to the very mischief against which the statute was designed to guard.

I would allow the appeal of the execution creditors and direct judgment in their favour in accordance with the prayer of the statement of claim.

BRODEUR J.—The main question in this case is as to whether a chattel mortgage which has not been renewed is good against ordinary creditors of the mortgagor. The section we have to construe is section 17 of the Bills of Sales Ordinance, ch. 43, which enacted that every chattel mortgage has to be renewed within two years of the filing, under penalty that in default the mortgage

shall cease to be valid as against the creditors of the persons making the same and against subsequent purchasers or mortgagees in good faith for valuable consideration.

That section has been the law of the North West Territories since 1881. That legislation had evidently been adopted from the legislation then in force in Ontario because the Ordinance of 1881 copies almost word for word the statute which was then in force in Ontario.

It is contended by the respondent that the word *creditors* in that section means the execution creditors. The appellant, on the other hand, contends that the word *creditors* should be construed literally as applying to all the creditors, including the ordinary creditors.

We find in the Statute 13 Elizabeth that the name *creditors* is there mentioned in connection with the right to set aside fraudulent or preferential assignment.

(1) 12 Ont. App. R. 367. (2) 29 O.R. 87, at p. 92.
(3) 84 N.Y. 634, at p. 638.

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Brodeur J.

That word was construed in different cases in England, which are to be found in May on Fraudulent Conveyances, 3rd ed., p. 102; and I may in that respect quote the case of *Reese River Silver Mining Co.* v. *Atwell* (1), where it was held by Lord Romilly M.R. that simple contract creditors are entitled to a decree declaring a deed void under the Statute of Elizabeth, though not having obtained the judgment at law.

In 1881, in Ontario, in the same year in which the Ordinance was passed in the North West Territories, Chancellor Boyd, in the case of *Barker* v. *Leeson* (2), being called upon to construe exactly the same section as the one passed in the North West Territories decided that the word *creditors* in that section could not be restricted to execution creditors but should apply to all creditors.

Then the Council of the North West Territories, in passing that legislation and in adopting the word *creditors*, is supposed to have used the word according to the construction which it had received in England and was receiving in the Province of Ontario.

Three years later, in Ontario, was decided the case of *Parkes* v. *St. George* (3) where the Court of Appeal held that a creditor, who is not in a position to seize or lay an execution on a property cannot maintain an action to have the chattel mortgage declared invalid.

That decision of the Court of Appeal of Ontario seems to have been followed in that province until 1892, when the law was changed.

In 1895, the question came up before this court in the case of *Clarkson* v. *McMaster* (4), and there the Chief Justice, Sir Henry Strong, said that he

(1) L.R. 7 Eq. 347.
(2) 1 O.R. 114.
(3) 10 Ont. App. R. 496.
(4) 25 Can. S.C.R. 96.

could not agree with the opinions expressed in the case of *Parkes* v. *St. George* (1). I will quote his words:—

> I see no reason why the word *creditors* should be restricted to a particular class of creditors, viz., judgment creditors.

And he goes on:—

> Registration or possession are required manifestly for the protection not only of actual creditors but of those who might become creditors relying on the visible possession of property by their debtor and the absence from the appropriate registry of any charge upon that property.

In the Province of Alberta from which the present appeal comes there seems to have been a great divergence of opinion among the judges of that province. It seems to me that the case of *Parkes* v. *St. George* (1), has been decided on account of the peculiar expressions used in the English "Bills of Sale Act," which speaks of execution creditors. Chief Justice Hagarty, in rendering the judgment in the case of *Parkes* v. *St. George* (1), says:—

> It is significant that with the extreme care manifested in these Acts (the English "Bills of Sales Acts") to avoid secret or fraudulent assignments of chattels, they should have carefully limited their operation to creditors having executions. I cannot believe our legislature ever contemplated applying the remedy of registration to the case of every person having a claim or account against the mortgagor at the date of the instrument.

It is pretty clear that the Ontario "Bills of Sales Act" was taken from the English Act. But if the Ontario Legislature has found it advisable to use the word *creditor* as it was used in the Statute of Elizabeth, it seems to me that the change was made intentionally on the part of the legislature and that it meant to give to the creditors the same rights as they had under the Statute of Elizabeth.

The Court of Appeal of Alberta came to the conclusion that they should follow the decision of *Parkes* v. *St. George* (1). With a great deal of deference I

(1) 10 Ont. App. R. 496.

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hold the contrary view. It seems to me that the word *creditors* should be construed as applying to all creditors.

The appeal, then, should be allowed with costs of this court and of the courts below.

MIGNAULT J.—Two questions are submitted by the appellant:—

1. By virtue of section 17 of the Bills of Sales Ordinance, being ch. 43 of the Consolidated Ordinances of the North West Territories, the respondent having failed to file a renewal statement within thirty days next preceding the 18th of January, 1917, its chattel mortgage ceased to be valid as against the creditors of the mortgagor and the appellant was such a creditor.

2. This failure to file a renewal statement has not been cured by the seizure made by the respondent on the 5th April, 1917, of the goods covered by the chattel mortgage, which was not such a taking possession of the mortgaged goods as could cure the omission to file the statutory renewal.

First question.—The answer to this question depends on the construction of the word "creditors" in sections 11, 17 and 19 of the Ordinance, the appellant contending that it means creditors generally, the respondent claiming that it only applies to execution creditors, to the exclusion of mere contract creditors.

In this case the appellant became an execution creditor only on the 4th May, 1917, subsequent to the seizure made by the respondent on the 5th April.

As briefly as they can be stated, the provisions of the Bills of Sales Ordinance, with regard to the registration and renewal of registration of chattel mortgages, are as follows:—

Section 6 requires the registration, within thirty days from its execution, of every mortgage or conveyance

of goods and chattels which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged.

By section 11 it is provided that if such mortgage or conveyance is not so registered, it shall be

absolutely null and void as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith for valuable consideration.

Section 17 states that

every mortgage filed in pursuance of this Ordinance shall cease to be valid as against the creditors of the persons making the same and against subsequent purchasers or mortgagees in good faith for valuable consideration after the expiration of two years from the filing thereof unless, within thirty days next preceding the expiration of the said term of two years, a statement exhibiting the interest of the mortgagee, his executors, administrators or assigns in the property claimed by virtue thereof and a full statement of the amount still due for principal and interest thereon, and of all payments made on account thereof, is filed in the office of the registration clerk of the district where the property is then situate * * *

Finally section 19 directs that another statement in accordance with the provisions of section 17 shall be filed in the office of the registration clerk of the district where the property is then situate within thirty days next preceding the expiration of the term of one year from the day of the filing of the statement required by section 17,

and in default thereof such mortgage shall cease to be valid as against the creditors of the person making the same and as against purchasers and mortgagees in good faith for valuable consideration, and so on from year to year, that is to say, another statement as aforesaid duly verified shall be filed within thirty days next preceding the expiration of one year from the filing of the former statement, and in default thereof such mortgage shall cease to be valid as aforesaid.

This Ordinance was adopted in 1881, and was substantially copied from the Ontario Act, R.S.O. 1877, ch. 119, which also stated (section 4) that chattel mortgages not registered would be

absolutely null and void as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration.

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Section 11 of the Ontario Act provided that

every mortgage, or a copy thereof, filed in pursuance of this Act, shall cease to be valid as against the creditors of the persons making the same and against subsequent purchasers and mortgagees in good faith for valuable consideration, after the expiration of one year from the filing thereof,

unless within thirty days next preceding the expiration of the said term of one year a statement exhibiting the interest of the mortgagee is again filed in the office of the clerk of the County Court.

The English "Bills of Sale Act," 1878, 41-42 Vict. ch. 31, also required the registration of bills of sale, failing which

such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs, officers or other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any court authorizing the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void as regards the property in or right to the possession of any chattels comprised in such bill of sale.

It is perfectly clear that decisions under the English "Bills of Sale Act" cannot be taken as a guide for the construction of the Canadian statutes. In drafting the latter statutes the legislature has departed from the carefully guarded language of the English Act, and that, it seems to me, cannot have been done with any other idea than of giving to the Canadian statutes a wider application than the English Act.

In *Parkes* v. *St. George* (1), decided in 1884, the Ontario Court of Appeal, Hagarty C.J., Burton, Patterson and Osler JJ. held, Patterson J. dissenting, that a judgment or execution creditor is entitled to impeach a chattel mortgage on the ground of an irregularity or informality in the execution of the

(1) 10 Ont. App. R. 496.

document, or by reason of its non-compliance with the provisions of the "Chattel Mortgage Act" (R.S.O. ch. 119), but that a creditor who is not in a position to seize or lay on an execution on the property, cannot maintain an action to have the instrument declared invalid, and that a creditor in that position can only maintain such a proceeding where the security is impeached on the ground of fraud.

In 1892, the Ontario Act respecting mortgages and sales of personal property was amended by 55 Vict. ch. 26, and it was enacted (section 2) that in the application of the said Act the words,

> void as against creditors shall extend to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors * * * as well as to creditors having executions against the goods and chattels of the mortgagor or bargainor in the hands of the sheriff or other officer.

Referring now more specially to *Parkes* v. *St. George* (1), which was followed by the Alberta Court of Appeal in the *Security Trust Co.* v. *Stewart* (2), Chief Justice Harvey dissenting, doubts as to its correctness where expressed by so eminent a jurist as Chief Justice Sir Henry Strong in *Clarkson* v. *McMaster* (3). Before *Parkes* v. *St. George* (1) Chief Justice Sir John Beverley Robinson, dealing with the statute then in force, had expressed a contrary opinion in *Holmes* v. *Vancamp* (4), and Chancellor Boyd in *Barker* v. *Leeson* (5), had decided that a chattel mortgage, registration of which had not been renewed, ceased to be valid as against all creditors of the mortgagor then existing.

Mr. Woods, for the respondent, referred us to the dictum of Lord Atkinson as to the construction of statutes in *Banbury* v. *Bank of Montreal* (6), where the noble Lord said, at p. 691:—

(1) 10 Ont. App. R. 496.
(2) 12 Alta. L.R. 420; 39 D.L.R. 518; [1918] 1 W.W.R. 709.
(3) 25 Can. S.C.R. 96.
(4) 10 U.C.Q.B. 510, at p. 515.
(5) 1 O.R. 114.
(6) [1918] A.C. 626; 44 D.L.R. 234.

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The question then is, does this section (section 6) of Lord Tenterton's Act apply to innocent representation? No doubt the words of the section are general. On its face it applies to every representation, innocent or fraudulent; but one cannot construe these words, general in character though they be, without having regard to the circumstances in reference to which they were used, and to the object appearing from the statute which the legislature had in view in using them. Lord Coke, in a well-known passage in *Heydon's Case* (1), lays it down that to get at the scope and object of an Act one should consider: (1) What the law was before it was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy parliament has appointed; (4) the reason for the remedy. In *Hawkins* v. *Gathercole* (2), Turner L.J. said that "in construing Acts of Parliament the words which are used are not alone to be regarded." He then quotes with approval and adopts a passage from the judgment in *Stradling* v. *Morgan* (3). This statement of the law was by Turner L.J. stated to be the best he knew of. It has been approved of by Lord Hatherley in *Garnett* v. *Bradley* (4), by Lord Selborne in *Bradlaugh* v. *Clarke* (5), and by Lord Halsbury in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs and Trade Marks* (6). The passage from Plowden is so applicable to the present case and, approved of as it has been, is so authoritative that one may be excused for quoting it at length. It runs thus: "The judges of the law in all times past have so far pursued the intent of the makers of statutes that they have expounded Acts which were general in words to be but particular where the interest was particular," and after referring to several instances proceeds: "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign (*i.e.*, extraneous) circumstances. So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

There is no doubt that, apart from the authority due to this exposition of the law governing the con-

(1) [1584] 3 Rep. 7b.
(2) (1855) 6 DeG.M. & G. 1, 20-1.
(3) [1560] Plowd. 199, at pp. 204 and 205.
(4) 3 App. Cas. 944, at p. 950.
(5) 8 App. Cas. 354, at. p. 362.
(6) [1898] A.C. 571, at p. 575.

struction of statutes, the duty of courts is to have regard, in construing general terms,

> to the circumstances in reference to which they were used and to the object appearing from the statute which the legislature had in view in using them.

But I can discover in this Ordinance no indication that the intention of the legislature was not to use the words "creditors of the mortgagor" in their general sense. The statute provided for the establishment of registration districts and for the registration of mortgages and conveyances intending to operate as a mortgage of goods and chattels. The object of the statute was without doubt to secure the due publicity of these mortgages and conveyances, and this publicity was required for the protection of third parties dealing in good faith with a person in actual possession of goods and chattels, for registration was required in the case of

> every mortgage or conveyance intending to operate as a mortgage of goods and chattels which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged.

When, therefore, the statute says that in default of registration or the filing of a statement of the interest of the mortgagee, the mortgage shall be absolutely null and void, or shall cease to be valid, as against the creditors of the mortgagor and subsequent purchasers or mortgagees in good faith for valuable security, I cannot think that the word "creditors" should be cut down by construction so as to read in the statute the qualification that these creditors must be judgment or execution creditors. The evil or mischief which the legislature unquestionably desired to remedy was the possibility of a debtor making secret conveyances or mortgages of his goods and chattels not accompanied by an immediate delivery and actual change of posses-

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sion. That such secret conveyances or mortgages would be prejudicial to creditors generally, who have given credit to the mortgagor on the faith of his possession of ample goods and chattels, as well as to judgment or execution creditors who have obtained a lien on his goods, cannot be doubted, and the intention was to remedy this evil and to give to registration the same effect as an actual delivery and change of possession, both serving as a notice to third parties from whom the owner of the goods and chattels might seek to obtain credit or who might obtain a lien on his property.

I think that the Ontario statute passed in 1892, eight years after *Parkes* v. *St. George* (1) was decided, expressly declaring that the word "creditors" shall extend to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves, as well as to creditors having executions against the goods and chattels of the mortgagor or bargainor, shews that at least in Ontario, where this legislation was first enacted, the intention was not that the word "creditors" should be restricted to execution creditors. And notwithstanding the great respect which I have for the decision in *Parkes* v. *St. George* (1), and the reluctance which I naturally feel to dispute its authority, I cannot, now that the question is raised before this court, do otherwise than express the opinion that the appellant, although a contract creditor, was such a creditor as was in the contemplation of the sections of the Ordinance above cited. For that reason, I think, with deference, that the decision of the Alberta Court of Appeal in *Security Trust Company Ltd.* v. *Stewart* (2), should be overruled.

(1) 10 Ont. App. R. 496.

(2) 12 Alta. L.R. 420; [1918] 1 W.W.R. 709; 39 D.L.R. 518.

I, therefore, have come to the conclusion on this first question that the respondent's chattel mortgage ceased to be valid as against the appellant, no renewal statement having been filed as required by the Ordinance.

Second question.—I here express my entire concurrence with what my brother Anglin has said on this branch of the case, and I am of the opinion that there was not, by means of the proceedings under the seizure made by the respondent on the 5th April, 1917, such a taking of possession of the mortgaged goods as would dispense with compliance with the requirements of the statute as to registration or renewal thereof.

The appeal should, therefore, be allowed with costs throughout, and judgment should be rendered in accordance with the appellants' demand.

Appeal allowed with costs.

Solicitors for the appellants: *Short, Cross, Maclean & Macdonald.*

Solicitors for the respondent: *Wood, Sherry, Collisson & Field.*

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*Feb. 6.
*Mar. 17.

THE BANK OF HAMILTON (PLAINTIFF) ..... APPELLANT;

AND

MARY ANN HARTERY AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Debtor and creditor—Judgment—Mortgage—Registration—Priority—"Land Registry Act," R.S.B.C. (1911), c. 127, ss. 73, 104, 137—"Execution Act," R.S.B.C. (1911), c. 79, s. 27.

A judgment, registered in the Land Registry Office on an application made after the date of the execution of a mortgage by the judgment debtor but before the application for the registration of the mortgage, takes priority over the mortgage by virtue of section 73 of the "Land Registry Act." *Jellett* v. *Wilkie*, 26 Can. S.C.R. 282, and *Entwistle* v. *Lenz*, 14 B.C. Rep. 51; 9 W.L.R. 17, distinguished. Idington J. dissenting.

Per Idington J. dissenting.—The only charge a judgment creditor gets by virtue of his judgment is upon such interest as the debtor may have at the time of registration or issue of execution; and, in this case, that is subject to whatever rights the mortgagee may have acquired by virtue of its mortgage.

Judgment of the Court of Appeal (43 D.L.R. 14; [1918] 3 W.W.R. 551), affirmed, Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Clement J. (2), and dismissing the plaintiff's action.

The appellant held a mortgage, upon certain lands, executed by Harper between the 10th and the 16th of March, 1916, and registered in the Land Registry Office on an application dated the 12th of July, 1916.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 43 D.L.R. 14; [1918] 3 W.W.R. 551.
(2) 25 B.C. Rep. 150; [1917] 3 W.W.R. 964.

The respondents were the holders of a judgment against Harper, which was duly registered on an application made on some date between the 16th of March and the 12th of July, 1916. The question in issue is which of these charges is entitled to priority.

W. C. Brown for the appellant.
G. E. Housser for the respondent.

THE CHIEF JUSTICE.—I think the judgment appealed from correctly interprets the meaning of section 73 of the "Land Registry Act" of British Columbia on which this appeal depends. That section gives priority to charges according to date of their registration, not of their execution. As put by Mr. Justice Martin, could there possibly be any doubt as to the meaning and effect of that section in a dispute between two charges of the same kind, *e.g.*, mortgages, or as to the priority that ought to be declared between them? I think not, and am unable to see how a contrary conclusion could be reached as to charges of a different kind.

I agree with the Chief Justice that the cases relied upon by Mr. Justice McPhillips, *Entwisle* v. *Lenz* (1), and *Jellett* v. *Wilkie* (2), do not govern or apply to the case before us, which is simply one as to the priority of charges under section 73 of the "Land Registry Act" and the rule which should govern in a contest on that point and is not one as between an equitable right to the fee as against a charge.

I would dismiss the appeal with costs.

IDINGTON J. (dissenting).—The decision of the courts below, that by prior registration a judgment

(1) 14 B.C. Rep. 51. (2) 26 Can. S.C.R. 282.

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creditor destroys, as against him an existent though unregistered mortgage, is supported by a rather plausible way of putting forward the alleged premises and drawing the conclusion reached.

Nevertheless, I think the premises are not well founded. The only charge a judgment creditor gets by virtue of his judgment is upon such interest as the debtor may have at the time of registration or issue of execution.

In this case that is subject to whatever rights the mortgagee may have acquired by virtue of its mortgage.

Suppose I see fit to charge one-half of my interest in any land with a burden of some sort, and then give another charge expressly subject thereto, could priority in registration of the latter give its holder any advantage over the former? No one, I venture to think, would say it could. Yet when we have regard to the language of the last part of section 27 of the "Execution Act," par. 1, defining what is acquired by registration of a judgment, the lien or charge created thereby on the lands of the judgment debtor is expressly declared to operate

> in the same manner as if charged in writing by the judgment debtor under his hand and seal; and after the registering of such judgment the judgment creditor may, if he wish to do so, forthwith proceed upon the lien and charge thereby created.

Surely that means only such interest in any lands as the judgment debtor has and no more.

Because the words "lands of a judgment debtor" are used they cannot be held to mean the entire fee in same, but only the interest he may happen to have therein.

This is not only in accord with common sense, and the law as it stood before the enactment of these registration provisions, but is in accord also with the

provisions in sub-sec. (*b*) of sec. 137 of the "Land Registry Act," which reads as follows:—

No judgment shall form a lien upon any lands as against a registered owner thereof, or the holder of a registered charge thereon, where the registration of such person as owner or as holder of a charge has been effected after a notice, of not less than fourteen days, has been given by the registrar to the judgment creditor, either personally or at his registered address, of the registrar's intention to effect registration of the aforesaid fee or charge free of such judgment. If the judgment creditor claims a lien upon the said lands by virtue of his judgment he shall within the time fixed by the registrar's notice, register a certificate of *lis pendens* in accordance with section 34 of the "Execution Act," otherwise the registrar may register such fee or charge free from such judgment.

As I read this, it makes a clear provision for the adjustment of the priority of the respective rights of the judgment creditor and the holder of another charge.

If the judgments below are to be taken literally surely there never was any need for the adjustment thus provided for.

Again, section 104 of the "Land Registry Act" reads as follows:—

No instrument executed and taking effect after the 30th day of June, 1905, and no instrument executed before the first day of July, 1905, to take effect after the 13th day of June, 1905, purporting to transfer, charge, deal with or affect land or any estate or interest therein (except a leasehold interest in possession for a term not exceeding three years), shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered in compliance with the provisions of this Act; but such instrument shall confer on the person benefitted thereby, and on those claiming through or under him, whether by descent, purchase or otherwise, the right to apply to have the same registered. The provisions of this section shall not apply to assignments of judgments.

What does this section mean? Respondents urge that it means a good deal more than it says. For we must read the whole and not drop the last few lines as giving nothing. Whilst by the drastic language of the first part of the section every right of a vendor or chargee seems swept away, clearly the last few lines give a right to have something registered.

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The right thus given clearly cuts down or renders liable to be so, the judgment creditor's right by rendering it subject to the possibility of the registration by vendee or chargee or those claiming under him of any instrument which is designed to convey or charge the land.

That is the right of the appellant and the mode of enforcing it was supplied by section 137 of the "Land Registry Act," as well as what is indicated herein.

My only difficulty in this case is whether or not the appellant lost its opportunity by the registration it made of its mortgage in July, 1916, six months before bringing this action for prosecuting the specific remedy given by these sections. And my difficulty has not been helped much by what I respectfully submit are the extreme views taken by the court below depending entirely upon a construction of section 73 of the "Land Registry Act" with which I cannot agree.

The dissenting judgment of Mr. Justice McPhillips failing to observe the effect I find in said sections, or indeed to notice them at all, further increases my difficulties. Such omission suggests there may be something else in the Acts in question which counteracts said effect or prevents reliance upon said sections at all under the peculiar circumstances of the appellant's registration of its mortgage.

However, I have been unable to discover anything else than such registration by appellant.

It seems to me that act was done in error by the appellant; that it has not misled any one; that nothing has been done by anyone concerned in reliance thereon, and that under the authority of *Howard* v. *Miller* (1), the mistake may be rectified, and that being possible the rights of the parties hereto may be declared

(1) [1915] A.C. 318; 22 D.L.R. 75.

as if nothing had happened. We were told in that case when before us that there could be no rectification unless for fraud. I was not then of those who accepted that doctrine and, seeing the court above has discarded it, am less inclined to act upon it.

The principles therein involved and applicable to the peculiar circumstances there in question are somewhat analogous, but the actual decision helps herein no further than holding it possible to rectify an error when no countervailing equity intervenes.

The findings of fact, so far as they go, do not suggest any other difficulty. In the *Howard Case* (1) there was an error not only on the part of the party applying for registration but also the registrar or someone in his office. Here the mistake seems wholly the appellant's own. Though otherwise alleged in the declaration I can find no proof bearing out the allegations in that regard.

I am of opinion the appeal should be allowed and the appellant held entitled to a declaration as prayed.

It is not a case for costs, and the error of appellant being the primary cause of the litigation the fee of five dollars fixed by the statute would have been payable to respondent if the right proceeding had been taken.

ANGLIN J.—Section 27 of the "Execution Act" provides that upon registration a judgment shall form a lien or charge on land of the debtor

in the same manner as if charged in writing by the judgment debtor under his hand and seal.

Under section 2 of the "Land Registry Act" a "charge" includes a judgment. Amendments to the "Land Registry Act" made by ch. 43, sec. 3, of the statutes of 1914, read as follows:—

(1) [1915] A.C. 318; 22 D.L.R. 75.

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"Mortgage" means and includes any charge on land created for securing a debt or lien, or any hypothecation of such charge;

"Mortgagee" means the owner of a mortgage registered under this Act;

"Mortgagor" means and includes the owner of land or of an estate or interest in land pledged as security for a debt.

Section 73 of the same Act provides that:—

When two or more charges appear entered upon the register affecting the same land, the charges shall, as between themselves, have priority according to the date at which the applications respectively were made, and not according to the dates of the creation of the estates or interests.

The respondent's judgment was registered before the appellant's mortgage. Indeed, although the appellant's mortgage was executed before the registration of the respondent's judgment, the certificate of acknowledgement or proof required by section 77 of the "Land Registry Act" to obtain registration was procured only some three months after the registration of the judgment. The appellant, therefore, became entitled to apply for registration of its mortgage only after the respondent's judgment had become a charge on the land by registration.

Section 104 of the "Land Registry Act" reads as follows:—

No instrument executed and taking effect after the thirtieth day of June, 1905, and no instrument executed before the first day of July, 1905, to take effect after the said thirtieth day of June, 1905, purporting to transfer, charge, deal with or affect land or any estate or interest therein (except a leasehold interest in possession for a term not exceeding three years), shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered in compliance with the provisions of this Act; but such instrument shall confer on the person benefitted thereby, and on those claiming through or under him, whether by descent, purchase or otherwise, the right to apply to have the same registered. The provisions of this section shall not apply to assignments of judgments. 1905, ch. 23, sec. 74; 1908, ch. 29, sec. 6.

By section 2, "instrument" includes any document dealing with or affecting land.

Notwithstanding the very plain and explicit language of section 104 (formerly section 74 of the

Act of 1906), the Supreme Court of British Columbia *en banc*, reversing Martin J., held in *Entwisle* v. *Lenz* (1), that a prior unregistered deed has priority over a registered judgment, I agree with Martin J. that this decision is logically irreconcilable with the judgment now under review. Only because the legislature has re-enacted section 74 *in ipsissimis verbis* in the revision of 1911 as section 104, and because we are here dealing not with a deed or transfer but with a mortgage or charge, do I hesitate to hold that *Entwistle* v. *Lenz* (1), should be overruled, unless, indeed, it can be distinguished on the ground that the transfer in that case was actually deposited for registration but owing to a mistake in the description was not recorded against the debtor's land. When a statute declares that an instrument

shall (not) pass any estate or interest either at law or in equity

until registered, the reasoning by which the conclusion is reached that the transferor in an unregistered deed to which that statute applies is nevertheless merely a dry legal trustee and that he retains no estate or interest, but that the entire beneficial interest is vested in the transferee, is, I confess, quite too subtle for me to follow.

But the case now before us may, I think, be disposed of under section 27 of the "Execution Act" and section 73 of the "Land Registry Act" without actually overruling *Entwistle* v. *Lenz* (1), by merely declining to apply it to facts not absolutely identical with those there dealt with. Even if some estate or interest was created in the debtor's land by the appellant's unregistered mortgage upon its execution, as against another chargee who had registered his charge before that mortgage was registered, the interest or

(1) 14 B.C. Rep. 51.

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estate so created could not avail. Section 73 in terms so provides, unless it be entirely meaningless. As Mr. Justice Martin says:—

> If this were a case between two "charges" of the same kind, *e.g.* mortgages, would there be any doubt as to the "priority" that ought to be declared?

But by section 27 of the "Execution Act" the lien created by a judgment when registered is the same as if such judgment had been

> charged in writing by the judgment debtor under his hand and seal,

i.e., is the same as the lien created by a registered mortgage. Reading these two statutory provisions together, as they must be read, I entertain no doubt that the judgment appealed from is correct and should be upheld.

Yorkshire v. *Edmonds* (1), is necessarily overruled by this judgment. *Chapman* v. *Edwards et al.* (2), on the other hand, may be supported as depending on the consequences of fraud. Neither fraud nor actual notice is present in the case now before us. As to the latter, however, sub-sec. 2 of sec. 104, as enacted in 1912 (ch. 15, sec. 28), must be taken into account. It indicates how far the legislature is prepared to go in support of the rights created by prior registration.

BRODEUR J.—In March, 1916, the appellant had a mortgage executed in its favour by McArthur and Harper on lands which they possessed. That mortgage was registered only on the 12th July, 1916. In the meantime, *i.e.*, between March and July, 1916, the respondents, who are the holders of a judgment against McArthur and Harper, had that judgment duly registered.

The question is: Is the mortgage held by the

(1) 7 B.C. Rep. 348. (2) 16 B.C. Rep. 334.

bank, or the charge arising out of the judgment, entitled to priority?

By section 73 of the "Land Registry Act" (R.S. B.C., ch. 127) it is enacted that:—

When two or more charges appear entered upon the register affecting the same land, the charges shall, as between themselves, have priority according to the dates at which the applications respectively were made, and not according to the dates of the creation of the estates or interests.

There is no doubt that the mortgage constituted a charge upon the property, and there is no dispute as to that.

As to the judgment, section 2 of the same "Land Registry Act" declares that the word "charge" includes a judgment.

But it is contended by the appellant that a judgment can affect only the interest which the judgment debtor actually had in the lands, relying, in that respect, on a judgment rendered in this court in the case of *Jellett* v. *Wilkie* (1).

In that case of *Jellett* (1), Sir Henry Strong C.J. stated that the common law rule is that

an execution creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor;

and he adds that this law has become the law in the North West Territories

unless it has been displaced by some statutory provision to the contrary.

The provisions of the "Land Registry Act" which I have quoted above shew conclusively that the registration of the mortgage and of the judgment creates two charges upon the land; that those charges are to be treated alike; and there is no distinction made in that statute with regard to the beneficial interest of the judgment debtor or not as it was under the common

(1) 26 Can. S.C.R. 282.

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law. The statute has superseded the old rule and the priority of the charge is to be determined by the dates at which they are registered.

Besides, by section 104 of the same "Land Registry Act," it is provided that no instrument purporting to affect land shall pass any estate in such land until it shall be registered. The effect of that provision is that the appellant's mortgage should be considered as being an instrument dated the 12th of July, 1916, and until then the estate which the mortgage would have passed has remained in the mortgagor and the judgment duly affected all the estate he had at that time in the land.

I am of opinion that the appeal should be dismissed with costs.

MIGNAULT J.—I concur with my brother Anglin.

Appeal dismissed with costs.

Solicitors for the appellant: *Ellis & Brown.*

Solicitors for the respondents: *Williams, Walsh, McKim & Housser.*

EDWARD McCARTHY (CLAIMANT)...APPELLANT;

AND

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

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*Feb. 24.
*Mar. 3.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Statute — Construction — Municipal corporation—Public work — Land not taken—Injuriously affected—Compensation—"Date at which damages are ascertained"—Sask. R.S. 1909, c. 84, s. 247.

Under section 247 of the "City Act" (Sask. R.S. 1909, ch. 84), when any land, though not taken for some public work, is injuriously affected thereby, a claim for damages must be filed with the city clerk within fifteen days after the publication in a local newspaper of a notice of the completion of the work; and sub-section 3 provides that "the date of publication of such notice shall be the date in respect of which the damages shall be ascertained."

Held, Davies C.J. dissenting, that, in determining the compensation to be awarded under the statute, the court has only to consider the depreciation in value which the claimant's property, as it stood at the date of the publication of the notice, had suffered as a necessary result of the work done by the municipality, and the fact that since the commencement of the work, but before the notice of its completion, the claimant's buildings had been destroyed by fire and rebuilt by him, cannot effect the right of the claimant to recover compensation for depreciation in their value by reason of this work.

Per Davies C.J. dissenting.—Damages to buildings erected by the owner after the "work" has been commenced are not "necessarily incurred by the construction of the work," within the meaning of the statute.

Judgment of the Court of Appeal (42 D.L.R. 792; (1918), 2 W.W.R. 1013), reversed, Davies C.J. dissenting.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), varying the judgment of the Supreme Court *en banc* (2), and further reducing an award given to the claimant.

PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 42 D.L.R. 792; (1918), 2 W.W.R. 1013.

(2) 38 D.L.R. 336; (1918), 1 W.W.R. 94.

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The claimant claims compensation for land and buildings injuriously affected by the construction of a subway by respondent. The work had begun about the 18th September, 1911, and the public notice of the completion of the subway was given on the 17th October, 1914. On the 10th January, 1912, the buildings were destroyed by fire, but rebuilt, partly with insurance moneys recovered, in the summer of 1912. The claimant filed a demand for compensation to the amount of $81,000, and he was awarded $21,334 by the arbitrator. The respondent then appealed to the Supreme Court of Saskatchewan *en banc* where a reduction of $4,050 was made. Subsequently, on a motion by the respondent to amend the minutes of the above judgment, the amount of $6,484 was further deducted from the claimant's award.

E. B. Jonah for the appellant.
G. F. Blair K.C. for the respondent.

THE CHIEF JUSTICE (dissenting)—The damages to be ascertained "for injurious affection" to lands, no part of which has been taken, have to be determined as from or on a particular day, but they are only such as were "necessarily incurred by the construction of the work" and must relate to the conditions existing not alone at the date fixed to ascertain the damages, but those created or caused by or necessarily resulting from the exercise of the city's powers in constructing the work.

The evidence shewed that the buildings, which had been upon the appellant's property at the time the subway was commenced, had been destroyed by fire some three months after such commencement. It was not contended, and could not be successfully contended,

that the construction of the subway had anything to do with the burning of the building directly or indirectly, or that the city was an insurer and liable for plaintiff's loss by fire not caused by the subway. The respondent collected his insurance and built another and larger building in its place while the subway was being constructed. That building, having been commenced and completed months after the commencement of the construction of the subway, cannot in any way be considered as coming within the terms of the statute. I fail to understand how damages can be awarded for a new building erected on the premises of the appellant after the construction of the subway was commenced and during its construction. I think the damages allowed by the arbitrator of 40% for depreciation in the value of this building now in dispute in this appeal was properly disallowed by the Court of Appeal.

Improvements upon the property made after the commencement and during the construction of the subway are, in my opinion, not within the contemplation of the statute. It is the condition of the property when the construction of the subway was commenced that is to be considered when the arbitrator is to ascertain the "damages necessarily incurred by the construction of the work," and not improvements which the owner may put on the land after the work has been commenced.

It was contended that because the statute provided that the date of the publication of the notice of the completion of the work or undertaking should be the date in respect of which the damages should be ascertained, that as a consequence buildings erected by the owner after the work was commenced and depreciated in value in consequence of the work should be valued.

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As I have said I cannot accede to that contention. The owner could not, by his own act, after the commencement of the work, increase the damages to which he otherwise would be entitled. Those damages must be confined to those as the statute provides "necessarily incurred by the construction of the work," and I cannot think damages incurred to buildings erected by the owner after the "work" has been commenced are within the statute.

I would dismiss the appeal.

IDINGTON J.—This is an appeal from the judgment of the Court of Appeal for Saskatchewan which deducted from the award of an arbitrator the sum of $6,484. The award was made under provisions enabling the arbitrator to determine the damages suffered by the appellant by reason of the injurious affection of his property by the construction of a subway.

The only right of recovery of damages appellant could have in law was that given by section 247 of respondent city's charter reading as follows:—

> In case any land not taken for any work or undertaking constructed, made or done by the council or commissioners under the authority of this Act is injuriously affected by such work or undertaking the owner or occupier or other persons interested therein shall file with the city clerk within fifteen days after notice has been given in a local newspaper of the completion of the work his claim for damages in respect thereof stating the amount and particulars of such claim.
>
> 2. Such notice shall be given by the city clerk forthwith after the person in charge of the work or undertaking has given his final certificate and shall state the last day on which any claim under this section may be filed.
>
> 3. The date of publication of such notice shall be the date in respect of which the damages shall be ascertained.

The foregoing furnishes the only basis of submission possible and must be held to contain the limitations of the claim made, and authority of the

arbitrator to determine the damages suffered by reason of the construction of the work in question.

It is to be observed that the claim could only arise after the completion of the work as evidenced by the final certificate of him in charge of the work and upon the notice of the city clerk forthwith thereafter.

The date of that publication

shall be the date in respect of which the damages shall be ascertained.

The Court of Appeal, in going beyond that date of 19th October, 1914, I submit with respect, erred by exceeding the powers there given by this statutory submission to the arbitrator.

It was not the condition of things existent two or three years before that time, but simply how much the completed structural changes affected the value of the appellants' property on the 19th October, 1914, by depriving it of the advantages the owner would have enjoyed had the said changes on the street never taken place.

Hence importing into the matters to be considered the destruction of a property by fire in the month of January, 1912, and the insurance money secured in relation thereto, was doing that for which there was no authority.

The above statutory provision seems novel and may be unique, nevertheless it is what those concerned for respondent chose to induce the legislature to provide.

Each expropriating statute generally fixes a time for determining the damages to meet the particular case in respect of which provision is made. The fact that usually the question of what damages any party may suffer by reason of the execution of any public project having to be determined before such execution is entered upon, may have led to the misconception of the court below in regard to what should fall within the operation of the section in question.

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It is to be observed that any statute passed, competent for any parliament or legislature to pass, authorizing the execution of any work, gives no right to those suffering thereby to recover damages in respect thereof unless provision for compensation or damages is provided for. I repeat the only provision made herein seems to be that which I have quoted.

The appeal does not enable us to determine whether or not the point of view taken by the arbitrator and his measure of damages were correct. We can only determine herein whether or not the limits of the submission have been exceeded or not.

The appeal should be allowed and the judgment of the court below, so far as relative to the item of $6,484, amended by restoring said sum to the amount awarded appellant, with costs of this appeal to the appellant.

ANGLIN J.—When the defendant city constructed the subway which gave rise to the claim for compensation or damages before us on this appeal, it was governed by the "City Act" of Saskatchewan (R.S.S. 1909, ch. 84). No part of the claimant's property having been taken, his claim for injurious affection fell under section 247 of that Act. That section prescribed that such a claim should be filed with the city clerk within fifteen days after publication in a local newspaper of notice of completion of the work, which the municipal council was directed to give. Subsection 3 is in the following terms:—

3. The date of publication of such notice shall be *the date in respect of which* the damages shall be ascertained.

This provision, in my opinion, admits of only one construction. It prescribes that the compensation of the claimant should be the amount of the depreciation in the value of his property, as it stood at the date set, due to the work in question, *i.e.*, he should be awarded

the difference between its value as it then stood with the work constructed and what would have been its value as it then stood had the work not been constructed. The use in sub-section 3 of the words, "the date in respect of which" makes this abundantly clear; and a comparison of the language of that subsection with the corresponding clause at the end of sub-sec. 2 of sec. 246 removes any possible ground for contending that the words "in respect of which" are not more than an equivalent of "at which."

Mr. Blair very properly directed our attention to the language of section 245 restricting the damages to such as necessarily result from the exercise of (the) powers of the city. But I find nothing in these terms which would justify our placing any other construction than that which I have indicated on sub-sec. 3 of sec. 247. Of course the damages to be allowed must be confined to the depreciation in value which the claimant's property as it stood at the date of publication of the notice of completion had suffered as a necessary result of the work done by the municipality in the exercise of its powers. The owner cannot enhance his damages by introducing fanciful considerations.

He is apparently not entitled to compensation for loss sustained during the construction of the work owing to reduction in the rental value of his property, or other inconvenience. That is one of the anomalies of this peculiar legislation. Another is that if the work is not completed there would appear to be no provision for any compensation although serious loss may have been entailed.

But, with great respect, I am unable to appreciate the bearing on the claimant's right to compensation of the fact that pending the construction of the work he recovered some insurance in respect of injury to his

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buildings by fire. Neither is the relative value of his buildings when the work was begun and when it was completed a matter for consideration in determining the compensation to be awarded under the statute.

Although sub-sec. 3 of sec. 247 is probably a unique provision in legislation of this class, it is not at all unjust that the claimant should be compensated on the basis fixed by it. He is entitled to make the most of his land—to build upon it so as to use it to the best advantage. Its possibilities when so utilized must be taken into account in determining its value to him and in estimating the depreciation caused by the work constructed by the municipality. For this purpose a building should be valued not according to its cost—it may be very extravagant for the locality and therefore unprofitable—but upon the basis of its rental value, and depreciation must be measured on the same footing.

I am, with deference, of opinion that the Court of Appeal erred in disallowing $6,484 awarded by the arbitrator for damages in respect of the claimant's building and that this item of the award should be restored. The appellant is entitled to his costs of the appeal to this court and also to his costs of the defendant's motion before the Court of Appeal to vary the minutes of its judgment.

BRODEUR J.—In 1911 the respondent corporation commenced the construction of a subway on Broad Street, in the city of Regina. The appellant was the owner of lands and buildings fronting on that subway but which were not taken and expropriated. However, those lands and buildings were injuriously affected by the construction of that work, since it partially lowered the grade of the street.

In 1912 a fire occurred in the appellant's buildings; and, as they were insured, he recovered the insurance money and he rebuilt them.

The subway was completed in 1914 and, as required by the law, a notice was published in October, 1914, by the city clerk. By the law of Saskatchewan, the liability of the municipal corporation to pay compensation for land injuriously affected is not limited to the cases where some land has been actually taken by the city but it exists in any case where land is injuriously affected by the exercise of the power conferred by the Act. *Vachon* v. *City of Prince Albert* (1).

In the case of land taken a plan has to be filed shewing the land which is to be expropriated and the work which is to be done; and the names of the owners must be filed with the city clerk. Those owners are then notified and the claims for compensation must be filed within fifteen days from the date of the deposit of the plan.

In the case, however, of land not taken but simply injuriously affected, the owner of the land has to file his claim for damages with the city clerk, within fifteen days after notice has been given in a local newspaper of the completion of the work. (Sec. 247, ch. 84, rev. statutes of Saskatchewan, 1909.)

The law also provides that

> the date of publication of such notice shall be the date in respect of which the damages shall be ascertained.

So, we see that there are different provisions in the case of lands taken and of lands injuriously affected. In the first case the owner is obliged to make his claim within fifteen days of the deposit of the plan; and in the case of land simply injuriously affected, the claim has to be filed within fifteen days after the notice of completion has been given.

(1) 9 Sask. L.R. 80.

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McCarthy filed his claim in due time after the notice of completion was given. In the judgment *a quo* McCarthy was denied the right to claim any compensation in respect of his building because the property had been built on after the commencement of the subway. I am unable to agree with that proposition. The law states specifically that the date of publication of the notice of completion shall be the date at which the damages shall be ascertained. Then, we have to find out what buildings were on the property when the work was completed, and the extent to which those buildings are injuriously affected. We have nothing to do as to whether those buildings were of recent date or not.

Of course, if something had been done by the owner so as to unduly increase the burden of the city as regards the compensation to be paid, the situation might be different (*Mercer* v. *Liverpool, St. Helens & Lancashire Railway* (1)). But there is no suggestion in this case of any such fraudulent action on the part of the land owner.

In those circumstances, I am of opinion that the appeal should be allowed and that the appellant should be entitled to recover the sum of $6,484 for damages as to his building with costs of this court and of the motion to amend the judgment in the court below.

MIGNAULT J.—The only question which arises here is as to the construction and effect of certain provisions of the statute governing the respondent previous to 1915.

The appellant claimed compensation for land and buildings injuriously affected by the construction of Broad Street subway, being an extension north of

(1) 73 L.J. K.B. 960.

Broad Street across the right-of-way of the Canadian Pacific Railway to Dewdney Street, in the city of Regina. No part of the appellant's land or buildings was taken, but he claimed that they were injuriously affected by the construction of the subway and demanded the sum of $81,000 for his damages. Public notice of the completion of the subway was given on the 17th October, 1914, the work of construction of which had begun about the 18th September, 1911.

On the 10th January, 1912, the appellant's building on lots 24, 25 and 26 was destroyed by a fire which also damaged his building on lots 27 and 28. The building on the two latter lots was repaired or rebuilt in the spring and summer of 1912, and was in the same condition as repaired or rebuilt on the date the damages were assessed, namely, the 14th October, 1914. The appellant filed his claim for damages on the 22nd October, 1914.

The arbitrator awarded to the appellant $21,334. The respondent then appealed to the Supreme Court of Saskatchewan *en banc*, where, as appears by the judgment of Mr. Justice Newlands of the 27th November, 1917, a reduction of $4,050 was made in the amount awarded to McCarthy. Subsequently, on the 15th July, 1918, on a motion of the respondent to amend the minutes of judgment, the amount of $6,484 was further deducted from Mr. McCarthy's award for the reasons stated by Mr. Justice Newlands as follows:—

> In this matter, Mr. Blair, for the city, called the attention of the court to the fact that the learned arbitrator in assessing the damages to the McCarthy property had included in his award the building upon the property, and had allowed 40 per cent. depreciation for damage to the same by the subway; that the evidence shewed that the building which had been upon this property at the time the subway was commenced had been destroyed by fire some three months after the commencement of that work; that McCarthy had collected the insurance and had rebuilt.

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This matter was not dealt with in our previous judgment through an oversight.

As the building which is now upon the property was built after the commencement of the subway, it cannot be said to be injured by that work, so McCarthy would not be entitled to any damages on that account. Neither can the rebuilding be considered as a repair of an existing building, as urged by Mr. Jonah, because after the fire it could not be used for any purpose, and was not such a building as could be damaged by the building of the subway.

The building was damaged by fire, for which McCarthy was paid by the insurance company, not by the subway.

There should, therefore, be deducted from the award to McCarthy the sum of $6,484, the amount allowed for damage to the building.

Mr. McCarthy now appeals from the judgment thus reducing his award by $6,484.

I am, with deference, of the opinion that this reduction should not have been made.

The sections of ch. 84, R.S.S. 1909, which governed, at all the dates in question in this case, the compensation payable for land taken by the respondent, or for land injuriously affected by the construction of public works by it, are the following:—

Section 245.—The said council or commissioners shall make to the owners or occupiers of or other persons interested in any land taken by the city in the exercise of any of the powers conferred by this Act due compensation therefor and pay damages for any land or interest therein injuriously affected by the exercise of such powers the amount of such damages being such as necessarily result from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation or damages if not mutually agreed upon shall be determined by arbitration under this Act.

Section 246.—Before taking any land the council or commissioners shall deposit with the city clerk plans and specifications shewing the land to be taken or used and the work to be done thereon and the names of the owners or occupiers thereof according to the last revised assessment roll.

2. The city clerk shall thereupon notify such owners and occupiers of the deposit of the said plans and specifications and of the date of such deposit, and that all claims for compensation for the land so to be taken and the amount and particulars thereof must be filed with him within fifteen days from the date of the deposit of the said plans and specifications which date shall be that with reference to which the amount of the compensation for such lands shall be ascertained.

3. If any claimant under this section has not filed his claim within the period hereinbefore limited it may be barred and extinguished on an application to a judge upon such terms as to notice, costs and otherwise as the judge may direct.

247. In case any land not taken for any work or undertaking constructed, made or done by the council or commissioners under the authority of this Act is injuriously affected by such work or undertaking the owner or occupier or other persons interested therein shall file with the city clerk within fifteen days after notice has been given in a local newspaper of the completion of the work his claim for damages in respect thereof stating the amount and particulars of such claim.

2. Such notice shall be given by the city clerk forthwith after the person in charge of the work or undertaking has given his final certificate and shall state the last day on which any claim under this section may be filed.

3. The date of publication of such notice shall be the date in respect of which the damages shall be ascertained.

4. Any claim under this section not made within the period hereinbefore limited shall be forever barred and extinguished.

A clear distinction is here made between compensation for lands taken by the city and compensation for lands not taken but injuriously affected by a public work constructed by it.

In the case of lands taken, plans and specifications of the lands and work are deposited with the city clerk before taking the lands, and thereupon the city clerk notifies the owners of the lands to be taken, and the date of the deposit of the plans and specifications is that with reference to which the amount of the compensation for such lands shall be ascertained.

In the case of lands not taken but injuriously affected, the owner notifies the city clerk of his claim for damages within fifteen days after notice has been given in a local newspaper "*of the completion of the work,*" and the date of publication of such notice *shall be the date in respect of which the damages shall be ascertained.*

Since the date of the notice of the completion of the work is the date in respect of which the damages to lands not taken but injuriously affected shall be ascertained, it is entirely immaterial whether during the

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construction of the work the buildings of the appellant were destroyed by fire and rebuilt by him. It is also immaterial whether or not the appellant received insurance money on account of the destruction of the building. I cannot, with respect, agree with Mr. Justice Newlands when he says that as the building which is now on the property was built after the commencement of the subway, it cannot be said to be injured by that work. The roadway was narrowed from 100 feet to about 33 feet, and any building erected on such a roadway would be damaged by the work. In other words, it would generally be worth less than if the roadway had not been narrowed. It is true that McCarthy received the amount of his insurance, but apparently he employed it to rebuild, and there is nothing in the statute preventing him from so doing. There is no suggestion of fraud on his part or of any attempt to injure the city. What he did was to replace at his own cost a building which was on the property when the work began.

Moreover, as I have stated, the statute is clear and the only date to be considered for the purpose of determining the compensation to which the appellant is entitled is that when the notice of completion of the work was published.

I would, therefore, allow the appeal with costs as stated by my brother Anglin, and fix the compensation to be paid to the appellant at the sum of $17,284, being the amount allowed by the court below before the reduction was made.

Appeal allowed with costs.

Solicitors for the appellant: *Cross, Jonah, Hugg & Forbes.*

Solicitor for the respondent: *G. F. Blair.*

ADOLPH WEISS (PLAINTIFF).....APPELLANT;

AND

NATHAN L. SILVERMAN (DEFENDANT).....RESPONDENT.

AND

G. ZUDICK AND OTHERS (MIS-EN-CAUSE).

1918
*Nov. 25.

1919
*Feb. 4.

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

Lien — Builder — Renunciation — Registration — Delay — Procedure — Transferee as mis-en-cause—Appeal—Absence of notice—Res judicata—Articles 1023, 1031, 1571, 2013b, 2081, 2127 C.C.—Article 1213 C.P.Q.

S. supplied the materials and executed the work necessary for the plumbing and heating system included in the construction of a building. Within the delay during which he had a lien on the property without registration (article 2013b. C.C.), S. signed and delivered to B., with whom the owner of the property was negotiating a loan, a document by which he declared that he renounced *all legal privilege*. Later on, S. registered his claim against the property and afterwards transferred the greater part of it. W., a mortgage creditor, then took an action to set aside S.'s lien and, asking that the transfer be declared null and void, summoned G., the transferee, as *mis-en-cause*. In the trial court, G. appeared through counsel, but did not fyle any plea; and judgment was rendered, dismissing the action, upon the contestation produced by S. W. then appealed to the Court of King's Bench and to the Supreme Court without giving any notice to G.

Held, that the privilege of S. had ceased to exist at the date of its registration.

Per Idington J.:—S. having failed to enforce his privilege within the delay mentioned in article 2013b. C.C., his right was extinguished.

Per Anglin, Brodeur and Mignault JJ.:—The document signed by S. was an absolute and unqualified renunciation of his privilege and not a mere undertaking not to register it.

Per Anglin, Brodeur and Mignault JJ:—On this appeal, S. cannot set up a plea of *res judicata* to which the transferee may be entitled.

Per Anglin and Mignault JJ.:—The judgment of the trial court, so far as it affects the transferee, cannot be disturbed by the Supreme Court.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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Per Brodeur and Mignault JJ.:—W., though not a party to the document signed by S., has a right to take advantage of it, because as creditor of the owner who failed to do it, W. can exercise the latter's right to have the registration declared illegal.

Per Brodeur J.:—A judgment pronouncing the extinction of a claim, if rendered before the notification of the transfer, can be opposed to the transferee.

Judgment of the Court of King's Bench, 24 R.L. N.S. 204, reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), affirming the judgment of the Superior Court, District of Montreal, and dismissing the action with costs. The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Paul St. Germain K.C. and *Weinfield K.C.* for the appellant.

Busteed K.C. for the respondent.

THE CHIEF JUSTICE.—I concur in the result.

IDINGTON J.—The appellant sues as mortgagee of certain property to have it declared amongst other things that an alleged privilege created by a mechanic's lien registered by respondent against the mortgaged property had ceased to exist by reason of respondent's failure, within one year from the date of such registration, to take a suit to enforce same.

The alleged privilege was registered on the 26th of November, 1914.

On the 27th February, 1915, the owners made an abandonment of their property.

The respondent never filed his claim with the curator or took any steps of any kind either to enforce same or to have his right declared.

Art. 2013b C.C. provides as follows:—

(1) 24 R.L. N.S. 204.

The right of preference or privilege upon the immovable exists as follows:—

Without registration of the claim, in favour of the debt due the labourer, workman and the builder, during the whole time they are occupied at the work or while such work lasts, as the case may be; and with registration, provided it be registered within the thirty days following the date upon which the building has become ready for the purpose for which it is intended.

But such right of preference or privilege shall exist only for one year from the date of the registration, unless a suit be taken in the interval, or unless a longer delay for payment has been stipulated in the contract.

I am of the opinion that such failures, as I have just now referred to, terminated his right, if any ever existed, to enforce any such alleged privilege unless, which is not pretended, a longer delay had been stipulated for in the contract.

The express and imperative language of this article, which gives or enables the creation of the privilege, specifies the conditions of its existence, and limits its duration, cannot be overcome or defeated by references to the articles dealing with the powers and duties of a curator or the possibility of a successful issue to a suit so brought. The necessity for the prompt assertion (beyond mere registration) of such a claim is well illustrated in many phases of this litigation.

If, as is faintly suggested, the law does not permit of such a suit, then so much the worse for respondent's claim; for the doing so is one of the limitations imposed upon him as the boundary of his right to assert such a privilege, which is the creature of a statute.

But I see no insuperable obstacle in the way of bringing a suit. I need not labour with that. I submit that a sufficient answer is to be found in the unchallenged existence of this very suit by a mortgagee and the right to bring it even after all the property has been sold; upon which fact stress is laid as an argument against the respondent's right to do something akin thereto.

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I may remark in passing that the considerant in the judgment appealed from which relies upon the sale of the property as an answer to this point is surely founded in error, for though there was an abortive sale by or for the curator within the year, there was no real sale until September, 1916.

The principle involved in the case of *La Banque d'Hochelaga* v. *Stevenson* (1), is applicable to the decision of this case, and I intend to abide by it. In that case it was expressly held that the privilege is limited to one year from the date of registration.

The claim therein was as this put forward in one aspect on behalf of an assignee of the builder and alternatively rested on the right given the supplier of material. It was held to have been barred in the first way of putting it by reason of failure to proceed within the year and in the alternative claim as invalid by reason of failure to give notice to the proprietors within the prescribed period for doing so.

I think the appeal should be allowed with costs throughout.

Since writing the foregoing, my brother Brodeur has called attention to the peculiarity of the assignees of some part of the claim in question not being parties to this appeal. I have considered the matter and agree that the rights of such assignees as not before us should be protected and agree in the mode of doing so suggested by the judgment of my brother Mignault.

ANGLIN J.—The plaintiff who holds a hypothec upon the property in question sues to set aside a privilege claimed by the defendant Silverman as a builder in which the *mis-en-cause* Brucker, Gurney-Massey, Limited, and J. Watterson & Company,

(1) [1900] A.C. 600.

Limited, are interested as transferees of it in part. The basis of the plaintiff's claim is an express renunciation by Silverman of his privilege under art. 2081 C.C., par. 4, made prior to any of the transfers.

The original renunciation was lost, and the plaintiff at the trial proved a copy of it by parol evidence. The learned trial judge dismissed his action on the ground that such evidence was inadmissible. The Court of Appeal held that the case fell within art. 1233 C.C., par. 6, and that parol proof of the renunciation was, therefore, admissible; and neither this point nor the sufficiency of the parol proof adduced is now contested on behalf of the respondent.

The Court of Appeal, however, maintained the judgment dismissing the action on other grounds, the lamented Chief Justice Archambeault taking the view that the renunciation operated merely as a contract between Silverman and the other renouncing lien-holders who joined in it and one Bulkis, at whose instance it was obtained by the debtor-owners, that the liens would not be registered, of which only Bulkis could take advantage (art. 1023 C.C.). The learned Chief Justice based this conclusion upon his view that the lien or privilege did not exist when the document in the form of a renunciation was executed because it had not then been registered. I am, with profound respect, unable to accept this view because art. 2013b C.C. declares in explicit terms that the lien exists without registration during the construction of the building and for 30 days after its completion. Art. 2081 C.C. declares that by a remission, express or tacit, the privilege becomes extinct. The instrument executed by Silverman was a remission or renunciation and no mere undertaking with Bulkis not to register. As Carroll J. points out it was a unilateral—not a

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bilateral-contract, and therefore not within art. 1023 C.C. If the lien had been registered when the renunciation was executed the learned Chief Justice would apparently have considered it thereby extinguished. If the lien subsisted when the renunciation was executed although not yet registered, as I think it undoubtedly did, I can see no reason why the renunciation should not have the same effect.

Mr. Justice Carroll, on the other hand, was of the opinion that although the renunciation when executed extinguished the defendant's lien for the benefit not merely of Bulkis, but of all the defendant's creditors, yet because after signing it the defendant registered a claim of lien and thereafter executed what purported to be transfers of partial interests therein to the three *mis-en-cause* above mentioned, which they registered without notice of the renunciation, the plaintiff was thereby precluded from setting up the renunciation which had not been registered as against the registered transferees. But, with deference, if the renunciation or remission extinguished the privilege (art. 2081 C.C.), subsequent registration could not revive it. If it were non-existent the attempted transfers of it were nullities and their registration was equally ineffectual. Art. 2127 C.C., cited by the learned judge, deals with conveyances or transfers, not with renunciations or remissions. It is the unregistered transfer of a privilege which is avoided in favour of a subsequent transfer duly registered.

I see no reason why the appeal should not be allowed as against the respondent and his interest. If the *mis-en-cause* have rights under the judgment of the Superior Court, the respondent Silverman cannot derive any advantage from them.

But although the view I have taken as to the

nature and effect of the document signed by Silverman *et al.* is adverse to any claim of the *mis-en-cause* apart from the judgment dismissing this action, the appellant has failed to convince me that it is possible for us to adjudicate against them in their absence and deprive them of the benefit of the judgments pronounced below. After I had dealt with the merits of the appeal, I had the advantage of seeing the opinions of my learned brothers Brodeur and Mignault, who differ in their views as to the consequences of the appellant's failure to give notice to the *mis-en-cause* of his appeal to the Court of King's Bench and likewise of his appeal to this court. My brother Mignault points out the gravity of the difficulty thus raised. My brother Brodeur's view is that, in the absence of any proof that Silverman's transferees notified the debtors of the transfers in their favour, we should hold them void as against the curator, to whom the debtors' estate has been transferred (arts. 1571 and 2127 C.C.), and therefore as against the appellant as a creditor (art. 1031 C.C.). But are we on this ground, any more than upon the ground that the registration of their void transfers was ineffectual, entitled as against the *mis-en-cause* in their absence to deprive them of whatever rights they may have under the judgments of the provincial courts? I fear not. I, of course, agree that Silverman cannot set up the plea of *res judicata* to the benefit of which the *mis-en-cause* may be entitled. But I incline to accept the view of my brother Mignault that since notice was not given to the *mis-en-cause* of this appeal the judgments of the provincial courts so far as they effect them cannot now be disturbed.

Under all the circumstances, however, I would reserve to the appellant the right, notwithstanding his appeals to the Court of King's Bench and to this

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court, to appeal against the judgment of the Superior Court in favour of the *mis-en-cause*, if, after the lapse of time that has occurred he can obtain any necessary leave to do so, or to take such other steps as he may be advised to protect his interests against their claims.

The respondent should pay the appellant's costs of this litigation throughout.

BRODEUR J.—This is an action by Weiss, a mortgage creditor, to have declared illegal the registration of a builder's privilege by Silverman on the property covered by his mortgage.

The ground invoked by the plaintiff was that Silverman, the creditor of the privilege, had abandoned it by an agreement *sous seing privé*.

The defendant Silverman denied having ever signed such an agreement.

At the trial it was proved that the document in question had existed but that it had been mislaid or destroyed. However, a copy of it had been made by a person in whose custody the document had been for a while and that copy has been filed in this case.

The Superior Court dismissed the action on the ground that the plaintiff had not produced the original writing, and had not obtained an admission from the defendant that would constitute a *commencement de preuve par écrit*.

The Court of Appeal, relying on par. 6 of art. 1233 of the Civil Code, decided, on the contrary, that proof could have been made by testimony, since the proof in writing, while being in possession of a third party, had been lost and could not be produced. They dismissed, however, the plaintiff's action on another ground, viz., that the renunciation signed by the defendant Silverman

n'était qu'un engagement de la part de l'intimé de ne pas faire inscrire de privilège sur la propriété et ne peut avoir d'effet qu'entre les parties et * * * que l'appelant n'a pas été partie à la dite promesse de l'Intimé et n'a pas titre pour s'en prévaloir.

On this appeal we are not concerned with the question of admissibility of evidence, since the respondent, in that respect, accepts the decision of the Court of King's Bench; but we have to construe the remission in question and find out if the appellant could invoke it.

The renunciation reads as follows:—

(Renonciation de privilège contre la propriété de G. Zudick et autres, 19 octobre 1914.)

Nous, soussignés, entrepreneurs d'ouvrages et fournisseurs de matériaux pour les constructions que MM. Joseph Shpretzer, Gershon Zudick, Henry Shapiro fait actuellement ériger aux Nos * * * de la rue Outremont sur le lot portant le numéro officiel 35, 386, 387, 388, 389, 390 & 391, Paroisse de Montréal, déclarons renoncer chacun pour nous *à tout privilège légal* que nous pouvons avoir comme tels sur ces immeubles et consentons qu'ils n'en soient jamais affectés ni à ce jour, ni à l'avenir.

That document was signed by several contractors and suppliers of materials, amongst whom was the defendant respondent, Silverman.

It would appear rather extraordinary that Silverman contended all along that he had not signed such a document, since the copy brought in evidence shews his name appearing amongst those who signed. It was contended at bar by his counsel that the document being written in a language with which he was not familiar, that might explain the stand he took before the Superior Court in his plea and in his evidence.

I may have my doubts as to the good faith of the defendant; but it is not necessary to express any views as to that, since the case does not turn upon that. We have simply to deal with the agreement as it has evidently been written and signed.

Silverman, by that document, undertook to renounce any legal privilege which he could claim on

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the immovable property belonging to the persons for whom he worked, and he agreed that that property would never be burdened for the past or for the future with such a privilege.

It was a very sweeping engagement which he took; no reservation with regard to person or time.

It was not simply a promise that his privilege would not be registered; but he stated formally in the writing he signed that he abandoned his privilege.

By art. 2081 of the Civil Code a privilege becomes extinct by remission. The creditor of the privilege who gives up his right is in the same position as a creditor of an obligation. If the latter releases his debtor from his obligation it becomes extinct (art. 1138 C.C.).

At the time Silverman signed his release he had a right of preference as builder upon the additional value given to the immovable by his work done (arts. 2013, 2013b C.C.). He was within the delay during which his privilege existed without registration. His right was born and in existence; and he could undoubtedly release that right.

That is what he has done by the writing of which we have a copy. But it is contended that this document was signed in favour of a certain Bulkis, to whose agent it had been handed.

It is in evidence that the document was signed on the occasion of a loan which the owners of the property were negotiating with that man. But no stipulation is made in the document to the effect that Bulkis's mortgage or claim would have priority over Silverman's privilege. The document was in general terms; it was handed to the debtors themselves and constituted, as far as the evidence shews, a release on the part of the

creditor of the privilege in favour of his debtors, since he was asked by the latter to sign such a release.

It is contended, however, that the appellant cannot take advantage of that instrument if we apply the rule *res inter alios acta*.

By art. 1023 of the Civil Code, contracts have effect only between the contracting parties. They cannot affect third persons, except in certain cases; and amongst those are the right of the creditors to exercise actions of their debtors, when to their prejudice they neglect to do so (art. 1031 C.C.).

In this case the owners of the property on which the privilege has been registered should have taken the necessary proceedings to set aside that privilege and strike out its registration; but as they have failed to do so, Weiss, as one of their creditors, can proceed to exercise that right. I am, therefore, of opinion that Silverman, having given a release of his privilege, is now without any right to claim that such a privilege now exists; and, as far as he is concerned, the appeal should be allowed.

Weiss, however, by his action not only asks that Silverman's privilege be set aside but that the transfer which he made to third parties of a part of the sum covered by it, viz., Gurney-Massey & Company, Max Brucker and J. Watterson & Company be declared illegal, null and void in so far as the property in question or the proceeds of sale thereof are concerned and that those transfers be radiated.

The plaintiff Weiss has summoned those third parties as *mis-en-cause*. They filed appearances but did not file any plea. They were given notice of inscription when the case was heard on the merits. The plaintiff's action having been dismissed, inscription in appeal was then made by Weiss; but he did not

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give notice thereof to those third parties, and the judgment of the Superior Court having been confirmed no notice of appeal to the Supreme Court was given to them and the defendant Silverman was the only one served with those notices of appeal.

It is contended by the respondent that the renunciation made by the transferor Silverman cannot affect the rights of the registered transferees; and he invokes art. 2127 of the Civil Code, according to which where there are successive transfers by the same person of the same privileged claim the rights of the transferees are governed not by priority of transfer but by priority of registration.

I am unable to agree with the respondent's contention. If the issue was between different transferees of Silverman, art. 2127 C.C. would apply. If Silverman had transferred that privilege to A., who had not registered his deed, and later on to B., who had his deed registered in due time, of course the latter would have a better claim than A. That is the case provided for in art. 2127 C.C. But this is not the present case. It is not a matter of dispute between transferees and transferees. It is the case of a privilege that has been abandoned by the creditor and which has been extinguished. The registration which Silverman made in order to revive that privilege was of no effect and he could not transfer to the *mis-en-cause* greater rights than he possessed. Aubry & Rau, vol. 3, 4ème, éd., p. 287.

Our registration laws protect in a certain measure the creditors of registered rights. For example, the real rights subject to registration take effect from the moment of their registration against creditors whose rights have been registered subsequently (art. 2083 C.C.).

There is a preference which results from the prior registration of the deed of a conveyance of an immovable between purchasers who derive their respective titles from the same person (arts. 2089, 2098 C.C.). In those cases the ordinary principles applied to obligations and contracts do not avail (art. 1472-1480-1025-1027 C.C.).

But in this case the registration of the privilege was made on a property, of which Zudick and his associates were open owners, without their consent and likely without their knowledge. Silverman, in registering that privilege which he had abandoned, could not give to his transferees any rights which he did not possess himself (art. 2088 C.C.).

The Court of King's Bench, in a case of *Longpré* v. *Valade* (1), decided that:—

L'enregistrement d'un acte résilié entre les parties ne peut faire revivre cet acte lors même que l'acte de résiliation n'aurait pas été enregistré.

In a case of *Stuart* v. *Bowman* (2), it was decided also that:—

L'enregistrement ne valide pas un titre nul à l'encontre des droits du véritable propriétaire.

We may say in conclusion on that question of registration that the cessionnaires had no more rights on Zudick's property than Silverman himself. His renunciation of his privilege has extinguished it and it could not be revived by registration.

The respondent, in a supplementary factum, now urges that the conclusions of the action concerning the transfers and their registration could not be granted because no notice of appeal was given to the transferees *mis-en-cause*, and that there is *res judicata* as to that part of those conclusions.

(1) 1 Dor. Q.B. 15. (2) 3 L.C.R. 309.

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That contention is a forcible one, but the respondent is not the proper party to raise it. It should be raised by the *mis-en-cause* themselves. They are the only persons entitled to raise the issue of *res judicata*.

Besides, the evidence of record does not shew that the alleged transfers were duly made and served upon the debtors. In law the transferees have no possession available against third persons until signification of the deed of transfer and of the certificate of registration has been made to the debtors (arts. 1575-2127 C.C.).

There has been, since one of those transfers was made, an abandonment of property by the debtor and a curator has been appointed. In the case of the two other transfers, they have been made since the *cession de biens* has taken place. It may be that those transfers have been regularly served upon the debtor, but the evidence does not shew it. Some further facts and arguments could be brought up by the transferees on subsequent proceedings which could affect the rights of the plaintiff. But taking the record as it is, the pleadings as they have been made, I think that the plaintiff should succeed and obtain all his conclusions.

I may quote on that point the following authorities which shew that the judgment which has decided that a claim has been extinguished may be opposed to the transferee if that judgment has been rendered before the notification of the transfer. Aubry & Rau, vol. 8, p. 373; Demolombe, vol. 30, no. 351; Lacoste, Chose jugée, no. 485; Dalloz, 1855, I-281; Dalloz, 1858-1-236.

In the present case it does not appear that the transfers have been served upon the debtors. The *mis-en-cause* had registered their transfers, but the necessary notice has not been made and they have no possession available against the debtors or their *ayant cause*.

I come to the conclusion that the appeal should be allowed as to all the rights and interests of the respondent Silverman in question in this action, without prejudice to the rights of the transferees, the *mis-en-cause*, if any, under the judgment of the Superior Court, and to whatever rights against them the appellant may have, if any. Costs throughout to the appellant against the respondent Silverman.

MIGNAULT J.—With no little hesitation I have come to the conclusion that as against the respondent Silverman, the appellant can rely on the unconditional renunciation to privilege made by Silverman on the 19th October, 1914. It is true that this renunciation was obtained by J. A. Parent, notary, acting for one G. Bulkis, who on the same day made a loan of $11,000 to Gershon Zudick, Joseph Shpretzer and Henry Shapiro, the owners of the building on which Silverman had acquired a builder's privilege. But this renunciation is absolute and unqualified. The document signed by Silverman says:—

Nous, soussignés, entrepreneurs d'ouvrages et fournisseurs de matériaux pour les constructions que M. Joseph Shpretzer, Gershon Zudick, Henry Shapiro, fait actuellement ériger aux Nos * * * de la rue Outremont sur le lot portant le numéro officiel 35, 386, 387, 388, 389, 390 et 391, Paroisse de Montréal, déclarons renoncer chacun pour nous à tout privilège légal que nous pouvons avoir comme tels sur ces immeubles et consentons qu'ils n'en soient jamais affectés ni à ce jour. ni à l'avenir.

I would further add that, even construing this document as it was construed by the Court of King's Bench, this was a deliberate renunciation in favour of Bulkis, a hypothecary creditor, and Bulkis could not avail himself of this renunciation without the appellant, an anterior hypothecary creditor, getting the full benefit of it. Bulkis was examined as a witness but seemed singularly indifferent to the fact that he had

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lent $11,000 on the property and that he had a vital interest in having the builders and furnishers of materials renounce their privilege. Notwithstanding this he says that he got a paper from the notary containing some signatures, but never read it and finally lost it. This is one of the peculiarities of this rather remarkable case. I feel convinced, however, that, unless Bulkis has been promised security otherwise, he would act according to his interests, and then the appellant would have the full benefit of Silverman's renunciation.

On 26th November, 1914, a little more than a month after signing this renunciation, the respondent Silverman registered a claim against the property for $7,375. Of this amount he transferred, on 5th February, 1915, the sum of $2,571 to one Max Brucker, and, on 9th April, 1915, he also transferred $2,429.77 to Gurney-Massey & Co. Ltd., and $1,688.45 to J. Watterson & Co. Ltd., so that he is now creditor only for the sum of $665.78. The appellant alleges that these transfers were registered, but does not pretend that the transferees did not comply with the requirements of art. 2127 C.C. as to the signification of the transfers.

In February, 1915, Zudick, Shpretzer and Shapiro made an abandonment of their property for the benefit of their creditors and the property in question was sold at the instance of the curator, and after collocating several privileged claims, there remained in the hands of the prothonotary the sum of $30,388.13, which was insufficient to pay the hypothecs and the builders' privileges so that the prothonotary reported that a "ventilation" would be necessary to determine the value of the improvements.

On the 15th February, 1917, the appellant took this

action against Silverman, and made the above mentioned transferees parties to his action as *mis-en-cause*. He asks that the privilege be declared null and void, and also that the transfers be annulled in so far as the said property or the proceeds of sale thereof are concerned, that the prothonotary be ordered not to collocate the respondent and his transferees as privileged creditors, and that the transfers be radiated, cancelled and struck from the certificate of search.

The respondent Silverman contested the action, denying that he had signed the renunciation. The transferees appeared by attorney, but did not plead to the action, and were foreclosed. The judgment was rendered in the Superior Court on the inscription of the plaintiff against Silverman and on his inscription *ex parte* against the transferees.

Silverman having, as a witness, denied that he had signed the renunciation, the Superior Court refused to allow the plaintiff to make secondary proof of the renunciation and also decided adversely to the contentions of the plaintiff who pretended that the privilege was null for want of compliance with the necessary formalities. The action was dismissed with costs.

The plaintiff appealed to the Court of King's Bench, and the latter court, while deciding that the renunciation was legally proved, came to the conclusion that, as regards the appellant, it was *res inter alios acta* (art. 1023 C.C.). Mr. Justice Carroll was of the opinion that the appellant could avail himself of the renunciation, but that it could not affect the transferees, who were protected by art. 2127 C.C., and could not lose their rights by reason of a renunciation which had received no publicity.

I agree that the renunciation of the respondent Silverman was legally proved. Undoubtedly Silver-

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man, notwithstanding his denial, signed it, and his counsel very properly abandoned, at the hearing before this court, the plea that his client had not signed the document. I have also come to the conclusion, as stated above, that the appellant can claim the benefit of the renunciation as regards Silverman. Whether he can set it up against the transferees is, however, another question.

After the argument, an examination of the record in the court below disclosed the fact that although the transferees had been made parties to the suit in the Superior Court and had appeared by counsel, the appellant had not given them notice of his inscription in appeal to the Court of King's Bench (art. 1213 C.C.P.), nor did he give them notice of his petition for leave to appeal to this court, so that the transferees were not parties to the appeal, and the question might arise whether they were not protected by the judgment of the Superior Court which dismissed the appellant's action, not only with regard to Silverman, but also with respect to the transferees of the greater part of the claim he had registered against the property.

The attention of the solicitors of the appellant and of the respondent Silverman was called to this fact, and they were given the opportunity of filing supplementary factums if they desired. They have done so.

The respondent Silverman, in his supplementary factum, submits that the judgment of the Superior Court is now *res judicata* and, therefore, conclusive in favour of the transferees. He has, however, no right to make this plea on behalf of the latter.

The appellant, on the other hand, has filed a supplementary factum in which he takes several grounds, which I will briefly summarize.

1. The appellant claims that by appearing by

counsel in the Superior Court, and failing to plead to the action, the transferees tacitly shewed that they intended to submit themselves to justice and to acquiesce in the final judgment to be rendered upon the issues between the appellant and the respondent.

2. The appellant submits that the inscription in appeal against Silverman alone is effective against the transferees, the privilege claimed by Silverman and his transferees being indivisible.

3. He also contends that the transferees were duly represented on the appeal by the respondent Silverman, inasmuch as they had taken the transfers as a pledge and were subrogated in Silverman's rights, so that Silverman, being the warrantor of the transfers he had made to them, could plead in their name.

I think the first ground urged by the appellant is not a sufficient answer to the objection that the transferees should have been made parties to the appeal taken by the appellant. Granting that the transferees, who had appeared in the Superior Court, but did not plead to the action, tacitly shewed that they intended to submit themselves to justice and to acquiesce in the final judgment—and I do not consider that this was an acquiescence in any judgment that might be rendered in another court upon the issues between the appellant and Silverman—I am of the opinion that they were entitled to notice of any inscription for proof and hearing in the Superior Court (art. 418 C.C.P.), as well as of any inscription in appeal from the judgment. They received notice of the inscription in the Superior Court but not of the inscription in appeal. Most certainly the appellant could, after the first judgment, abandon the conclusions he had taken against the transferees and limit the appeal to the respondent Silverman, and how could he more effectively shew his intention to do

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so than by giving notice of appeal to Silverman alone?

The second answer of the appellant is on its face more serious, and he undoubtedly cites in his supplementary factum very weighty authorities to shew that in the case of an indivisible obligation, legal proceedings or appeals taken by or against one of several creditors or debtors are effective as to the latter.

But on due consideration, I have come to the conclusion that, in view of the circumstances of this case, the answer of the appellant does not dispose of the objection.

In the first place, the appellant did not, before the Superior Court, conduct his action against Silverman as representing in any way his transferees, but he made the latter parties to his action, thereby separating their case from that of Silverman, and giving them the opportunity of contesting the action separately. The fact that they did not make a separate defence does not alter their status in the action, and they were undoubtedly entitled to be heard on an appeal from the judgment, which judgment dismissed the appellant's action, not only as to his demand against Silverman, but also as to the conclusions taken by him against the transferees.

In the second place, I am of the opinion that the appellant misapplies the rules concerning indivisible obligations.

There is no doubt that a privilege is indivisible, but all the authors hold that this indivisibility, as well as the indivisibility of the contract of hypothec, is not of the essence of the contract, but exists by virtue of the will of the parties. It is without effect on the obligation itself, of which the privilege or hypothec is merely the accessory, and if the claim guaranteed by the privilege or hypothec be divisible, as this claim is

divisible, it is not made indivisible because an indivisible security has been given. So, in my opinion, Silverman cannot in any way represent his transferees.

Moreover, the indivisibility of the privilege or of the hypothec exists in favour of the creditor and cannot be turned against him.

See Guillouard, Privilèges et Hypothèques, vol. 2, nos. 637 and 638; Laurent, vol. 30, nos. 175, 177, 178; Baudry-Lacantinerie, Privilèges et Hypothèques, vol. 2, no. 900; Paul Pont, Privilèges et Hypothèques, vol. 1, nos. 331 *et seq.*; Cassation, 9th November, 1847, Dalloz, 48, 1. 49.

The third answer of the appellant seems to me clearly unfounded. There is no proceeding here of the nature of an action in warranty. And assuming that Silverman is obliged to warrant the transfers he has made, this mere fact would not, in my opinion, permit the appellant, after impleading the transferees in the first court, to entirely ignore them in his appeal to a higher court.

I think, therefore, under the very special circumstances of this case, that effect should be given to Silverman's renunciation merely in so far as his interest is concerned, to wit, the sum of $665.78. There would be a very serious question whether the unregistered renunciation could be opposed to the registered transferees. It is, however, not necessary to decide this question inasmuch as the transferees are no longer parties to these proceedings. It is also unnecessary to decide the objections made by the appellant as to Silverman's privilege, for the renunciation puts an end to it in so far as his interest is concerned, and as regards the transferees, the latter are not before this court, so I would not feel justified, even were I of the opinion that the appellant's objections are well taken—and I

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express no opinion on this point—in passing upon the validity of any privilege belonging to the transferees.

I would allow the appeal in so far as the interest of the respondent Silverman in this claim is concerned, without prejudice to any rights the transferees may have acquired under the judgment of the Superior Court, and to whatever rights against them the appellant may have, if any.

The appellant should have his costs throughout against the respondent Silverman.

Appeal allowed with costs.

Solicitors for the appellant: *Weinfield, Sperber, Ledieu & Fortier.*

Solicitor for the respondent: *J. Cohen.*

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UNION BANK OF CANADA (DEFENDANT) ..... } APPELLANT; *Feb. 18, 19. *Mar. 17.

AND

FRANK C. PHILLIPS AND OTHERS— (DEFENDANTS) .....

AND

BOULTER WAUGH LIMITED (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Statute—Construction—Agreement for sale—Assignment—Assignor giving mortgage—Caveat by assignee—Lapse of—Knowledge by mortgagee—Priorities—"The Land Titles Act," Sask. S., 1917, 2nd sess., c. 18, s. 194. R.S. Sask., 1909, c. 41, s. 162.

In April, 1912, the owner made an agreement to sell a lot of land to P. for a price payable by instalments, and in May, 1913, P. assigned to B. his interest in this agreement. This assignment was not registered, but in June, 1913, B. filed a caveat. In September, 1914, P., having paid the purchase price, was registered as owner of the land subject to the caveat. Subsequently P. executed a mortgage of the land, and when it was registered the mortgagee was made aware of B.'s caveat. In June, 1915, the registrar, under section 136 of "The Land Titles Act" of Saskatchewan, notified B., at the request of the mortgagee, that his caveat would lapse at the expiration of a certain delay, unless continued by order of the court; and, by a subsequent order, B.'s caveat was continued for 35 days from the 8th of October, 1915. As no action had been taken by B. within that time, the caveat was vacated.

Held that, under section 194 of "The Land Titles Act" of Saskatchewan and in the absence of fraud, B., having allowed his caveat to be vacated, could not invoke the knowledge by the mortgagee of the existence of the caveat in order to maintain its priority of claim.

Judgment of the Court of Appeal (11 Sask. L.R. 297; 42 D.L.R. 548; (1918) 3 W.W.R. 27, 196), reversed.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin and Mignault JJ. and Cassels J. *ad hoc.*

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APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of Brown C.J. at the trial and maintaining the plaintiff's action. The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

S. B. Woods K.C. for the appellant.

P. E. Mackenzie K.C. for the respondent.

THE CHIEF JUSTICE.—The question for our decision in this appeal really turns upon the proper construction to be given section 194 of "The Land Titles Act, 1917," of Saskatchewan. Apart from that statute, and especially from section 194, there is little doubt that, under the authorities, the plaintiff respondent would have a right to maintain its action and the priority of its security over that of the bank and that, but for section 194, the failure on its part to maintain or renew its caveat which it had registered to protect its interest would not, with the knowledge possessed by the bank of the respondent's interest, operate to affect such right of priority. As Chief Justice Haultain puts it,

> The outstanding and important facts are that the plaintiff had an equitable interest in the land in question prior in time to the equitable interest of the defendant bank, and that the bank had full knowledge and notice of that interest at the time it took its security from Phillips. Apart from the provisions of "The Land Titles Act, 1917" (2nd sess.), ch. 18, these facts bring this case clearly within well established principles.

The section in question, 194, reads as follows:—

> 194. No person contracting or dealing with or taking or proposing to take a transfer, mortgage, incumbrance or lease from the owner of any land for which a certificate of title has been granted shall, except in case of fraud by such person, be bound or concerned to inquire into

(1) 11 Sask. L.R. 297; 42 D.L.R. 548; (1918), 3 W.W.R. 27, 196.

or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof nor shall he be affected by any notice direct, implied or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding.

2. Knowledge on the part of any such person that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

The authorities relied upon in the argument at bar were to the effect that a purchaser or morgtagee for value of an equitable interest in lands with actual or constructive notice of other equitable unregistered interests prior to that which he acquired took subject to those interests.

But it seems to me that the object and purpose of this section, apart from cases of fraud, was to lay down a different rule which should govern in cases coming within its ambit, and, unless we are prepared to ignore the section altogether or fritter away its language and meaning, we must hold that, except in cases of fraud, these equitable rules established by the authorities, however just and equitable they may seem to be under ordinary circumstances, are not applicable to cases coming within section 194 of "The Land Titles Act."

I think the object and purpose of such statutes as the one here was very well stated by Edwards J. in delivering the judgment of the Court of Appeal in New Zealand in *Fels* v. *Knowles* (1):—

> The object of the Act was to contain within its four corners a complete system which any intelligent man could understand, and which could be carried into effect in practice without the intervention of persons skilled in the law. * * * The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute. Everything which can be registered gives,

(1) 26 N.Z. Rep. 604, at p. 620.

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The Chief Justice.

in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered.

In construing section 194 of "The Saskatchewan Land Titles Act," we must always bear in mind that cases of fraud are excepted from it, but that knowledge of an unregistered interest in lands "shall not of itself be imputed as fraud." The section provides that no person dealing with lands for which a certificate of title has been granted shall

be affected by any notice direct implied or constructive of any trust or unregistered interest in the land any rule of law or equity to the contrary notwithstanding.

That seems to be sufficiently explicit and clear as making the register everything and outside notices or knowledge immaterial.

Now in this case a caveat had been filed on behalf of the plaintiff respondent against the lands in question and the registrar having given the plaintiff respondent notice to take action on the caveat the local master made an order under the statute directing the plaintiff within 35 days to bring an action to establish any claim it might have to the lands with an express provision that if such action was not brought the caveat should be vacated. No action having been brought the caveat was vacated.

The plaintiff then notified the appellant bank that it had not abandoned its claim and it brought the present action resting its claim to relief on the ground that the appellant bank, having had the knowledge of plaintiff's claim before taking its mortgage, cannot in equity acquire a title free from and prior to such claim.

This raises a clear cut issue whether the old rules of equity which section 194 was supposed to do away with still prevail and will be given effect to notwithstanding

the section or whether the plain words of the section itself, which practically makes the register everything, shall prevail.

I have no hesitation myself, apart from cases of fraud, in reaching the latter conclusion and that the plaintiff, whether by mistake or negligence, having allowed its caveat to be vacated, cannot invoke the old rule of notice and knowledge to maintain its priority of claim over that of the bank.

Such rule has, in my judgment, been expressly abrogated by this section 194, in all cases coming within its ambit and the register alone made the sole test always of course excepting, as the section does, cases of fraud.

I cannot find that the plaintiff has any one to blame but itself for the position it finds itself in. The bank did not try to take any unjust advantage of it. Perfectly within its right, the bank took proceedings under the Act which resulted in the plaintiff being ordered to bring an action to enforce that claim within a definite period, otherwise its caveat would lapse and be vacated.

The respondent allowed it, by its own neglect and inaction, to be vacated and so lost the right it otherwise would have had to enforce its claim of priority as against the defendant bank which in the meantime had acquired an interest in the land. I agree with Mr. Justice Newlands

that the vacating of the caveat cleared the registered title to the land of any claim the plaintiff might have against it in priority to any right that had attached to such land by such lapse.

I would allow the appeal with costs here and in the Court of Appeal and restore the judgment of the trial judge.

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IDINGTON J.—The question raised herein, I think, should be determined by the interpretation and construction of section 162 of "The Lands Titles Act," ch. 41 of the Revised Statutes of Saskatchewan, 1909, (Sask. s. 1917, 2nd session, c. 18, s. 194) so far as relevant to the facts in evidence.

162. No person contracting or dealing with or taking or proposing to take a transfer, mortgage, incumbrance or lease, from the owner of any land for which a certificate of title has been granted shall, except in case of fraud by such person, be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof nor shall he be affected by any notice direct, implied or constructive of any trust or unregistered interest in the land any rule of law or equity to the contrary notwithstanding.

2. The knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

One Munson sold some land to one Phillips and gave him an agreement of purchase therefor on the 2nd of April, 1912, which he assigned, merely in the way of security, on the 2nd of May, 1913, to a company under whom, by virtue of several assignments, the respondent corporate company claims.

In the course of events attendant upon the said several assignments, one Scott Barlow, who had become one of the said several assignees, as trustee for respondent company, registered a caveat on the 5th of June, 1913.

In September, 1914, Phillips had paid the balance of the purchase money and obtained a conveyance from Munson who had never been notified by the assignees aforesaid, or any of them, of the fact of the said assignment by Phillips the vendor.

No one has pretended that Phillips, in doing so, had any fraudulent purpose in view or claimed that his action in doing so was fraudulent.

Thereafter, on the 23rd of March, 1915, the appel-

lant obtained from Phillips a mortgage upon the said lands and having had, when doing so, knowledge of the said caveat filed by Scott Barlow, the appellant is held by the court below to have committed a fraud and thereby is deprived of its rights as such mortgagee.

Not a word appears in the pleading herein charging such fraud.

And a very curious circumstance appears in evidence which seems quite inconsistent with the charge of fraud made by the court below. It is this: that the appellant, shortly after getting its mortgage from Phillips, instructed solicitors to call the attention of Scott Barlow, in whose name the caveat stood, that he must proceed to enforce his claim thereunder or it would lapse in thirty days, unless continued by order of the court.

The respondent, in consequence of this, applied accordingly and obtained an order continuing the caveat for thirty-five days on terms of the caveator taking proceedings within that time to establish his rights thereunder.

This he and the respondent failed to do and in the language used in the western provinces relative to such omissions, the caveat lapsed.

The respondent took ineffectual steps later to have it re-established.

The consequence of such failures is that on the registry record the appellant stands in priority to anything the respondent can now get registered against the same land. What has that in it in the nature of fraud?

The answer is furnished by the judgment in *Le Neve* v. *Le Neve* (1), upon which had been built, as it were, an enormous volume of law, which produces judicial

(1) 1 Ambler 436.

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expressions that might, if later legislation discarded, warrant one in saying any such advantage with knowledge, was equivalent to fraud and liable to have that declared and the priority of registration deprived of its usual effect.

I cannot, however, see how such doctrines can be maintained in such cases as this, in view of the express language of the legislature in the clause above quoted.

It seems impossible that the proper effect can be given to that section unless we try to appreciate what the legislature was about.

Clearly it was not satisfied with the results of the law as settled by judicial expressions and decisions, and had determined upon the adoption of a system of registration as a basis of ownership of land and a means of settling the order of priority of claims into or out of any such ownership when once registered under the Act in question.

In doing so it cast upon those acquiring any such ownership or claim to any interest therein burdens, perhaps previously unknown, in the way of diligence in order to protect the rights so acquired by observing the provisions of the Act in that regard under penalty of losing ownership or priority of claim save in the case of fraud on the part of those obtaining the priority, which the Act seems clearly to contemplate as possible even with notice or knowledge unless springing from that conveyed by means of registration of a caveat. Notice or knowledge resting upon the warning given by a permissible caveat would be available to him registering it, or those claiming under him by virtue thereof as a means of maintaining priority over any later registration.

But the steps necessary to secure such benefits

must be those contemplated by the Act and not something else.

The principle involved is not new. A privilege of any kind created by statute must be enforced in the way that statute provides.

It cannot be made available in any other way. The respondent seems to have recognized that by getting the renewal under the Act.

When it failed to proceed according to the law enacted for its benefit its rights ceased.

The notice or knowledge thus obtained by appellant was nothing more than all other kinds of notice or knowledge excluded by the section quoted from having any effect and, by the express language of the Act, "shall not of itself be imputed as fraud."

I am unable, therefore, to see how the language of the legislature can be properly defied and set at naught by reason of judicial conceptions of what might have been called fraud, before this express prohibition of their being given further recognition.

We have been referred to a number of New Zealand cases which, of course, do not bind us any more than the judgment appealed from. I have, however, looked at them and find in most, if not all, some element of fact which could well be interpreted as to constitute fraud, or might well be held as within such a compliance with the statute as to found a claim thereunder for the relief sought and got.

The New Zealand Act differs somewhat from that now in question and the corresponding section to that above quoted is capable of a less drastic meaning than it.

The Australian statutes, upon which cases were cited to us, are not in our library. And I may be permitted to think that the attempted construction of

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such like statutes as in question from a reading of a single section or extract therefrom is rather a hazardous sort of proceeding.

For this court to attempt to call that fraud on the part of the appellant which it appears to have done herein, would only tend to impair the regard attaching to any finding of fraud we might be able to find as understood by the exception in above quoted section.

Nor is this the only illustration furnished by the administration of justice wherein due diligence is recognized as entitled to acquire its reward and he wanting in the application thereof is doomed to disappointment.

So long as its application is not associated with a fraudulent purpose, he suffering has no legal right to complain.

It does not seem to me that the facts upon which the court above had to proceed in the case of *Loke Yew* v. *Port Swettenham Rubber Co.* (1), have much resemblance to those we have to deal with and the relevant law contained in the statute there in question has still less to that above quoted.

The appeal should be allowed with costs throughout and, I think, the respondent should be at liberty to redeem and judgment go for that as falling under its alternative prayer for relief.

ANGLIN J.—The facts in this case appear in the judgments delivered (2), in the Court of Appeal. They establish that the appellant bank took the mortgage for which it now claims priority over the respondent's unregistered equitable interest in, or claim upon, the lands in question with "direct" notice of such interest.

(1) [1913] A.C. 491.

(2) 11 Sask. L.R. 297; (1918) 3 W.W.R. 27, 196; 42 D.L.R. 548.

Were it not for the effect of section 194 of "The Land Titles Act" (statutes of Saskatchewan, 1917 (2nd sess.), ch. 18), I should unhesitatingly agree with the learned Chief Justice of Saskatchewan and Lamont J. that any attempt of the bank to give to its security "an effect inconsistent with or destructive of" the respondent's prior interest would, under these circumstances, be "looked upon by equity as a fraud which it (could) not countenance." Mr. Justice Lamont has, in my opinion very convincingly shewn that but for the effect of section 194 a caveat would not have been required to protect the respondent's interest against the bank and that the lapse of its caveat, therefore, did not leave it in any worse position than it would have occupied had it never lodged it.

But I find in section 194 an insuperable difficulty to giving effect to the principle of equity which would otherwise support the respondent in this position. The language of that section is so explicit that it leaves no room for doubt as to the intention of the legislature that that principle shall be abrogated in favour of a

person * * * taking * * * a transfer mortgage, incumbrance or lease from the owner of any land for which a certificate of title has been granted, except in the case of fraud.

By sub-sec. 2:

Knowledge that any trust or unregistered instrument is in existence shall not of itself be imputed as fraud.

Here there was knowledge, but nothing more. Knowledge, of course, could not of itself constitute fraud. Fraud must always have consisted in the doing of something which that knowledge made it unjust or inequitable to do. The meaning of the statute must, therefore, be that the doing of that which mere knowledge of "any trust or unregistered interest" would make it inequitable to do shall nevertheless not be imputed as fraud, within the meaning of that term as used in

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sub-sec. 1 of sec. 194. That which equity deems fraud, therefore, is by this enactment of a competent legislature declared not to be imputable as fraud.

A passage from my judgment in *Grace* v. *Kuebler* (1), is cited by the learned Chief Justice and by Lamont J. apparently as inconsistent with this view. All that that case decided was that the mere lodging of a caveat to protect an interest acquired subsequently to the making of an agreement for the sale of registered land does not affect the purchaser under such agreement, otherwise ignorant of them, with notice of the rights to protect which the caveat is lodged so as to render ineffectual as against the caveator payments on account of purchase money subsequently made by the purchaser to his vendor. Expressions of opinion in the judgment on any other point must, it is needless to say, be regarded as *obiter*. If anything I said in that case is really inconsistent with the views I have expressed above, I can only cry *peccavi* and plead that it was not so intended. I find in section 194 the "very explicit language" which I deem necessary to justify our regarding a statute as intended to render unenforceable such a wholesome doctrine as that of the effect of notice in equity. To give effect to a provision that a person is to be unaffected by notice, his rights and remedies must be the same as they would have been had he not had notice. However wholesome we may consider the equitable doctrine as to the effect of notice—however regrettable and even demoralizing in its tendency we may deem legislation rendering it inoperative—it is not in our power to disregard it. The legislative purpose being clear we have no right to decline to carry it out. Were we to do so consequences still more deplorable must

(1) 56 Can. S.C.R. 1, at p. 14; 39 D.L.R. 39, at pp. 47-8.

ensue. The court would occupy a wholly indefensible position, one of usurpation of an authority, sovereign within its ambit, which it is its imperative duty to uphold.

MIGNAULT J.—In my opinion the decision of the question submitted is entirely governed by the provisions of "The Land Titles Act" of Saskatchewan (ch. 41 of the Revised Statutes of Saskatchewan (1909)). (Sask. S., 1917, 2nd session, c. 18).

As briefly as they can be stated, the pertinent facts are as follows:—

In April, 1912, one J. H. Munson made an agreement to sell to Frank C. Phillips lot 10, block 6, plan E.M., town of Humboldt, Saskatchewan, for $1,750 payable by instalments.

In May, 1913, Phillips, being indebted to Boulter Waugh and Company, Limited (now represented by the respondent), assigned his interest in the agreement for sale to the said company, which immediately transferred its interest to its credit manager, Mr. Scott Barlow, in trust for the company. These assignments were not registered, but on the 5th June, 1913, Mr. Barlow filed a caveat in the district land titles office to protect the interest thus assigned by Phillips.

In September, 1914, Phillips, having paid to Munson the purchase price, received a transfer and was registered as owner of the land, subject to a mechanic's lien and to the Barlow caveat.

Subsequently Phillips became indebted to the appellant and executed a mortgage of the land in its favour, which mortgage was registered on the 24th March, 1915. When the appellant acquired this mortgage from Phillips, it was aware of the Barlow caveat, which was entered on the certificate of title, and of the rights represented by this caveat.

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On the 29th June, 1915, the deputy registrar, under section 130 of "The Land Titles Act," (R.S. Sask. 1909, c. 41) notified Mr. Barlow at the request of the appellant that his caveat would lapse at the end of 30 days unless continued by order of the court. An order was made on the 28th July, 1915, and registered, continuing the caveat until further order. By a subsequent order of the court, the Barlow caveat was continued for 35 days from the 8th October, 1915, and it was ordered that in default of the caveator taking proceedings within that time, the caveat should be vacated. On the 13th November, 1915, a certificate of the clerk of the court was registered stating that no action had been taken during the 35 days continuing the caveat, and that this time having expired the caveat was vacated.

Legal proceedings were subsequently taken to reinstate the Barlow caveat resulting in a judgment of the Supreme Court of Saskatchewan *en banc* of the 14th July, 1916, setting aside an order of the local master at Humboldt reinstating the Barlow caveat, without prejudice, the judgment stated, to the right of the respondent to make application to file a new caveat.

The question to be decided is whether the appellant is entitled to priority over the respondent in respect of their respective rights in and to the lands in question, and this question, as I have said, must be determined according to the rules enacted by "The Saskatchewan Land Titles Act."

The material provisions of this statute (R.S. Sask. 1909, c. 41) are as follows:—

125. Any person claiming to be interested in any land under any will, settlement or trust deed or under any instrument of transfer or transmission or under any unregistered instrument or under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially, but the title to which is

registered in the name of some other person or otherwise, may lodge a caveat with the registrar to the effect that no registration of any transfer or other instrument affecting the said land shall be made and that no certificate of title therefor shall be granted until such caveat has been withdrawn or has lapsed as hereinafter provided unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in such caveat;

Provided that no caveat which has heretofore been or that may hereafter be lodged shall be deemed to be insufficient for the purposes of the lodgment thereof merely upon the ground that the interest claimed therein is not shewn to be derived from the registered owner of the land affected.

129. The owner or other person claiming any interest in such land may by summons call upon the caveator to attend before a judge to shew cause why the caveat should not be withdrawn; and the said judge may upon proof that such last mentioned person has been summoned and upon such evidence as the judge requires make such order in the premises as to the said judge seems fit.

130. Subject to the provisions of the preceding section such caveat shall continue unless and until it is removed as hereinafter set forth, namely: The owner or other person claiming any interest in such land may require the registrar by notice in writing which shall be in form Y in the schedule to this Act to notify the caveator at his address for service as set forth in the caveat that such caveat shall lapse at the expiration of thirty days from the mailing of such notice by the registrar unless within said thirty days, the caveator shall file with the registrar an order made by the judge providing for the continuing beyond the said thirty days of said caveat, and in the event of such order not being filed with the registrar within the said thirty days, such caveat shall lapse and shall be treated as lapsed by the registrar; the notice hereinbefore provided to be given by the registrar shall be by registered letter.

Provided, however, that whenever the registrar is satisfied that any interest in such land other than the interest therein of the caveator is protected by such caveat he may refuse to notify the caveator as required by this section, and in such case the removal of such caveat shall be subject only to the provisions of sec. 129 hereof.

131. The caveator may by notice in writing to the registrar withdraw his caveat at any time; but notwithstanding such withdrawal the court or judge may order the payment by the caveator of the costs of the caveatee incurred prior to such withdrawal.

132. A memorandum shall be made by the registrar upon the certificate of title and upon the duplicate certificate of the withdrawal, lapse or removal of any caveat or of any order made by the court or a judge in connection therewith.

2. After such withdrawal, lapse or removal it shall not be lawful for the same person or for any one on his behalf to lodge a further caveat in relation to the same matter unless by leave of the judge.

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133. Any person lodging or continuing any caveat wrongfully, and without any reasonable cause, shall be liable to make compensation to any person who has sustained damage thereby.

2. Such compensation with costs may be recovered by proceedings at law if the caveator has withdrawn such caveat and no proceedings have been taken by the caveatee as herein provided.

3. If proceedings have been taken by the caveatee then the compensation and costs shall be determined by the court or judge acting in the same proceedings.

The rules laid down here can give rise to no difficulty. Under section 129, the owner or other person interested in a lot of land may by summons call upon the caveator to attend before a judge to shew cause why the caveat should not be withdrawn, or he may, under section 130, require the registrar to notify the caveator that such caveat shall lapse at the expiration of 30 days from the mailing of the notice by the registrar, unless, within 30 days, the caveator shall file with the registrar an order made by the judge providing for the continuing of the caveat beyond the 30 days, and if such order is not filed, the caveat shall lapse and shall be treated as lapsed by the registrar.

The notice in question was given under section 130. The caveator first obtained an order of the court continuing the caveat until further order, but a subsequent order continued the caveat for 35 days from the 8th of October, 1915, and ordered that in default of the caveator taking proceedings during this term, the caveat should be vacated. No proceedings having been taken by the caveator during the 35 days I am of the opinion that his caveat fully lapsed. The permission subsequently granted him by the Supreme Court *en banc* to file a new caveat—permission which was required under section 132—and the filing of the caveat could only operate from the date of the new caveat and could not affect the prior registered mortgage of the appellant.

But the respondent relies on the knowledge acquired by the appellant at the time it took its mortgage from Phillips of the rights represented by the Barlow caveat as first filed, and the respondent contends that it would be "against conscience" or equivalent to fraud to thus acquire a right in land with knowledge of the existing unregistered rights of the respondent. Many cases are cited in this connection, but I cannot but think that they are without application in view of sec. 162 of "The Saskatchewan Land Titles Act," (R.S. Sask. 1909, c. 41) which section is, in my opinion, a complete answer to the respondent's contention.

This section reads as follows:—

162. No person contracting or dealing with or taking or proposing to take a transfer, mortgage, incumbrance or lease from the owner of any land for which a certificate of title has been granted shall, except in case of fraud by such person, be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor shall he be affected by notice direct, implied or constructive, of any trust or unregistered interest in the land any rule of law or equity to the contrary notwithstanding.

2. The knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

In this connection, but of course not an authority, but merely as shewing that the registration laws of the different provinces are not so far apart, I might refer to art. 2085 of the Quebec Civil Code, the application of which has never given rise to any difficulty, and which reads as follows:—

2085. The notice or knowledge acquired of an unregistered right belonging to a third party and subject to registration cannot prejudice the rights of a subsequent purchaser for valuable consideration whose title is duly registered, except when such title is derived from an insolvent trader.

I, however, base entirely my opinion on section 162 of "The Land Titles Act," and I take it that the knowledge acquired by the appellant of the unregistered interest of the respondent cannot, of itself, be imputed

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as fraud. The registration by the appellant of the mortgage acquired by it from Phillips was certainly not a fraudulent act, for if the Barlow caveat had been maintained by the court the appellant's mortgage would have been subject to the rights represented by this caveat. And it certainly cannot be contended that the appellant committed a fraudulent act by availing itself of the right granted by sec. 130 of "The Land Titles Act" to any person claiming an interest in a lot of land to test the validity of a caveat lodged in the land titles office. If Barlow or the respondent allowed the caveat to lapse, no fault or fraud can be imputed to the appellant, but the respondent suffers by reason of its own negligence.

The learned judges of the Court of Appeal who have found in favour of the respondent observe that if the opinion I feel constrained to adopt is to be followed, Barlow would be in a worse position by filing a caveat than if he had relied on the equitable doctrine that the knowledge of his right by the appellant prevented the latter from acquiring priority as against his interest in the land in question.

I am not at all sure in view of sec. 162 that Barlow would have been in a better position had he not filed the caveat, a point on which it is unnecessary to express any opinion. He has, however, filed a caveat to protect his rights and he, therefore, has put himself entirely under "The Land Titles Act." The respondent has, moreover, since the first caveat lapsed and it was refused reinstalment, filed a new caveat which is subsequent in date to the registration of the appellant's mortgage. I think, therefore, that the statute entirely governs the parties in this case, and it is clear to my mind that the appellant is entitled to preference.

The learned Chief Justice of Saskatchewan cites

certain maxims coming, I think, originally from the Roman Law with which, as a civilian, I am familiar, such as *nemo dat qui non habet*, or *qui prior est tempore potior est jure* But I may say with deference that these maxims are not of universal application, and when third parties are concerned they cannot be applied without some qualification. It might, moreover, be possible to offset axiom by axiom and to refer to the one so often mentioned by the old jurists, *vigilantibus non dormientibus scripta est lex.* I prefer, however, to rest on the clear text of the statute, and I take it as being eminently desirable, in the interest of the security of land transactions in a system where registration of titles to land is provided for, that the entries in the public register, in the absence of fraud, be taken as conclusive. Here the respondent failed to register its assignment and even to protect its caveat when it was called upon in the manner prescribed for by "The Land Titles Act" to do so. I cannot, under the circumstances of this case, come to its assistance.

I am, therefore, of the opinion that the appeal should be allowed and the judgment of the learned trial judge restored with costs throughout.

CASSELS J.—I concur in the reasons and result arrived at by Mr. Justice Mignault.

Appeal allowed with costs.

Solicitor for the appellant: *F. H. Bence.*
Solicitors for the respondent: *McCraney, Mackenzie & Hutchinson.*

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*Feb. 7.
*Feb. 17.

CHARLES A. GODSON (DEFENDANT). APPELLANT;

AND

P. BURNS & COMPANY (PLAINTIFF). RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Landlord and tenant—Lease—Conditional renewal—Mutual agreement—Liability of lessor—Trade fixtures—Removal by lessee.

When a lease provides for a renewal thereof "upon such terms as may be mutually agreed upon" and further provides that "in the event of a renewal of this lease not being granted, * * * the lessor shall pay to the lessee * * * the actual costs * * * of alterations and additions" made by the lessee to the premises, the lessor is liable if no agreement is reached between him and the lessee, it being immaterial whether both, or either of them, were unreasonable in the discussion of terms and conditions of renewal.

It was also provided that "all improvements, alterations and fixtures constructed or made or to be constructed or made in and upon the said premises shall become the absolute property of the lessor" at the expiration of the lease.

Held, that the lessee was entitled to remove his trade fixtures.

Judgment of the Court of Appeal ([1918], 3 W.W.R. 587), affirmed.

APPEAL from the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Gregory J. (2), and maintaining the plaintiff's action with costs.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Tilley K.C. for the appellant.

A. H. Clarke K.C. for the respondent.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) [1918], 3 W.W.R. 587. (2) [1917], 3 W.W.R. 966.

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THE CHIEF JUSTICE.—For the reasons given by Chief Justice Macdonald and Mr. Justice Martin in the Appeal Court, which are together quite satisfactory to me, I think this appeal must fail and should be dismissed with costs.

IDINGTON J.—The answers to the only questions raised herein depend upon the construction of the lease. I am of the opinion that the learned trial judge and the Court of Appeal have correctly construed the same.

The language used in expressing the agreement of the parties might have been more explicit, but I do not think it difficult to understand and accurately determine its meaning, if we pay attention to the business the parties had on hand.

I do not think we can help the solution of the problems presented by paying attention to the business which some other parties long ago had in hand and the language they used relevant thereto.

It is quite clear the parties postponed for nearly five years the settlement of the terms of a renewal lease and depended for the protection of their respective self-interests upon the development by work to be done within the meaning of the contract as likely to ensure a renewal upon reasonable terms. For who could imagine a lessor as being likely to pay $15,000 for the privilege of refusing a lease upon reasonable terms?

This lessor did so refuse and imagined he could by devious methods escape paying the $15,000. And he has thereby started the amusing exhibitions of dialectical skill necessary to enable him to hope to escape the consequences of so doing.

The meaning of the word "fixtures" in the clause which has been for convenience sake numbered five,

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but not so in the instrument, is *primâ facie* more fairly arguable.

Seeing, however, that the operation of the whole scheme was expressly made dependent upon the following paragraph in clause 2

> Provided, however, that the plan and specifications of any such alterations or additions shall be first submitted to and approved by the lessor;

and seeing further that he paid, as is admitted, $5,000 on account of such work and there is not pretended to have ever been any other "plans and specifications" than those adduced in evidence, I accept them as an infallible guide and especially so when coupled with the later conduct of the lessor and his language in his correspondence as to "fixtures."

These plans and specifications seem to have no relation to such fixtures as now in question, and hence any claim in respect of their removal must be founded upon something else which is *not* discoverable in the lease when read in light of the law relevant to trade fixtures owned by a tenant.

How a lessor so keenly alive to his selfish desires as appellant seems to have been failed to object to their removal, done openly under his own eyes or those of his agent, surprises me. And his solicitor's failure to recognize the possibility of claiming therefor, till over a year after the pleadings were closed, indicates how little either expected from such a claim.

And even when amended then, I incline to think as urged by respondent's counsel, he failed to rest the claim upon the right ground in law if such had ever had any foundation in fact.

The appeal should be dismissed with costs.

ANGLIN J.—For the reasons stated by Mr. Justice Martin I am satisfied that the failure to renew the

respondent's lease entitled him to recover the $15,000 in question in this action. If reasonableness of conduct were a consideration that should enter into the matter I would agree with the view of the Chief Justice of the Court of Appeal

that the lessee (had) *bonâ fide* endeavoured to bring about an agreement on reasonable terms of renewal.

The construction placed by the learned dissenting Justice of Appeal on the provision for renewal, with respect, seems to me to be so unreasonable that it is inconceivable that it is what the parties intended. The language used certainly does not require such a construction. In my opinion it scarcely admits of it.

I also concur in the view of the Chief Justice that the learned trial judge came to the right conclusion as to the construction of what he terms the 5th clause of the lease, which immediately follows the short form covenant for quiet enjoyment, and that the respondent was entitled to remove the tenant's fixtures which it took away from the premises. They formed no part of the "alterations to the front" and

alterations and additions to the interior of the building

for which the appellant agreed to pay a sum not exceeding $20,000 in the event of non-renewal. Applying the rule *noscitur a sociis* the word "fixtures" in the clause of the lease in question, having regard to the improvements and alterations with which it is connected, must be restricted to what are ordinarily known as landlords' fixtures.

I would dismiss the appeal with costs.

BRODEUR J.—This is an action by a lessee to recover the value of improvements made upon the property leased. The lease was for five years from the 1st April, 1909 and was concerning premises in

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Vancouver known as the Braid Building. It could be renewed at the lessee's option on terms to be agreed upon and by his giving three months' notice in writing of his desire to renew. The rent was $12,000 a year.

By the lease, the lessee, who is the respondent, agreed to make certain alterations necessary for the requirements of his business and to adapt the other portions of the premises as hotel rooms, since only a portion of the ground floor and basement was used by the respondent for his business.

It was stipulated that the alterations and plans should be submitted to and approved by the lessor, and it was further agreed that the lessor would pay the lessee during the second year of the term a sum of $5,000 in connection with those improvements.

Clause 4 of the lease, which is the one the construction of which has occasioned this litigation, reads as follows:—

> In the event of a renewal of this lease not being granted for a further term of five years as aforesaid, then in such case, but not otherwise, the lessor shall pay to the lessee at the end of the term hereby granted, the balance of the actual cost to the lessee of such alterations and additions over and above the said sum of Five Thousand Dollars ($5,000). Provided, however, that such total cost shall not in any case exceed the sum of Twenty Thousand Dollars ($20,000).

Extensive alterations were made and approved by the lessor. Those alterations are estimated by the respondent as having cost a much larger sum than the $20,000 stipulated as being the amount which should be paid for those alterations in case the renewal of the lease should not be granted.

The notice required by the lease was given by the lessee, that he was willing to renew the lease. Negotiations went on and were being carried out until a few days before the lease expired, but the parties were never able to agree. The lessee then had to vacate

the premises and has instituted the present action to recover the $15,000 which was stipulated in that clause 4.

There is no doubt that the parties contemplated a renewal lease for a further period of five years if they could agree as to the terms; but in the case they would not agree as to the terms, or in the case where a new lease would not be granted, then, in such a case, what should be done with regard to the improvements?

The parties agreed that if a renewal would take place, the benefit of the alterations enjoyed by the lessee and the $5,000 already paid by the lessor would be sufficient to cover those alterations and the lessee would have no further claim as to them. But if there was no renewal, then I construe the lease as meaning that the lessor is bound to pay the balance of the sum stipulated for the value of the alterations.

Another question was raised as to some fixtures to the value of $8,000, which had been put in by the respondent on the premises and which were of the category of fixtures called tenant's fixtures.

The appellant claims that he is entitled to those fixtures.

I think, on the contrary, that the fixtures mentioned in the lease which could be retained by him are those alterations and fixtures provided by the contract itself and not the fixtures which the lessee might bring in. Clause 5, relied upon by the appellant to substantiate his contention, mentions at first in general terms

all improvements, alterations and fixtures;

but the reference in the latter part of the clause to the payments made on account of those improvements shews conclusively that what the parties intended to cover was not the tenant's fixtures but those improvements included in the formal covenant, viz., those

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which the lessee undertook to make with approval of the lessor.

For those reasons, I am of opinion that the plaintiff (respondent) was entitled to claim the $15,000, and that the judgment rendered in his favour below should be confirmed with costs.

MIGNAULT J.—The contract which has given rise to this litigation is in truth a singular one.

The appellant, on the 1st February, 1911, leased to the respondent a certain building in Vancouver for a term of five years at a rental of $1,000 per month, the lessee to have the privilege

of renewing said term for a further term of five years from the first day of April, 1916, upon such terms as may be mutually agreed upon between the parties hereto, and further upon the lessee giving to the lessor a notice in writing of the lessee's desire to renew same as aforesaid, which said notice shall be given at least three months before the expiration of the term hereby granted.

It was stipulated that the lessee should make

such alterations to the front, and such alterations and additions to the interior of the building hereby demised as in the opinion of the lessee shall be necessary for the requirements of its business, provided, however, that the plans and specifications of any such alterations and additions shall be first submitted to and approved by the lessor.

It was agreed that the lessor would pay to the lessee, during the second year of the term of the lease, the sum of $5,000,

which sum shall be accepted by the lessee in full of all claims and demands of the lessee against the lessor for any and all alterations hereafter made to the building by the lessee as aforesaid.

Notwithstanding this specific stipulation, however, the lease immediately added that

in the event of a renewal of this lease not being granted for a further term of five years as aforesaid, then in such a case, but not otherwise, the lessor shall pay to the lessee at the end of the term hereby granted, the balance of the actual cost to the lessee of such alterations and additions over and above the said sum of $5,000. Provided, however, that such total cost shall not in any case exceed the sum of $20,000.

The parties could very well expect trouble under such a contract. The renewal clause, leaving as it did the terms and conditions of renewal to be determined

by a future agreement of the parties, really gave no right of renewal to the lessee, for a disagreement as to these terms and conditions was a more likely contingency than an agreement. But, on the other hand, it was possibly thought by the lessee that he could nevertheless go ahead and make expensive alterations and additions, in the expectation of recovering from the lessor the value of the alterations and additions up to the sum of $20,000 (including the $5,000 already paid by the lessor), should the latter not grant a renewal of the lease on terms acceptable to the lessee.

On the 28th December, 1915, the respondent gave formal written notice to the appellant of his desire to renew the lease, and that he was ready and willing to enter into negotiations with a view to the settlement of the terms of such renewal. Some correspondence followed and finally, on the 2nd March, 1916, the appellant stated as his terms of renewal of the lease for the premises as a whole (apparently the whole block), $850 per month for the balance of that year, and for the ensuing period of four years, $1,000 per month. The respondent demurred to this, and on 23rd March proposed a renewal at a rental of $500 per month, offering whatever it could get out of the upstairs and basement in addition, adding, that if this were not satisfactory, it would be willing to leave the matter to arbitration. In a subsequent letter of 27th March, the respondent repeated this offer, and stated that if it were not accepted, the respondent would expect to receive the sum of $15,000 under the provisions of the lease.

Both of the parties adhered to the position they had respectively taken until finally, on the 28th April, the appellant accepted the offer he had previously refused of a renewal at a rental of $500 per month, but this proposal was refused by the respondent which had

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previously given notice to the appellant of its intention to move out of the premises.

The present action was taken by the respondent (lessee) against the appellant (lessor) demanding, because the parties had failed to agree as to the terms of renewal of the lease and the lessor had not granted a renewal of the same, that the appellant pay him $15,000 for the balance of the cost of the alterations and additions, the total cost of which was approximately $39,000. His action was maintained by the learned trial judge, Mr. Justice Gregory, and this judgment was affirmed by the Court of Appeal, Mr. Justice McPhillips dissenting.

The right of action of the respondent depends on the construction of the lease, and notwithstanding the somewhat singular and almost conflicting provisions of this lease, it does not seem impossible to arrive at a construction which will give effect to what I take to have been the intention of the parties. The premises rented by the appellant required considerable alterations to make them suitable for the respondent's business, and the appellant had agreed to contribute at all events the sum of $5,000 to the cost of these alterations and additions, thereby indicating that they enhanced the value of his building. On the other hand, it was also considered that if the lease were not renewed for a further term of five years, the lessee should be further compensated for his improvements, and the extent to which the lessor should contribute to the payment of the same was fixed at an amount not exceeding $15,000, over and above the $5,000 he had already paid. It is true that for the renewal of the lease an agreement of the parties as to the terms and conditions on which the renewal would be granted was necessary, and the parties evidently considered that these terms and conditions could not be determined in advance, but if the

renewal was not granted by the lessor, and if he took possession of the premises with the alterations and additions made by the lessee at the expiration of the lease, it was expressly stipulated that the lessor should pay to the lessee the balance of the actual cost of the alterations and additions over and above the $5,000, not to exceed in the aggregate $20,000.

It seems to me entirely immaterial whether the lessor and the lessee, or either of them, were unreasonable in the discussion of terms and conditions of renewal. There was no agreement between them and the renewal term of five years was not granted by the lessor, and he thus came into possession of the leased premises at the expiration of the lease. I think, therefore, that the lessee is clearly entitled to the $15,000, which is no way a penalty against the lessor, but a sum payable to the lessee on a contingency provided for and which has happened. I think also that the offer of the lessor on the 28th April to accept terms of renewal which he had already refused to accept came too late to avail him in this litigation.

Mr. Tilley, on behalf of the appellant, earnestly argued that the respondent had violated the lease by removing certain improvements, alterations and fixtures, and that consequently he could not avail himself of the stipulation concerning the $15,000. In my opinion, nothing was removed by the lessee which does not fairly come under the description of tenant fixtures which the lessee could in any event remove at the expiration of the lease.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Lennie, Clarke, Hooper & O'Neill.*

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*Mar. 24.
*Apr. 9.

AURELE VEUILLETTE.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Mixed jury—Proceedings in one language only—New trial—Substantial wrong—Art. 1019 Cr. C.

The appellant, being tried on an indictment for murder, made a statement, by counsel, that the language of the defence was French; and the trial judge directed the impanelling of a mixed jury. Each of the six French-speaking jurors stated to the court at the time of their selection that they understood and spoke both English and French. The trial proceedings were carried on in the English language. The questions submitted in a reserved case, and on which there was a dissent in the Court of King's Bench, are: (1) The trial judge had not summed up the case to the jury in the French language; (4) the trial judge had commented "upon the failure of the prisoner" (who was a witness on his own behalf) "to testify that he had not actually committed the murder."

Held, Brodeur J. dissenting, that, even assuming these grounds to be errors in law constituting, "something not according to law * * * done at the trial or some misdirection given," the conviction should not be set aside, as "in the opinion of the court" no "substantial wrong or miscarriage" has been "thereby occasioned" to the appellant. (Sec. 1019 Cr. C.)

Per Anglin and Mignault JJ.—Though the terms of the trial judge's charge may be open to criticism, the prisoner's evidence was open to comment by him as that of any other witness.

Per Idington, Anglin, Brodeur and Mignault JJ.—After the election by the accused for and the empanelling of a mixed jury, he had a right to have the case conducted in both English and French.

Per Brodeur J. dissenting:—The failure by the trial judge to have summed up the case in French constituted a "substantial wrong" to the appellant: the conviction should be set aside and a new trial ordered.

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

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) Q.R. 28 K.B. 364.

the judgment of the trial court, with a jury, at Bryson, District of Pontiac.

The accused, appellant, was found guilty of murder but he prayed for a case to be reserved for the Court of King's Bench.

The questions submitted in the reserved case stated by the trial judge and the circumstances of the case are fully stated in the above head-note and in the judgments now reported.

W. K. McKeown K.C. and *A. J. McDonald* for the appellant.

Ernest Gaboury for the respondent.

THE CHIEF JUSTICE.—I have carefully read and considered the reasons for their judgment in this case given by the learned judges of the Court of King's Bench and weighed carefully the able argument presented at bar by Mr. McKeown on the prisoner's behalf.

The Chief Justice of the Court of King's Bench having dissented from the judgment of the majority of that court on the first and fourth questions reserved, this appeal comes before us and is limited to those two questions.

Assuming for the purpose of the argument that the failure of the trial judge to charge the jury in both languages, French and English, brings the case within section 1019 of the Criminal Code as "something not according to law done at the trial," we are by that section expressly prohibited from setting aside the conviction or directing a new trial unless in our opinion "some substantial wrong or miscarriage" was occasioned thereby.

I am quite clear in my judgment that under the special facts and circumstances of this case no such "sub-

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The Chief Justice.

stantial wrong or miscarriage" was so occasioned at the trial to the prisoner either in the fact of the trial judge not having summed up the case to the jury in French nor in the fact of his having commented "upon the failure of the prisoner" (who had elected to give evidence) "to testify to the effect that he had not actually committed the murders mentioned in the indictment."

I would, therefore, dismiss the appeal.

IDINGTON J.—I agree so entirely with the reasoning of Mr. Justice Cross in his opinion given in the court below that I adopt same so far as applicable to that part of the reserved case presented for our consideration. I only desire to add a few words thereto, suggested to my mind by the argument for appellant insisting upon everything said in evidence being translated and addresses repeated in two languages.

I not only dissent from the view expressed by the learned Chief Justice relative to the first question submitted, but also submit with great deference that the adoption of such a rule as he suggests in such a case as now in question, where everyone concerned assumed, throughout a long trial that the jurors understood the English language used, might be fraught with injury to an accused. There is no other class of criminal trials which produces such a strain upon the minds of those concerned as does a trial for murder. There would inevitably result, from a repetition in two languages of all that was expressed, a prolongation of the trial tending to fatigue and inattention on the part of the jurors and possibly a confusion of thought which tiresome reiteration is apt to produce.

The just rights of an innocent man might be needlessly jeopardized in such a case.

The statutory right given an accused and now in question had originally a deeper import than the mere right to the use of the two languages. The latter right in substance is recognized in the due and proper administration of justice wherever and whenever, and so far as necessary; though not carried to the extent that the law in question does relative to the selection of a jury.

The right to a jury *de medietate linguae* is entirely of English origin, tracing back to Edward I., and so clearly formed part and parcel of English law that I imagine it was by reason thereof that it became law in so many of the United States, until abolished in all save Kentucky. If, instead of what happened by steps needless to dwell upon here, the English law had finally become the law of all Canada as result of the Conquest, it would have been as, of course, part thereof, but the final settlement of that vexed question carried with it modifications of the French law, of which this is one, and it, no doubt, was intended to protect him accused from racial prejudices in the jury panel. To impose upon him accused and thus protected the additional risks I have adverted to, when and so far as needless, might tend to force him to waive his privilege, when standing in need of its exercise, for no other reason than that he might desire and need the sympathetic hearing of those of his own or like origin to counteract the possible prejudice of those of another origin.

I do not think he should be driven to make such a choice. At the same time I must not be understood as implying any limitation upon his right to insist, if so advised, upon the two languages being used throughout the trial.

If well advised, common sense will generally govern him and his counsel in regard to the exercise of any

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such rights. And the court must always be ready to accede to his wishes, as I have no doubt it did herein.

I cannot imagine that any wrong or miscarriage of justice ensued herein by reason of the course pursued at the trial; with the concurrence of all concerned,

The case was not one that, so far as we are informed, needed anything but the ordinary conversational skill in use of language to apprehend what was said.

Cases are conceivable in which terms might be used calling for more than that degree of skill. Then, of course, care must be taken that each set of jurors fully understands the import of what is said.

In cases of trial for murder, where there is a possible alternative, of the crime being reduced to one of manslaughter, it frequently happens that nice distinctions of law need to be observed and in explaining such distinctions it might be well for a judge charging a jury to make such distinctions clearly understood by using both languages, lest a juror might not understand same when addressed in another than his mother tongue, even if he had acquired the facility of carrying on an ordinary conversation in another language. But in a murder trial such as this happened to be where it was inevitably either murder or nothing, all the jurors had to understand was the statement of plain ordinary every-day facts.

I am of the opinion that the appeal should be dismissed.

ANGLIN J.—The facts of this case sufficiently appear in the judgments delivered in the Court of King's Bench. The appeal to this court was confined to two of the four questions submitted by the reserved case—the first and the fourth—on which the learned Chief Justice of Quebec dissented from the majority view in the Court of King's Bench adverse to the prisoner.

The first question is as follows:—

Having regard to the facts, that the accused elected to be tried by a jury composed of one-half of persons skilled in the French language, and that the jury in question was in fact composed one-half of persons skilled in the said French language, was there error of law on the part of the presiding judge, occasioning substantial wrong or miscarriage, in not having summed up the case to the jury in the French language in addition to the summing up made in the English language?

On the reserved case submitted, it may properly be assumed that the appellant was entitled to be tried by

a jury composed for the one-half at least of persons skilled in the language of his defence

(in this case French), that upon arraignment he duly demanded such a jury (27 & 28 Vict., ch. 41, sec. 7, subsec. 2), and that at least six members of the jury impanelled were

found in the judgment of the court to be skilled

in the French language.

I am inclined to agree with the learned Chief Justice of Quebec that

after the election of the accused for a mixed jury, and after the impanelling of such a mixed jury, the case should have been conducted in both languages.

That, in my opinion, was a right of the accused implied by the statute. If not, its object would be purely sentimental and no right real and substantial in character would be conferred by it. There is not a little in the record to indicate tacit consent by the accused to the trial being conducted entirely in English. The learned Chief Justice questions the sufficiency of this consent although apparently of the view that

the consent of the accused expressly obtained and recorded

would have justified that course being adopted. I find it unnecessary to pass upon this aspect of the case.

No question is presented as to the effect of the omission to translate into French the evidence given

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in English. The question submitted is confined to the failure of the trial judge to repeat his charge or summing up in French.

Assuming in favour of the appellant that the omission to repeat, at least in substance, the charge or summing up was error in law, it would have constituted

> something not according to law * * * done at the trial

and would justify setting aside the conviction and ordering a new trial only if

> "in the opinion of the court of appeal some substantial wrong or miscarriage was thereby occasioned on the trial."

of the court of appeal some substantial wrong or miscarriage was thereby occasioned on the trial." Crim. Code, sec. 1019. I cannot accede to the contention of counsel for the appellant that, because the error complained of was one of omission and not of commission, it is not within the purview of section 1019. The omission of that which should have been done, made that which was done "something not according to law," and, therefore, a matter to which the section applies. The question submitted properly so assumes.

The stated case informs us that

> each and every one of the jurors stated to the court at the time of their selection that they understood and spoke both languages. When the first witness speaking English gave his evidence, the French-speaking jurors were asked by the court if they understood the evidence, and they all replied that they did. The Crown prosecutor, in explaining the case to the jurors spoke only in English, and Mr. McDonald, attorney for the accused, in addressing the jury after the evidence had been received, spoke only in English. He was followed by Mr. Gaboury, Crown prosecutor, who addressed the jury in English only and was followed by the presiding judge who addressed the jury in English only. No objection was made by the defence and no request preferred that the charge of the jury be repeated in French.

It was also stated at bar that the accused himself gave his evidence wholly in English.

Having regard to all these facts, I agree with Mr.

Justice Pelletier that the accused suffered no prejudice —that no substantial wrong or miscarriage was occasioned on the trial—by the failure of the trial judge to repeat in French his entire summing up or the substance of it.

The affidavits of some jurors tendered by the appellant are, in my opinion, inadmissible and I have not considered them for any purpose.

The fourth question reserved is as follows:—

Was there error of law occasioning substantial wrong or miscarriage in that the judge who presided commented upon the failure of the prisoner to testify to the effect that he had not actually committed the murders mentioned in the indictment?

Although the dissent of the Chief Justice is in terms confined to the first and fourth questions the reasons which he assigns rather indicate that he was not entirely satisfied that the third question should be answered in the negative. Perhaps, however, broadly construed—and I so deal with it—the fourth question may cover the ground of objection which the learned Chief Justice had in mind when he said:—

In his address the judge said to the jurors that the accused did not dare to swear that he did not kill the murdered man. Such a comment, in my opinion, is against the spirit of the law. It was not a fair comment and it was of a nature to cause a substantial wrong and miscarriage of justice.

The prisoner having testified on his own behalf his evidence was open to comment and observation by the presiding judge in addressing the jury as was that of any other witness. Mr. Justice Cross disposed satisfactorily of this branch of the case. Dealing with the third question, he says of the portion of the charge to which the learned Chief Justice takes exception:—

It is to be observed that the jurors were there to hear the evidence and that if there were inaccuracies upon the facts in what the judge said they would not constitute misdirection unless it could be said that they had, or were likely to have, some such effect as to lead the jury to think that some question which they ought to consider was in law excluded from their consideration, or otherwise mislead them as to the law.

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Anglin J.

Whatever may be thought of the learned trial judge's charge from other points of view, however open to criticism it may be as a departure from the standard of impartiality which judges entrusted with the administration of the criminal law in the English courts have thought it proper to adopt, I cannot find in it any error of law such as may properly be made the subject of a reserved case under arts. 1014 *et seq.* of the Criminal Code. I entirely agree, however, with Mr. Justice Pelletier's observation:—

> Il est évident que le juge a tenu un language énergique, pour ne pas dire plus, mais il n'y avait dans tout cela aucune direction erronée sur aucun point de droit, et je ne crois pas que cela puisse faire annuler le verdict.

The appeal, in my opinion, fails.

BRODEUR J. (dissenting).—L'appelant, Veuillette, a été trouvé coupable de meurtre et a demandé au juge qui présidait à son procès de réserver certaines questions pour la décision de la cour d'appel, et notamment celle de savoir si dans le cas où il y a un jury mixte le juge doit faire son allocution (charge) dans les deux langues.

Le juge ayant refusé cette demande, Veuillette s'est adressé à la cour d'appel pour obtenir l'autorisation d'appeler de cette décision. Il a produit au soutien de sa demande les affidavits de quatre jurés de langue française qui ont déclaré n'avoir qu'une connaissance imparfaite de l'anglais; et l'un d'eux, le nommé Demers, a même ajouté:—

> Il y a beaucoup de choses qui ont été dites pendant le procès de Veuillette et dans la charge au jury du juge Weir que je n'ai pas comprises.

La cour d'appel a accordé sur cette preuve la permission d'appeler (art. 1015 Code Criminel).

Quatre questions ont été soumises à la Cour d'Appel. La première est dans les termes suivants:—

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Having regard to the facts that the accused elected to be tried by a jury composed one-half of persons skilled in the French language, and that the jury in question was in fact composed one-half of persons skilled in the said French language, was there error of law on the part of the presiding judge, occasioning substantial wrong or miscarriage, in not having summed up the case to the jury in the French language in addition to the summing up made in the English language?

En vertu de la loi actuellement en force dans la province de Québec, où ce procès criminel a eu lieu, le prévenu, s'il est français ou anglais, peut demander, lors de sa mise en accusation, un jury mixte

et alors il sera jugé par un jury composé pour moitié au moins des personnes qui * * * seront * * * versées dans la langue du prévenu. (1864, 27-28 Vict., ch. 41, sec. 7).

Comme on le voit par le texte même du statut, c'est un droit absolu pour un anglais ou un français dans la province d'être jugé par six au moins de ses concitoyens qui parlent sa langue maternelle. Ce n'est pas même laissé à la discrétion du juge de décider s'il y a eu lieu ou non d'accorder cette demande du prévenu pour un jury mixte. C'est un droit absolu et incontestable. Et du moment qu'il manifeste ce désir, le juge est tenu d'en prendre note et de voir à ce que le jury soit mixte.

Cette législation n'est pas nouvelle. Elle remonte aux premiers jours de la domination anglaise. En 1764 le gouverneur Murray, dans son ordonnance du 17 septembre, déclarait que

In all tryals in this court, all His Majesty's subjects in the Colony to be admitted on juries without distinction.

Les canadiens de langue anglaise se sont trouvés fort mécontents de voir que cette ordonnance mettait les anglais et les français sur le même pied; et, dans un mémoire en date du 16 octobre 1764, ils disaient que

persons professing the religion of the Church of Rome * * * have been empannelled on Grand and Petty Jurys *even where two protestants were parties.*

Ils rappelaient cette disposition de la loi James the Third, ch. 5, sec. 8, qui déclarait que

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no papist * * * shall practice the Common Law as a Chancellor Clerk, Attorney or Solicitor. etc.,

et ils concluaient en disant:—

We therefore believe that the admitting of persons of the Roman Religion * * * as jurors is an open violation of our most sacred Laws & Libertys and tending to the utter subversion of the Protestant Religion & His Majesty's Power, authority, right & possession of the province to which we belong.

(Constitutional Documents, Shortt & Doughty, p. 154.)

Leurs plaintes furent référées en Angleterre où les officiers de la couronne décidèrent que les catholiques pouvaient agir comme jurés. Et en 1766, le ler juillet, une nouvelle ordonnance, destinée à faire disparaître la plainte des anglais qu'ils étaient exposés à être jugés par des jurés tous français a été signée décrétant que dans les actions

between British-born subjects and Canadians, the juries are to be composed of an equal number of each, if it be required by either of the Parties.

Shortt & Doughty, idem, p. 173.

Le jury mixte était établi et ce sur les représentations et à la demande des canadiens de langue anglaise. Nous retrouvons le principe de cette législation dans nos Statuts Refondus du Bas-Canada, dans la section 31 du ch. 84. Ce dernier statut ayant été abrogé en 1864, la disposition en question a été reproduite dans le statut de 1864, 27 & 28 Vict. ch. 41, sec. 7. C'est la loi maintenant en force.

Maintenant, quelle est l'étendue du droit qui était conféré aux prévenus?

On a prétendu que ce droit ne consistait que dans le choix des jurés et ne comportait pas l'obligation pour la cour de voir à ce que toutes les procédures soient conduites dans les deux langues afin d'être bien comprises par tous les membres du jury.

Ce serait, suivant moi, un droit bien illusoire si, malgré le droit qu'aurait un anglais, par exemple, de

choisir un jury mixte, il était permis à la couronne de faire entendre les témoins en langue française et de ne pas traduire leurs témoignages en anglais de manière à ce que la teneur de ces témoignages fût comprise par les jurés de langue anglaise. Cela constituerait un grave déni de justice.

Il en serait de même pour le résumé (charge) du juge. Ce dernier devrait voir à ce que son allocution soit comprise de tout le jury.

Il est vrai que la loi est silencieuse sur la manière dont une cause devra être conduite devant un jury mixte. Mais je ne veux pas de meilleure interprétation de la loi que cette pratique, constamment suivie depuis plus de cent cinquante ans, que dans le cas de jury mixte les dépositions des témoins sont traduites dans les deux langues et le résumé du juge est également fait ou traduit en anglais et en français.

Le gouverneur Murray sentait si bien la nécessité pour les préposés de l'administration de la justice de connaître les deux langues, que, dans un rapport qu'il faisait aux autorités impériales il se plaignait que

our chief Judge and Attorney-General are both entirely ignorant of the language of the natives.

De fait, quelques mois après les autorités impériales, sans motiver leurs raisons, remplaçaient le Juge en Chef et le Procureur General. Shortt & Doughty, idem, p. 178.

Mais on dit: Il n'y a pas eu de protestation dans la cause actuelle quand le juge a omis de parler en français, le prisonnier a donné son témoignage en anglais, son avocat n'a parlé qu'en anglais quand il a fait son allocution aux jurés, et, de plus, on a demandé aux jurés français s'ils connaissaient l'anglais et ils ont répondu que oui.

Toutes ces circonstances ne sauraient prouver qu'il y a eu acquiescement formel à cette illégalité. Je me

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demande même si dans un procès pour meurtre un acquiescement formel serait suffisant. La loi criminelle exige que dans les procès qui peuvent entraîner la peine capitale toutes les précautions doivent être prises pour que toutes les règles de la procédure soient suivies avec la plus grande rigueur. (Russell on Crimes, vol. 3, p. 2156.)

Nous avons au dossier une preuve énonçant que certain juré n'avait pas une connaissance suffisante de l'anglais pour comprendre tout ce qui a été dit par le juge et les témoins.

Nous avons également au dossier un fait qui ne porte pas, il est vrai, sur la question que je suis à examiner, mais qui démontre bien l'importance d'avoir tous les témoignages bien traduits. L'un des témoins donne son témoignage en anglais et rapporte une conversation de l'accusé qui était cependant tenue en français. On lui demande de répéter en français le texte de cette conversation. Il y a une variante importante. On la signale au témoin et il est obligé de dire:—

> The way they rattle me up is in French and English. I have a little of both and all the words are mixed up.

Ce témoignage est des plus importants dans la cause. Nous voyons que la version anglaise donnée par le témoin de cette conversation incrimine bien plus l'accusé que les mots dont ce dernier se serait servi d'après ce même témoin quand il rapporte le texte français. Ce texte français ne paraît pas avoir été traduit en anglais aux jurés et nous trouvons dans le dossier le fait que certains jurés ne comprenaient pas du tout le français.

Tout cela démontre l'importance qu'il y a de conduire la cause dans les deux langues et le danger qu'il y a de ne pas le faire.

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Pour maintenir le verdict, l'intimé se base aussi sur le fait que l'avocat de la défense n'a pas parlé aux jurés en français.

L'accusé était évidemment un adolescent bien pauvre, sans famille et sans protection. Il a trouvé dans son jeune défenseur un homme bien dévoué qui a évidemment entrepris cette cause sans l'espoir de toucher un sou d'honoraire. Mais, comme cet avocat le dit lui-même dans son factum

he was a very young member of the bar, and had not then the advantage of the experience which he has since acquired, was lead into the error of following the action of Crown counsel and of the presiding judge.

J'en suis venu à la conclusion que dans les circonstances le fait pour le juge de ne pas avoir fait son résumé dans les deux langues constitue un tort réel à l'accusé (art. 1019 Code Criminel); et en cela je partage l'opinion de l'honorable juge en chef de la province.

Le jugement *a quo* qui a répondu négativement à la question dont j'ai donné le texte plus haut devrait être renversé. La sentence devrait être annulée et un nouveau procès devrait avoir lieu.

L'appel devrait être maintenu avec dépens.

MIGNAULT J.—L'appelant, qui a été trouvé coupable de meurtre par un jury dans le district de Pontiac, province de Québec, aux assises criminelles y tenues en avril 1918, présidées par l'honorable juge Weir, a obtenu de la cour d'appel que quatre questions de droit fussent réservées pour l'opinion de la dite cour. Après avoir entendu le conseil de l'appelant et le conseil comparaissant pour la couronne, la cour d'appel répondit négativement aux questions soumises et confirma le verdict et la sentence de mort prononcée contre l'appelant, l'honorable juge en chef exprimant son dissentiment quant aux réponses données à la première

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et à la quatrième des questions ainsi réservées, auxquelles il était d'avis de répondre dans l'affirmative. Ce dissentiment ayant permis un appel devant cette cour, l'appelant nous demande d'infirmer la décision de la cour d'appel, son appel se trouvant restreint aux questions au sujet desquelles l'honorable juge en chef a exprimé son dissentiment. Je vais donc me borner à ces deux questions, la première et la quatrième.

PREMIÈRE QUESTION.

Having regard to the facts that the accused elected to be tried by a jury composed one-half of persons skilled in the French language, and that the jury in question was in fact composed one-half of persons skilled in the said French language, was there error of law on the part of the presiding judge occasioning substantial wrong or miscarriage, in not having summed up the case to the jury in the French language in addition to the summing up made in the English language?

Le droit d'avoir un jury mixte dans la province de Québec a été reconnu par la loi passée par le parlement du Canada en 1864, 27-28 Vict. ch. 41, sec. 7, sous-section 2, qui se lit comme suit:—

2. Si le prévenu, lors de sa mise en accusation demande un jury composé, pour une partie au moins, de personnes parlant la langue de sa défense, si cette langue est le français ou l'anglais, il sera jugé par un jury composé pour moitié au moins des personnes dont les noms se trouvent successivement les premiers sur le tableau et qui lors de leur comparution n'étant pas légalement récusées seront, d'après l'opinion de la cour, versées dans la langue du prévenu.

Cette disposition légale est en pleine vigueur, et il a été jugé que l'abrogation qu'en a prétendu faire la législature de Québec par la loi 46 Vict. ch. 16, dépassait la compétence de cette législature, le droit criminel et la procédure criminelle étant du ressort exclusif du parlement canadien. *The Queen* v. *Yancey* (1).

En 1873 la cour d'appel, composée du juge en chef Duval, et des honorables juges Drummond, Badgley, Monk et Taschereau, a jugé, dans la cause de *Reg.* v. *Chamaillard* (2):—

(1) Q.R. 8 Q.B. 252.

(2) 18 L.C. Jur. 149.

That where it is discovered after verdict, in a case of felony, where half of the jury were ostensibly sworn as being skilled in the French language (being that of the prisoner) that one of such half was not skilled in the French language, the trial and verdict are unlawful, null and void, and will be vacated and set aside on a reserved case by the judge in the court below.

En 1897, le juge Wurtele a décidé dans la cause de *The Queen* v. *Shehan* (1), que

When the accused asks in the Province of Quebec for a mixed jury, it must be granted as a matter of right; the abandonment, by the accused, of the order for a mixed jury is not, however, a matter of right, but may be allowed by the judge.

Plus tard, dans la cause de *The Queen* v. *Yancey* (2), le même juge a décidé que

The words "language of the defence," in subsection 2 of section 7 of the statute of the Province of Canada, 27-28 Vict., ch. 41, which is still in force in the Province of Quebec, mean the language of the prisoner, and not the language in which his defence is to be conducted. The privilege of the prisoner is to claim a jury composed for one-half at least of jurors speaking or skilled in his language.

Enfin, en 1892, la cour d'appel, composée du juge en chef Sir Alexandre Lacoste, et des juges Blanchet, Hall, Wurtele et Ouimet, a jugé dans la cause de *The King* v. *Long* (3), que

Where an English-speaking prisoner in the Province of Quebec is represented at his trial by counsel speaking the French language, and no request is made for a translation of the testimony of French-speaking witnesses into English, for the benefit of the prisoner, failure to so translate as to enable the prisoner to personally understand the evidence is not a limitation of his right to make "full answer and defence" to the charge, and will not invalidate a conviction.

Le juge Wurtele a parlé au nom de la cour d'appel, et on voit qu'il ne s'agissait pas là d'un procès criminel instruit devant un jury mixte, mais du choix librement accepté d'un jury composé entièrement de personnes de langue française. Le cas ne se présentait pas sous l'operation de la loi 27-28 Vict. ch. 41, et l'opinion du

(1) Q.R. 6 Q.B. 139. (2) Q.R. 8 Q.B. 252.
(3) 5 Can. Cr. Cas. 493.

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même juge dans les causes de *The Queen* v. *Shehan* (1), et *The Queen* v. *Yancey* (2), fait voir la distinction qui existe entre ces espèces.

Enfin, je dois mentionner une cause du Manitoba, où le jury mixte existe également, mais dans l'espèce on ne paraît pas avoir procédé devant un jury ainsi composé. On a y jugé (*Reg.* v. *Earl* (3)):—

The fact that one of the jury sworn to try the prisoner did not thoroughly understand the English language is no ground, after trial and conviction, for holding that there has been a mistrial, or for granting a new trial.

It is too late to challenge a juror after he has been sworn, even if the ground for challenge was not known at the time.

Ignorance of the English language would not in this province be a ground of challenge of a juror.

The provisions of section 746 of the Criminal Code respecting the granting of a new trial, when it is imperative, and when discretionary, explained.

Revenant maintenant à la disposition de la loi 27-28 Vict. ch. 41, il est clair que cette disposition serait illusoire si, dans un procès instruit devant un jury mixte, les témoignages n'étaient pas traduits du français en anglais, et réciproquement, et si l'adresse du juge présidant le procès n'était pas faite, du moins quant à ses parties essentielles, dans ces deux langues. Telle a toujours été la pratique en la province de Québec, et le savant conseil de l'intimé devant nous, Mtre. Gaboury, en réponse à une question que je lui ai posée, a admis que cette pratique était aussi suivie dans le district de Pontiac. Je suis donc d'opinion que le prisonnier qui demande un jury mixte a le droit d'avoir un procès instruit dans les deux langues, française et anglaise, ce qui comprend bien l'adresse du juge au jury.

On invoque le fait que dans cette cause les jurés de langue française ont déclaré lors de leur assermentation

(1) Q.R. 6 Q.B. 139. (2) Q.R. 8 Q.B. 252.
(3) 10 Man. R. 303.

qu'ils comprenaient l'anglais, que lorsque le premier témoin a témoigné en anglais, les jurés de langue française, interrogés par le juge, ont répondu qu'ils avaient compris son témoignage, que le défenseur du prisonnier avait parlé l'anglais dans son plaidoyer au jury, et que le prisonnier lui-même avait rendu son témoignage en anglais. De là on conclut qu'il y a eu acquiescement du prisonnier à l'instruction du procès dans la langue anglaise.

J'hésiterais beaucoup à conclure du silence du prisonnier, ou même du fait qu'il a donné son témoignage en anglais, qu'il a renoncé à un droit indubitable qui découle de son choix d'un jury mixte, celui de faire instruire son procès dans les deux langues. Mais puisje dire qu'il y a dans cette cause ce que la question soumise appelle "substantial wrong or miscarriage," sans quoi, aux termes de l'article 1019 du Code Criminel, un nouveau procès ne peut être ordonné?

Mon honorable collègue, M. le juge Brodeur, signale un point très important de la cause, les dèclarations du prisonnier quant à ses agissements le jour du meurtre, où un témoin lui prête des paroles différentes selon qu'il rapporte ses paroles en anglais ou en français, ce qui semble indiquer que le témoin ne se rendait pas bien compte du sens de ses expressions quand il parlait une autre langue que la sienne.

Cependant en décidant s'il y a lieu d'ordonner un nouveau procès, nous sommes liés par la disposition formelle de l'article 1019. On Code Criminel. Il ne suffit pas, en effet, aux termes de cet article,

qu'il ait été fait quelque chose de non conforme à la loi pendant le procès,

il faut encore que

de l'avis de la cour d'appel, il en soit résulté quelque tort réel ou un déni de justice.

Je suis bien d'avis qu'il a été fait quelque chose de

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non conforme à la loi pendant le procès, c'est-à-dire que l'accusé avait droit à ce que le procès fût instruit dans les deux langues, et à ce que l'adresse du juge au jury fût faite ou traduite, au moins dans ses parties essentielles, dans les deux langues, mais puisque le Code Criminel exige en outre que je sois d'opinion qu'il en est résulté un tort réel ou un déni de justice, je ne puis, dans toutes les circonstances de cette cause, aller jusque là.

Je dois donc, et non sans regret, concourir dans la décision de la cour d'appel sur cette première question.

QUATRIÈME QUESTION.

Was there error of law occasioning substantial wrong or miscarriage in that the judge who presided commented upon the failure of the prisoner to testify to the effect that he had not actually committed the murders mentioned in the indictment?

Je répondrai négativement à cette question, car puisque le prisonnier a volontairement donné son témoignage, le juge pouvait faire des commentaires sur ce qu'il avait dit ou omis de dire J'adhère pleinement à ce que mon honorable collègue, M. le juge Anglin, dit de ces commentaires. Qu'ils aient été excessifs, je suis très respectueusement porté à le croire, mais il n'y a pas là erreur de droit. Sur ce point donc je partage l'opinion de la majorité de la cour d'appel.

Je suis d'opinion de renvoyer l'appel.

Appeal dismissed.

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THE CENTRAL VERMONT RAILWAY COMPANY (DEFENDANT).... } APPELLANT;

AND

DAME MARGARET BAIN (PLAINTIFF)..... } RESPONDENT.

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*Apr. 9

THE GRAND TRUNK RALWAY COMPANY OF CANADA (DEFENDANT IN WARRANTY)..... } APPELLANT;

AND

DAME MARGARET BAIN (PLAINTIFF)..... } RESPONDENT.

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

Negligence—Master and servant—Railway companies—"Joint operation"—Control—Limited liability of each company—Art. 1054 C.C., —Art. 1384 C.N.

The G.T.R. Co. was operating a line of railway between Montreal and St. Johns, P.Q., and the C.V.R. Co. was also operating a line between St. Johns, P.Q., and St. Albans, Vt. An agreement was entered into between the companies "to operate jointly, and as one line, the railway from Montreal to St. Albans." The same train crew was to remain in charge during the trip; but it was provided "that each party should pay the train and engine men employed in the joint service for the service performed by them on its own line," and "that * * * the rules and regulations of" either company "shall apply while the trains are upon the lines of that company." A through train, thus operated between St. Albans and Montreal, met with a collision, on the G.T.R. Co's line, caused by the negligence of an engineer in charge of the train from the starting point; and the respondent's husband was killed.

Held that, at the time of the collision, the engineer was in the employment and under the sole control of the G.T.R. Co., and the C.V.R. Co. could not be held liable for the accident.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault, JJ.

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Held, also, that "the joint service," referred to in the agreement, could only be construed as joint in the sense of being a continuous service, one part being controlled by one company and the other part by the other.

Per Brodeur and Mignault JJ.—The agreement between both companies is not *res inter alios acta* with regard to the respondent and her husband.

Judgment of the Court of King's Bench (Q.R. 28 K.B. 45), reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), affirming the judgment of the Superior Court, District of Montreal, and maintaining the plaintiff's action and the action in warranty, with costs.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported. The respondent's husband, while attending to his duties as locomotive fireman in the service of the Grand Trunk Railway Co., was killed on this company's line, near Montreal, by an engine belonging to the Central Vermont Railway Co. The respondent obtained before the Superior Court at Montreal, from the Grand Trunk Railway Co., a sum of $2,025 under the "Workmen's Compensation Act," but she took another action, under the common law for $25,000 as damages, against the Central Vermont Railway Co., which then formed an action in warranty against the Grand Trunk Railway Co. in pursuance of an agreement to that effect between both companies. The G.T.R. Co. intervened in the principal action and pleaded *inter alia* that, having paid already to the respondent the sum of $2,025, all her claims had been extinguished. The Central Vermont Railway Co. also contested the action declining any liability. The trial court awarded $10,000 to the respondent and maintained the action in warranty. The Court of King's Bench affirmed this judgment.

(1) Q.R. 28 K.B. 45.

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Eug. Lafleur K.C. and *A. E. Beckett K.C.* for the appellant: The Central Vermont Railway Company.

Henri Jodoin K.C. for the appellant: The Grand Trunk Railway Company.

E. Fabre Surveyer K.C .and *C. G. Ogden K.C.* for the respondent.

THE CHIEF JUSTICE.—At the close of the argument in this case, I entertained no doubt that the appeal of the Central Vermont Railway Co. should be allowed and the action against it dismissed.

The accident which caused the death of the plaintiff's husband was due to the negligence of the engineer Frost and the question to be determined was whether at the time of the accident he was in the employment of the Central Vermont Railway Co. or that of the Grand Trunk Railway Co.

The former company is a foreign one, and its powers within Canada are limited to running its trains from the international border line to St. Johns, in the Province of Quebec.

An agreement had been entered into between that company and the Grand Trunk Railway Co. to run a train jointly between St. Albans, U.S.A., and Montreal, via St. Johns, with provisions, amongst others, that the Central Vermont Railway Co. should pay the wages of train crew as far as St. Johns, and the Grand Trunk Railway Co. should pay them from that point to Montreal. The Central Vermont Railway Co was the engineer's employer till the train reached St. Johns. From that point on to Montreal, the Grand Trunk Railway Co. became his employer, paid his wages, and he was under their direct control. The operation of running the train between St. Albans and Montreal was referred to in the agreement between the two companies as a joint one, but in the light of the facts

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and the limited powers of the Central Vermont Railway Co., it can only be construed as joint in the sense of being a continuous service, one part being controlled by one company and the other part by the other company.

Having reached the conclusion that Frost's employer at the time of the accident was the Grand Trunk Railway Co., which alone had power to run trains on that part of the railway track and which company alone paid and was liable to pay his wages, I am of the opinion that the appeals must be allowed and the action against the Central Vermont Railway Co. dismissed with costs throughout if the companies insist upon collecting them.

IDINGTON J.—The question raised by this appeal must turn upon whether or not the engine driver, Frost, was at the time and place of the accident in question under the control of the Central Vermont Railway Co. or that of the Grand Trunk Railway Co.

It seems to me (with deference to those holding otherwise) impossible to say that either in law or in fact he was under the control of the Central Vermont Railway Co., which had no authority in law to run a train to Montreal.

These companies simply entered into an agreement for interchange of traffic on a basis which would enable them to constitute a through train and through traffic by means of lending men and cars and engines to the other when the train ran over the other's line.

The agreement as drawn seems to shew clearly that such was the purpose had in view. And to put that beyond doubt, it expressly provided that the pay of men engaged in the service, and incidental expenses, and the consequent damages claimed by third parties,

arising from the carrying on of the business, should be borne by that company over whose road said men and material travelled.

More than that, the rules and regulations of the company owning the road used were to be those governing the traffic carried over it, and could not in law be otherwise.

All the stress laid upon the descriptive expressions "joint line" and "to operate jointly" used in the agreement do not change its character. And if we could make them the governing factors in determining the nature of what the agreement really is, we might find a partnership which would not help the respondent's cause, but defeat it. Indeed, when we consider the contract as a whole we find these expressions are not entirely inapt if correctly applied.

I think the appeal should be allowed with one set of costs throughout.

ANGLIN J.—Having regard to the limitations upon the charter powers of the Vermont Central Railway Co. and to the terms of the agreement between that company and the Grand Trunk Railway Co., I am clearly of the opinion that the engineer Frost was, at the time of the collision which resulted in the death of the plaintiff's husband, in the employment and under the sole control of the latter company. Far from being inconsistent with this view, the weight of the oral evidence, I think, supports it. The operation of the route from St. Albans to Montreal was "joint" only in the sense that the service to be provided was continuous. Each railway company retained full control of the traffic over its own line of railway and, so far as appears, over the earnings of that traffic. The case of one company exercising running rights over the tracks of another is entirely different. North bound

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trains, while running between St. Albans and St. Johns, were Vermont Central trains in the sense that they were run by and under the exclusive control of that company. At St. Johns, they became Grand Trunk trains in the same sense and so continued until they reached Montreal. The members of the train crews, to whichever company they owed general allegiance, while operating on the Grand Trunk Railway Co., were its employees and under its control. That, as Mr. Justice Cross says,

> is the decisive element which engenders responsibility.

The Vermont Central Railway Co., though Frost's original employer, cannot be responsible for the consequences of his negligence in the discharge of his duties while the servant of the Grand Trunk Railway Co., as his *patron momentané*.

I would, therefore, with respect, allow these appeals and dismiss the action—with costs throughout, if asked.

BRODEUR J.—The question in this appeal is whether the engineer Frost was under the control of the Central Vermont Railway Co. or of the Grand Trunk Railway Co. when he caused the accident which resulted in the death of the respondent's husband. The appellants contended that he was under the Grand Trunk Railway Co.'s control. On the other hand, the respondent claims that he was the Central Vermont Railway Co.'s servant.

The judges below, with one exception, maintained respondent's contention.

The accident occurred on the Grand Trunk Railway Co.'s line near Montreal. The train in charge of the engineer Frost runs between St. Albans and Montreal by virtue of an agreement between the two appellant

companies, the Central Vermont Railway Co. and the Grand Trunk Railway Co.

The line between St. Albans, Vermont, and St. Johns, P.Q., is the property of the Central Vermont Railway Co.; and the Grand Trunk Railway Co. is the owner of the line between St. Johns, P.Q., and Montreal. In the ordinary course of business, the Central Vermont trains and engines should not go further than St. Johns, and there the passengers would have to change cars and board Grand Trunk cars for Montreal. The crews and engines should also be changed.

Those interchanges of trains, crews and engines would entail losses of time, inconvenience for the passengers and larger costs of operation. In order to obviate that, the two companies made in 1896 an agreement "to operate jointly and as one line" the railway from Montreal to St. Albans for both freight and passenger business. Each contracting party was to furnish a mileage proportion of engines, cabooses and train crews, and was to pay the train and engine men for the services performed by the latter on its own line,

and neither of the parties hereto shall be held responsible to the other for the actions of such joint employees while upon the line of railway of the other party.

The following stipulations were also found in the agreement:—

That each of the parties hereto shall assume all liability for loss or damages sustained in operating said trains on its own line,

and that

the rules and regulations of the Grand Trunk Railway Co. shall apply while the trains are upon the lines of that company.

The employees were paid on the mileage basis by each company, and they were receiving rates of wages when working on the Central Vermont line different

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from those paid for working on the Grand Trunk line.

The train which caused the accident was a passenger train composed of crews originally engaged by the Grand Trunk Railway Co. or by the Central Vermont Railway Co. The engineer Frost, whose negligence caused the accident, had been originally engaged by the Central Vermont Railway Co.; but in order to take charge of that through train he had to pass an examination before the Grand Trunk Railway Co.'s authorities. The train was composed of a Central Vermont engine and of Grand Trunk cars.

Once that train had reached the Grand Trunk line at St. Johns, it became for all intents and purposes a Grand Trunk Railway train. The crews came under the orders of the latter company and under its control. The movements of the train and the actions of its employees were under the orders of the Grand Trunk, and the Central Vermont lost all control over its own original employees, who received their salaries from the company on whose line they were running. Those employees were liable to be dismissed by the latter company and, in fact, that engineer Frost was dismissed by the Grand Trunk Railway Co.

Art. 1054 C.C. says that a person is responsible for the damage caused by the fault of persons "under his control." At the time of the accident, Frost had ceased to be under the control of the Central Vermont Railway Co., but he was then in the pay of and was employed by the Grand Trunk Railway Co.

The liability stipulated by our Code in art. 1054 C.C. against the employer rests upon the right of the latter to supervise and direct the work (Sirey, 1900-1-56).

It was, under the contract in question, the duty of the Grand Trunk Railway Co. and not of the Central

Vermont Railway Co. to supervise Frost's work and to give him the necessary directions. It has been suggested that he was under the influence of liquor. If that suggestion be correct, then the Grand Trunk Railway Co. was at fault to have had an engineer in that condition while in charge of the train.

Now the fact that Frost had been hired by the Central Vermont Railway Co. does not alter the situation. As it had been decided by the Court of Cassation, in a case reported in Sirey, 1903-1-104:—

La responsabilité édictée par l'article 1384 C.N.

(which corresponds to art. 1054 C.C.)

s'applique, en cas d'accident survenu par la faute du préposé, non pas au patron habituel mais au patron momentané qui avait ce préposé sous ses ordres et sur lequel il avait une autorité exclusive au moment de l'accident. En conséquence, c'est le patron momentané qui doit être déclaré civilement responsable.

Applying that principle in the present case, I say: The *patron habituel* of Frost was the Central Vermont Railway Co., but his *patron momentané*, at the time of the accident, was the Grand Trunk Railway Co.

It was said by the learned judge of the Superior Court that the contract between the Central Vermont Railway Co. and the Grand Trunk Railway Co. was with regard to the plaintiff and her husband *res inter alios acta* and could not bind the employees of the respective companies. Of course, in the case of Frost, he could refuse to work for the Grand Trunk Railway Co., since he had been engaged by the Central Vermont Railway Co.; but he was willing to work for the Grand Trunk Railway Co. since he was paid by the latter company.

As to the plaintiff herself or her husband, she was bound, in order to recover, to prove and to establish that the servant who caused the accident was employed

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by the Central Vermont Railway Co. She proved that he was originally hired by the latter company, but it was shewn also that, by virtue of an agreement between the two railway companies and accepted by the employee himself, the latter became a temporary employee under the control of the Grand Trunk Railway Co. It is not a contract *inter alios acta*; but it is a contract which determines the contractual relations of the parties and which affect also the relations of third parties with those employers and employees.

A person is a victim of an accident arising out of the construction of a building. The owner of the building has made with an independent contractor an agreement to carry out that construction. That contract is binding upon all those who would suffer from an accident in the course of that contract. If the victim could sue the owner of the building, then the latter could very well decline any liability on the ground that the servant who caused the accident was the contractor's servant; and the contract which he would invoke for that purpose could not be considered as *res inter alios acta*.

For all those reasons I have come to the conclusion that the accident was caused by the negligence of Frost, and when the latter was under the control of the Grand Trunk Railway Co.

As to the costs, I am of opinion that the filing of two contestations by the appellants and the taking of two appeals was unnecessary in view of the intimate relations of the appellants and that there should be granted to them the costs of one contestation and of one appeal.

The appeal should be allowed with costs of one contestation and of one appeal.

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MIGNAULT J.—Il y a dans cette cause une question de droit et une question de fait.

La question de droit souffre moins de difficulté, parce que la cour d'appel parait avoir pleinement reconnu la doctrine sur laquelle je me base, et, s'il y a erreur dans le jugement qui nous est déféré, ce n'est que sur la question de fait.

L'action de la demanderesse est basée sur le dernier paragraphe de l'article 1054 du code civil:—

> Les maîtres et commettants sont responsables du dommage causé par leurs domestiques et ouvriers dans l'exécution des fonctions auxquelles ces derniers sont employés.

Il n'y a pas de différence, si ce n'est d' expressions, entre cette disposition et l'article 1384-3° du code civil français. Nous pouvons donc nous guider d'après la doctrine française.

Je trouve cette doctrine très bien expliquée dans une note de Dalloz: 1909-1-135. La décision commentée par l'arrêtiste avait jugé que

> la responsabilité civile décrétée par l'article 1384 ayant pour fondement tout à la fois le libre choix qu'a fait le commettant de ses employés et le droit de leur donner des instructions ou ordres dans l'accomplissement de leurs fonctions, un arrêt peut condamner un commettant comme civilement responsable des fautes de ses employés, mis à la disposition d'un tiers, alors qu'il est constaté qu'il avait conservé sur eux le droit de surveillance et l'autorité.

Commentant cette décision de la cour de cassation, l'arrêtiste, dont je supprime les renvois, fait observer que

> cette décision tire une conséquence logique du fondement reconnu en jurisprudence à la responsabilité du commettant à l'égard de ses préposés. La jurisprudence décide, en effet, que la responsabilité des commettants ne suppose pas seulement qu'ils ont choisi leurs préposés, mais encore qu'ils ont le droit de leur donner des instructions et des ordres, qu'ils ont un droit de surveillance et de direction. On doit en conclure que, lorsque le commettant met son préposé à la disposition d'un tiers, pour savoir qui, du commettant ou du tiers, est responsable des fautes du préposé, il faut rechercher celui qui a le droit de donner des instructions au préposé. Si le tiers acquiert ce droit, c'est lui qui est responsable. Mais si, au contraire, comme dans l'espèce ci-dessus,

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le commettant a conservé l'autorité et le droit de donner des instructions, lui seul est responsable des fautes commises par le préposé; il n'y a pas eu déplacement de la responsabilité.

J'ai cité l'arrêt qui a donné lieu à ces commentaires et où on a jugé qu'il n'y avait pas eu déplacement de la responsabilité, parce que, en fait, le commettant avait conservé l'autorité et le droit de donner des instructions.

Dans un autre arrêt de la cour de cassation, au contraire, et vu que le commettant n'avait pas conservé l'autorité et le droit de donner des instructions, on a jugé que

la responsabilité édictée par l'article 1384 c. civ. s'applique, en cas d'accident survenu par la faute d'un préposé, non pas au patron habituel, mais au patron momentané qui avait ce préposé sous ses ordres, et sur lequel il avait une autorité exclusive au moment de l'accident (Cassation, 26 janvier 1901. Sirey, 1903, 1-104).

La distinction est donc bien claire et, comme je l'ai dit, elle n'est pas contestée par la cour d'appel. Tout dépend de la solution de fait à donner à la question suivante: Lequel des deux patrons, la compagnie du Vermont Central ou la compagnie du Grand Tronc, avait le nommé Frost sous ses ordres et avait une autorité exclusive à son égard, au moment de l'accident qui a coûté la vie au mari de l'intimée?

Jusqu'ici je me trouve en plein accord avec la cour d'appel, mais, en répondant à cette question de fait, j'ai le regret de ne pouvoir partager l'opinion de la cour supérieure et de la cour d'appel.

Pour déterminer laquelle des deux compagnies, la compagnie du Vermont Central ou la compagnie du Grand Tronc, avait le nommé Frost sous ses ordres au moment de l'accident, il faut consulter la convention intervenue entre les deux compagnies. Cette convention n'est pas, comme le savant juge de la cour supérieure le croit, *res inter alios acta* à l'égard de l'intimée. A la base même de toute action qu'elle

pourrait intenter en vertu de l'article 1054 C.C., il y a la question de savoir si Frost était le préposé de la compagnie du Vermont Central au moment de l'accident. Or, on produit la convention entre cette compagnie et la compagnie du Grand Tronc, et cette convention fait voir que dès que le convoi du Vermont Central atteignait Saint-Jean en se dirigeant dans la direction de Montréal, tous les employés du convoi venaient sous les ordres et autorité exclusifs de la compagnie du Grand Tronc. Peu importe que cet arrangement désigne les trains comme "joint trains," ou le service des convois comme "joint service." Chaque compagnie restait maîtresse absolue chez elle, elle payait les employés pour le travail fait sur sa ligne, et ces employés, pendant qu'ils se trouvaient sur la ligne de l'une des deux compagnies, n'avaient d'ordres à recevoir que de cette compagnie seule. Les articles 6 et 12 de la convention en font foi:—

6th. That each party hereto shall pay the train and engine men employed in the joint service for the service performed by them on its own line, and neither of the parties hereto shall be held responsible to the other for the actions of such joint employees while upon the line of railway of the other party hereto.

12th. That in operating the said joint service, the rules and regulations of the Grand Trunk Railway company shall apply while the trains are upon the lines of that company, and the rules and regulations of the Central Vermont Railroad Company shall apply while the said trains are upon the lines of that railroad company, but it is understood that the regulations of both companies shall be such as to facilitate the prompt and safe operating of said joint trains.

L'honorable juge Cross objecte que la compagnie du Vermont Central aurait pu ordonner à Frost de ne pas dépasser telle ou telle station entre Saint-Jean et Montréal. Il n'y a rien dans la preuve qui fasse voir que cette compagnie pouvait, en fait, donner un tel ordre à Frost, et, si elle l'avait fait, elle aurait violé son engagement avec la compagnie du Grand Tronc. Du reste, nous devons juger cette cause d'après la preuve

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au dossier; et cette preuve, tant testimoniale que documentaire, constate que Frost était, lors de l'accident, sous les ordres et autorité exclusifs de la compagnie du Grand Tronc.

Je suis donc d'opinion de maintenir l'appel de la compagnie du Vermont Central.

Mais la compagnie du Grand Tronc se porte appelante contre le jugement de la cour d'appel qui a confirmé le jugement de la cour supérieure à son égard. Ce dernier jugement a renvoyé sa défense à l'encontre de l'action principale et l'a condamnée à indemniser la compagnie du Vermont Central de la condamnation prononcée contre cette compagnie. Puisque dans mon opinion l'action principale de l'intimée doit être renvoyée, l'action en garantie de la compagnie du Vermont Central contre la compagnie du Grand Tronc tombe (*Archbald* v. *DeLisle* (1), et autorités y citées).

Il reste à décider du sort de la défense faite par voie d'intervention par la compagnie du Grand Tronc à l'encontre de l'action principale et qui a été produite le même jour que la compagnie du Vermont Central produisait son plaidoyer. Cette défense sur laquelle l'intimée a lié contestation doit être maintenue, et il s'ensuit que l'appel de la compagnie du Grand Tronc doit également être maintenu.

Quant à l'action en garantie, je suis d'avis qu'elle doit être renvoyée.

Au sujet des frais, je ne puis m'empêcher de croire qu'il y a eu multiplication inutile de procédures dans la contestation de l'action de l'intimée par ces deux compagnies qui paraissent étroitement liées. Deux défenses distinctes ont été produites le même jour par la compagnie du Vermont Central et par la compagnie du Grand Tronc, quand une seule défense par l'une de

(1) 25 Can. S.C.R. 1.

ces compagnies aurait suffi. De même, il y a eu deux appels devant la cour d'appel et deux appels devant cette cour. Usant de la discrétion qui appartient au juge en matière de frais, je suis d'avis de condamner l'intimée à payer les frais d'une seule contestation en cour supérieure et d'un seul appel devant la cour d'appel et devant cette cour. Je n'accorderai pas de frais de la demande en garantie.

Appeal allowed.

Solicitor for the appellant, The Central Vermont Railway Company: *A. E. Beckett.*

Solicitor for the appellant, The Grand Trunk Railway Company: *Henri Jodoin.*

Solicitor for the respondent: *C. G. Ogden.*

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GEORGE T. CLARKSON AND ANOTHER (PLAINTIFFS)..... } APPELLANTS;

AND

THE DOMINION BANK (DEFENDANT)..... } RESPONDENT.

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

Banks and banking—Loan to manufacturer—Security—Written promise—Advance for prior debt—"Bank Act," ss. 88, 90—Mortgage as security—Insolvency—Knowledge of bank—Mortgage on land outside Province.

By section 88 of the "Bank Act" a bank may lend money to a manufacturer on security of his goods or raw material and by section 90 it shall not acquire any such security unless the liability is contracted "(*a*) at the time of the acquisition thereof by the bank; or (*b*) upon the written promise or agreement that such * * * security would be given to the bank."

Held, Anglin J. dissenting, that subsection (*b*) does not contemplate a general promise or agreement to give security for future advances but it must have reference to a specific loan negotiated at the time on the security of specific goods.

A manufacturing company, by application in writing, obtained a line of credit from a bank and agreed to give security under the "Bank Act" on its stock and material for each advance made thereunder. Advances were made and security given as agreed. By similar application the credit was renewed from time to time, and after each renewal the bank took security not only for the present advance but for the total indebtedness of the company to that date.

Held, Anglin J. dissenting, that this security taken for the whole debt was only valid for the amount of the loan made at the time it was acquired; but

Held, Idington and Brodeur JJ. dissenting, that the security acquired for each individual advance was never released and did not merge in the general security so taken; the bank, therefore, was entitled to the benefit of all the securities so acquired.

In May, 1912, the company agreed to give to the bank, as further security, a mortgage on its factory site in St. Thomas, Ont., and also a mortgage on land in Montreal. The former was not executed until Nov., 1913, nor the latter until Jan., 1914. In March, 1914, the bank filed a petition for winding-up the company.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

Held, that in Ontario it is the date of the promise to give the mortgage that governs and as the mortgagor was solvent at that date the mortgage on land in Ontario was valid; but

Held, that in Quebec the date when the mortgage was executed can alone be considered, and as the mortgagor was insolvent to the knowledge of the bank when the Quebec mortgage was given it must be set aside.

Per Anglin J.—Insolvency to the knowledge of the bank at that date was not established; and

Qu.—Can an Ontario Court set aside a mortgage on land in Quebec?

After the petition for winding-up the company had been filed the bank advanced $17,600 on security of the stock in trade and material on hand.

Held, Idington and Brodeur JJ. dissenting, that if this advance was made, under the terms of section 20 "Winding-up Act," with the sanction of the liquidator and for the beneficial winding-up of the estate the bank was entitled to the benefit of the security.

Judgment of the Appellate Division (40 Ont. L.R. 245) and of the trial Judge (37 Ont. L.R. 591), reversed in part.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment at the trial (2), in favour of the defendant bank.

The material facts and the questions raised for decision on this appeal are stated in the above headnote.

Hellmuth K.C. and *J. B. Davidson* for the appellant. Under section 90 of the "Bank Act" a bank can take security for a present loan only. A general security to apply to future advances is invalid. See *Bank of Hamilton* v. *Halstead* (3), at p. 241; *Bank of Hamilton* v. *Shepherd* (4).

For a long time before the winding-up order was made the bank knew that the company was unable to pay its debts and knew that it was insolvent when the two mortgages were given as security. See *Molsons Bank* v. *Halter* (5).

(1) 40 Ont. L.R. 245; 38 D.L.R. 232.
(2) 37 Ont. L.R. 591.
(3) 28 Can. S.C.R. 235.
(4) 21 Ont. App. R. 156.
(5) 18 Can. S.C.R. 88.

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D. L. McCarthy K.C. and *Shapley* for the respondent. The written promise provided for in subsection (*b*) of section 90 may refer to future as well as present advances. *Imperial Paper Mills Co.* v. *Quebec Bank* (1).

The promise to give the mortgages was made when the bank had no reason to believe, and evidently did not believe, that the company was insolvent. As to the Quebec mortgage a court in Ontario could not set it aside.

THE CHIEF JUSTICE.—The principal and main question raised and argued on this appeal was as to the proper construction of sections 88 and 90 of the Dominion Act respecting banks and banking.

So far as is material for this case, section 88 provides as follows:—

3. The bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise manufactured by him, or procured for such manufacture.

* * * * *

6. The security may be taken in the form set forth in Schedule C to this Act, or to the like effect.

Section 90 enacts:—

90. The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any bill, note, debt or liability, unless such bill, note, debt or liability is negotiated or contracted:

(*a*) At the time of the acquisition thereof by the bank, or

(*b*) Upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank.

The bank's contention which was adopted and followed in the judgment appealed from was that the written promise referred to in subsection (*b*) was not one required to be given contemporaneously with a proposed loan or advance or having reference to any specific goods or property to be secured, but was a

(1) 110 L.T. 91; 13 D.L.R. 702.

blanket promise sufficient to cover any future loans or advances which the bank might make the promisor up to the time when it was acted upon and security taken. That time might be as counsel boldly put it in argument five or ten years after the promise given, and would enure to cover as well loans subsequently made from time to time to the promisor as property which was not even in existence when the promise was made.

The appellant, on the other hand, submitted that such a written promise as the Act referred to was one having reference to a specific loan then being negotiated for, and to specific goods proposed to be given in security for the loan, stated in the Act as an alternative to the acquisition by the bank of the security itself in those numerous cases in which the loan had necessarily to be advanced to enable the borrower to obtain possession of the goods so that he might give the bank the security.

I have had no hesitation whatever in adopting the appellant's contention on that point. In construing such a very important section as the one in question, which validates a secret and unregistered security on personal property not in possession of the grantee bank and in direct opposition to all provincial laws on the subject requiring registration of such a security, one must exercise one's common sense and common knowledge. I cannot believe it ever was the intention of Parliament to pass a law having the object and purpose contended for by the bank.

The section is a prohibiting one. It declares the bank shall not acquire any warehouse receipt or bill of lading or such security (Form C) as aforesaid to secure payment of any debt or liability unless such debt or liability is contracted *at the time* of the acquisition of the security, or upon a written promise that such security would be given.

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To my mind the object, intent and purpose of the section was plain and is sufficiently well expressed, though perhaps not so clearly as to remove all doubt. Primarily the section required that the taking of the security should be contemporaneous with the negotiation or contracting of the debt or loan. If, however, for any reason that could not be done, and scores of reasons arise to one's mind of conditions in which it could not, then the alternative of a written promise is substituted for the execution of the security. But the written promise to give security had reference, and reference only, not to a future debt or loan to be subsequently made, but to the then debt or loan being negotiated and to the goods and personal property then existing which it was proposed to give security upon, and with reference to which negotiations were taking place. It was only intended in my opinion to cover cases where the actual security could not be given because of the non-possession of the goods or property at the time by the borrower. But it had no reference to future or other loans than the one for a specific amount then being negotiated or to other goods than those specific goods which were to be secured by such loan.

Take an everyday occurrence and it can be multiplied by scores and hundreds. A merchant purchases a load of produce and it arrives at its destination. The bill of lading and draft for purchase price attached are sent to a bank. The purchaser, to get possession, must pay the draft and possibly the freight, carriage and other charges before he can get possession. He applies to a bank for an advance or loan to enable him to get possession of the goods. The bank makes the loan on his written promise to give warehouse receipt or Form C of the Act, as the case may be, as security

when he gets full possession and not till then can he give the warehouse receipt or the statutory security C. So he gives the bank the alternative written promise in the words of the statute

> that such warehouse receipt or bill of lading or security would be given to the bank.

This is only one illustration of the many hundreds of cases in which the "written promise" is made by statute sufficient to take the case out of the express prohibition in the section of the bank acquiring any of the securities including Form C mentioned. But the "written promise," so made by the section an alternative to the execution of the security itself where the borrower is not in a position to give the security, does not extend nor relate to any other loan than the specific one being negotiated or to any other goods than those to which specifically the negotiations for a loan relate. It is obvious, of course, that some time must elapse before, in the illustration I have given, the borrower is in a position to give the security, and the alternative of the written promise to give it in subsection (*b*) of the section is given so that the bank may not be without security for its money which it had to advance to enable the borrower to get the goods.

I am quite unable to find anything in the case of the *Imperial Paper Mills Co.* v. *Quebec Bank* (1), which touches the construction of section 90 or the true meaning to be given to the words "written promise" in subsection (*b*).

Assuming that I am right in my construction of section 90, I am not sure that it can make a material difference in the ultimate result in this appeal, for the plain reason that the bank in every case where they made a loan to Thomas Brothers, Limited, and took

(1) 110 L.T. 91; 13 D.L.R. 702.

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from that firm security in Form C as provided in section 90, included the contemporaneous advance or loan made by them in the amount for which the security was taken. To that extent, therefore, the security would stand. It is true they also included, along with the contemporaneous loan, other loans which they had made to Thomas Brothers, making the security cover as well the amount they had a right to take it for, viz., the contemporaneous loan, as also a very large number of other loans which they had no right to include. This inclusion not being within the statute in my judgment could not, of course, have the effect of making the security effective *quoad* these outside loans, nor could it invalidate the security so far as the contemporaneous loan was concerned.

Then as regards the mortgages I am of the opinion that the findings of fact of the trial judge as to the insolvency of the Thomas Brothers, Limited, and as to the absence of knowledge on the part of the bank and its manager of the insolvency, and as to the previous promise made to give such mortgage, confirmed as those findings were by the court of appeal, should not be interfered with so far as the Ontario real estate is concerned. The learned trial judge, in making his finding, evidently did so by accepting the evidence of the bank manager, Anderson, as to the insolvency of the manufacturing company, and as to the promise to give the mortgage. It was to some material extent a question of credibility. I therefore think his finding, with regard to the mortgage of the Ontario real estate, confirmed by the appeal court, should not be interfered with. But with respect to the Quebec real estate different considerations arise. A mortgage of such lands cannot be upheld, as I understand the law, based upon conditions existing when the promise to give the

mortgage was made, but upon the conditions existing at the time of the giving of the mortgage. No evidence was given before the trial judge or the court of appeal as to the law of Quebec on the question of the validity of mortgages taken at a time when the mortgagor was insolvent. It is clear that such a mortgage in that province cannot be sustained by virtue of a previous promise. As a federal court it is our right and duty to take judicial notice of Quebec law, and I have reached the conclusion that so far as the mortgage of Quebec real estate is concerned it was invalid and should be so declared because at the time of the giving of the mortgage the Thomas Brothers were insolvent.

I would therefore allow the appeal as to the mortgage on the Quebec lands with one quarter of the costs of the appeal as the point was a minor one. As to the $17,600 advanced by the bank after the filing or presentation of the petition for liquidation, no point or question was raised by the liquidator on the argument of this appeal. We, however, referred the questions arising out of these advances back to the parties for what they might have to say regarding the rights of the bank respecting them. After reading these supplementary factums or statements we are of the opinion that if the parties cannot agree as to the rights of the bank with respect to these advances, and the proceeds of the goods and chattels which these moneys were advanced to improve so as to enable them to be sold more profitably than in their unfinished state they could be, it should be referred to the proper officer of the court below to determine whether any of these advances were made under section 20 of the "Winding-up Act" in which case the bank should be entitled to the benefit of the securities taken and if not so made to determine whether the advances were

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made by the bank in the interest of the estate generally and for the completion of the partially manufactured goods and chattels to make them marketable and saleable, in which case the advances so made should be repaid to the bank out of the proceeds of such sales, and any balance left paid over to the liquidator as part of the assets of the insolvent estate.

IDINGTON J.—The most important question raised herein is whether or not the condition upon which a bank is enabled by sections 88 and 90 of the "Bank Act," ch. 29 R.S.C., 1906, to lend money upon the security of goods as therein specified, was duly observed by respondent in its dealings now in question with Thomas Brothers, Limited.

The parts of said sections relative to that in question herein, being subsections 3 and 5 of sec. 88, are as follows:—

(3) The bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him, or procured for such manufacture.

* * * * *

(5) The security may be taken in the form set forth in Schedule C to this Act, or to the like effect.

Sec. 90, sub-sec. 1, is as follows:—

(1) The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any bill, note, debt or liability, unless such bill, note, debt or liability is negotiated or contracted:

(*a*) At the time of the acquisition thereof by the bank; or

(*b*) Upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank;

Provided that such bill, note, debt or liability may be renewed, or at the time for payment thereof extended, without affecting any such security.

As far back as January, 1908, we are informed, the company owed the respondent about $200,000 and so continued up to the time it was put in liquidation early in 1914.

The amount of indebtedness to the bank varied and for some time exceeded that sum. But whatever it was it is claimed by respondent securities had been taken upon goods as specified by writings conformable with Form C in the schedule to the "Bank Act."

I cannot find that any of said writings, in fact, observed the requirements of the Act.

In the latest, dated 12th May, 1914, produced in the printed case as a fair sample of many others in the record, the first, and for our present purpose the most essential, part, reads as follows:—

> In consideration of an advance of two hundred and thirteen thousand, four hundred————dollars, made by the Dominion Bank to the undersigned for which the said Bank holds the following Bills or Notes (1) the products of agriculture, the forest, quarry and mine, the sea, lakes and rivers, the live and dead stock, and the products thereof and the goods, wares and merchandise mentioned below, are hereby assigned to the said Bank as security for the payment of the said Bills or Notes, or renewals thereof or substitutions therefor and interest thereon.
>
> This security is given under the provisions of section 88 of the Bank Act and is subject to the provisions of the said Act.

Those mentioned on the back thereof consist of one hundred and three items headed:—

Date of Note	Promisor	When payable	Amt.

Underneath the word "promisor" is written the words "Thomas Bros. Ltd." and underneath "when payable" "demand."

The dates of these notes run from "Sept. 20" to "May 12." The year in which given is not stated.

If we try to ascertain that, and turn to the foot of the document we find the following:—

> This security is given pursuant to the written promise or agreement of the undersigned and especially of agreement, dated 29th day of January, 1914.
>
> Dated at St. Thomas the 12th day of May, 1914.

On calling the attention of respondent's counsel to

(1) Those mentioned on back hereof.

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this being founded on a promise dated 29th January, 1914, yet running back to transactions as early as 20th Sept., 1913, if I understand the document aright, he said there were other documents which preceded and covered those items anterior to 29th January, 1914.

Assuming that to be so, how can respondent justify bringing them forward, as it were, to be incorporated with this document? How can it hope to make this document effective for the purpose of comprehending transactions of an earlier date than the promise relied upon? It certainly could not be permitted to so extend retroactively the operation of the later promise, or the still later lien contract as to include earlier advances than the dates of either the promise or the lien contract or as to include under or by virtue of either a claim upon goods over which Thomas Bros. Ltd. had neither actual nor prospective dominion by virtue of any then existent contract, either when the promise made or lien given.

Then where are we to draw the line? If we draw it at the date referred to in the instrument as the date of the promise, can we be quite sure that we cover thereby all that might rightfully have been considered as falling within the statute?

And supposing we do assume we are right in our guess, what of the anterior promises evidently contemplated to have been had in view by the contracting parties.

Again, which of the written promises or agreements are we to adopt?

The draftsman realized as the fact is and, I submit, law also, that the statute contemplates the existence of only a single promise and that in writing which may and must be the basis of the transaction in order to validate it.

But then he presents us with the impossibility of selecting some one, out of possibly many written promises or agreements, and that

especially of agreement dated 29th day of January, 1914,

to support this security which I now present as a test of what the judgment of the Appellate Division rests upon.

I am also oppressed with the language of the instrument presenting the foundation of the whole transaction as, let it be observed, an advance of $213,400.

It is not a group or series of transactions that the statute enables the bank to lend in respect of, and then provides for a security to be given therefor, but a single transaction, a single advance, and an existent single article or assortment of goods definitely specified and ascertainable by following the description thereof in the instrument; is respectively what the statute contemplates and provides for, by its express terms.

It is the certainty of identification both of the subject matter, and of the intended specific contractual relation in respect thereof, which the statute requires. No doubt facility of identification, in order thereby to prevent fraudulent practices, was also aimed at. But above all a strict and complete compliance with the conditions upon which an exceptional power was given banks, is imperatively required. To go beyond those is to produce that which is *ultra vires* and hence void.

And the respondent by its systematic course of conduct clearly indicates a conception of its limitations and duty in accord with such a view of the statute by getting, or perhaps pretending to have got, on each new advance a new lien security to cover it; yet, inconsistently with such view, at each of same steps trying to cover something else.

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It seems to have hoped by a metaphysical process, as it were, to enable the judiciary to reach the conclusion that a repetition once a year or thereabouts of a general promise could be converted, by a transferable mode of thought, into a divisible or multiple promise self-adaptable to meet any such situation that possibly could arise in the course of the contractual relations between itself and the borrower.

Why did the inventor of the annual promise plan not proceed a step further and substitute as a counterpart thereof, periodical loans and acceptances of lien securities therefor, modelled after that in Form C professed to be followed? Am I right in surmising that it possibly was felt the judiciary could not be expected to accept or assent to so much at one time?

However that may be, the transaction must be as to an advance to a wholesale manufacturer upon some of such goods, wares and merchandise as manufactured by him, or procured for such manufacture.

I am unable to see how such an instrument as this resting upon a statute which seems in every line of the relevant sections to contemplate actual specific loans to be made upon the security of specific goods or such as specifically pointed to in writing, or can be manufactured out of those so indicated with such definiteness as to enable them to be effectively traced and identified can be upheld.

I was at first disposed to think that as to the item for advances made at the time when it was given it might become a security upon the goods described, and hence as these instruments were numerous the respondent's claim might be maintained for something substantial.

But the more I have considered the matter the more absurd does such an instrument seem as a means

of executing the power conferred by the statute. In substance as a result of the respective dealings embraced in each, the others are like unto this.

Then again the only promise relied upon is that contained in the request addressed to the bank for a line of credit.

That if held effective would reduce the legislation to something quite ridiculous.

It would be equally good as a compliance with the statute if made when a man opened an account, and signed it then, and acted in accord therewith for the life of his business, whether a year or score of years.

I cannot think that was the sort of thing which was had in view by the conditional requirement of subsection (*b*) of section 90, quoted above.

Nor can I see how the case of *Imperial Paper Mills* v. *Quebec Bank* (1), touches the question at all.

The object of the legislation evidently was to limit the power of the banks, when taking security of that kind at all, within the narrow limit of doing so at the time of each transaction; or at that time having a specific promise in writing relative to a specific advance.

And the evidence in this case furnishes abundant evidence of the wisdom of so restricting the power of the bank.

It would have been better for respondent and all concerned had the statute been observed in the sense in which I now hold it should be read.

In this view the amendment of subsection 4 of section 88 in the "Bank Act" as it now stands, need not be considered.

Nor, upon the material before us, need any of the other like securities be considered.

If in the long course of dealings between the parties

(1) 110 L.T. 91; 13 D.L.R. 702.

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in question there were any isolated cases of securities given, which can possibly fall within the meaning of the statute, there should be a reference, if respondent desires it, to take an account thereof and report, subject to further directions, upon evidence distinctly proving the facts of a present advance, and specific goods being given as security, and not depending merely upon the production of some pieces of paper and evidence of an agent who does not know the facts, but only speaks to a system existent at some time.

In the mortgage securities called in question I, as the result of a perusal of the evidence, and especially the correspondence between the head office and local agent, bearing thereon, am quite convinced that the respondent well knew when the mortgage was taken on the Montreal property that the company was insolvent and that continuing in business was, for its own purposes, a better expedient than winding it up.

It had only been by careful nursing and direction on its part until that and possibly other securities were got, that the insolvency had not been exposed to the world at a much earlier date.

I think there is no difficulty in reaching and setting aside such a contract made in this province between the respondent and its debtor, as this was, and of necessity had to be here—though registration as result thereof had to conform with the Quebec law.

As to the other security I entertain a different view.

The condition of the concern was not so obviously hopeless at the date of the execution of the chief mortgage as of that of the later one.

Again that earlier mortgage was preceded by an agreement which may be upheld so far as restricted to antecedent debts, and within those limits may protect

the mortgage without rendering it offensive against the prohibition restricting banks from making loans on real estate.

With some doubt I have in relation to that aspect of the matters involved, but not touched upon in argument, I incline to hold the mortgage may be upheld.

Yet I must say that with the intimate knowledge the respondent had of the company's actual financial condition and mode of operating, it is difficult to understand how it could have hoped for any other ultimate result than that of its being forced into liquidation.

If called upon to pay, which is the crucial test, it must have been held insolvent by any shrewd business man acquainted with its affairs. It is more in deference to that of others than to my own judgment that I assent to the judgment below in that regard.

I think the appeal should be allowed with costs throughout in regard to the main objects of the appeal as indicated herein.

ANGLIN J.—The appellants, who are the liquidator and a creditor of Thomas Bros., Limited, an insolvent manufacturing company in liquidation, brought this action to set aside two mortgages on real estate and pledges of certain goods, purporting to have been made under subsection 3 of section 88 of the "Bank Act" (R.S.C. 1906, ch. 29, and 3 & 4 Geo. V. ch. 9), held by the respondent bank for an indebtedness of the company which amounted to about $213,400 on the 12th day of May, 1914, twelve days after the winding-up order was made.

The bank apparently received payments and made advances up to that date. The advances between

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March 25th, the date of presentation of the petition for winding-up, and May 1st, the date of the winding-up order, amounted to $15,400. After May 1st $2,200 more was advanced. The company's indebtedness to the bank, however, which on March 24th amounted to $228,827, had been reduced on May 12th, when the last advance of $200 was made, to $213,400. The earliest outstanding note on March 25th, 1914, bore date August 16th, 1913. If those outstanding notes represented actual contemporaneous advances, as the bank maintains they did, they would all fall within subsection 4 of section 88 of the "Bank Act" which came into force in July, 1913. The bank had put its representative in possession on the 24th of March, 1914. By subsequently realizing on its securities (except the St. Thomas mortgage) it had reduced the company's debt to $135,000 at the date of the trial.

Except as to such of the pledged goods as were dealt in but not manufactured by the company, which are not now in question, the action was dismissed by Sutherland J (1), and on appeal by the plaintiffs the Appellate Division sustained his judgment (2).

The attack on the real estate mortgages as fraudulent and void against the liquidator and as calculated to hinder and delay the creditors of the company, which was but faintly pressed at bar, in my opinion fails on the facts stated in the judgment delivered by the learned trial judge and affirmed in the Appellate Division. Anderson's evidence, having been believed by the judge who saw and heard him give it and by the Appellate Division, should not be rejected here unless under very exceptional circumstances.

The Ontario mortgage is supported by the promise of May, 1912. On the facts found by the trial judge

(1) 37 Ont. L.R. 591. (2) 40 Ont. L.R. 245; 38 D.L.R. 232.

and accepted by the Appellate Division, notorious insolvency within art. 2023 C.C. sufficient to invalidate the Quebec security was not established, and the insolvency of the company was not known to the bank when it was taken. Art. 1035 C.C. The plaintiffs' attack on this mortgage, however, was based entirely on the Ontario statute, R.S.O. ch. 134, sec. 5. They did not invoke the Quebec law. But see *Morrow* v. *Hankin* (1), and *Logan* v. *Lee* (2). Before setting aside this hypothec I should have to consider very carefully the jurisdiction of the Ontario courts to do so.

The case presented as to the securities under the "Bank Act" demands fuller consideration. Some facts in addition to those which I state and extracts from the relevant documents that may serve to make more comprehensible the situation out of which the questions discussed arise appear in the judgments below.

Prior to 1908 the company's line of credit with the bank did not exceed $150,000. In that or the next year it was increased to $175,000, and later, in 1909, to $200,000, continuing at about that figure until the date of the insolvency. During the same period the company's indebtedness to the bank varied slightly. Seldom below $200,000, it would appear to have reached a maximum of $233,000 about the 16th of April, 1914.

To quote from the judgment of Maclaren J.A.:—

> The records of the transaction in question were kept in two separate accounts by the bank, called respectively the purchase account and the sales account. The former contained on the credit side the record of all the demand notes which the company gave from time to time, generally for round amounts ranging from $1,000 to $10,000. On the debit side were entered all cheques given for payment of goods, wages, expenses, interest, etc. On the credit side of the sales account were entered the cash deposited, cheques of customers, drafts for collection, etc. On the debit side the demand notes of the company paid off from time to time, customers' notes or drafts returned unpaid, etc.

(1) 58 Can. S.C.R. 74, 45 D.L.R. 685 (2) 39 Can. S.C.R. 311, 313.

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As the learned trial judge said, however:—

> The two accounts had to be looked to to ascertain the exact standing of the customer with the bank, from time to time, and advances were made to the company in the advance account (called by Maclaren J.A. the purchase account), as they had credits in the other account. The two accounts had, of course, relation to each other and seemed in reality to be treated as one account.

The evidence of the bank manager establishes with reasonable certainty that each of the demand notes given from time to time for the sums placed to the credit of the "Purchase Account" was not a renewal note in any sense, but represented an actual advance made at the time the note was taken—an actual increase by the amount of the note (through withdrawals of its proceeds made by the company then or within a day or two afterwards) of the company's indebtedness to the bank as shewn by its net debit balance taking the two accounts together. It should perhaps be noted that discount was not deducted from the notes. Their face amounts were credited to the purchase account and bore interest at six per cent. The learned trial judge says:—

> It seems to me from the evidence in this case that the bank was from time to time making advances and taking security under section 88 of the "Bank Act."

As Maclaren J.A. says, distinguishing this case from *Bank of Hamilton* v. *Halstead* (1):—

> So far as the evidence goes the company had always the privilege of drawing the full amount that had been put to its credit through the negotiation of the demand notes.

The moneys represented by each of the demand notes were actually

placed freely at the disposal of the customer,

as in *Ontario Bank* v. *O'Reilly* (2), at p. 432,

were placed under the control of the company,

Toronto Cream & Butter Co. v. *Crown Bank* (3).

(1) 28 Can. S.C.R. 235; 27 O.R. 435; 24 Ont. App. R. 152.

(2) 12 Ont. L.R. 420.

(3) 16 Ont. L.R. 400, 413.

In the *Halstead Case* (1), as pointed out by Meredith C.J., whose judgment was approved in this court,

> Not a farthing of the amounts which the notes represented could be touched by (the customer) or made available by him for any purpose.

The practice in the case at bar was from time to time to retire the demand notes longest outstanding by cheques of the customer drawn on its "Sales Account" or by charging up the amounts of such notes against its credit balance in that account. The advances were made quite independently of such retirements.

Concurrently with the taking of each demand note and the placing of the moneys represented by it to the credit of the "Purchase Account," from which they were subject to withdrawal by the company at its will, the bank took a pledge under section 88 of the "Bank Act" on all the raw material, manufactured goods and goods in process of manufacture in the customer's premises. Down to the 7th of March, 1914, two separate documents were obtained on each occasion, one a pledge or security for the advance then being made (demand note contract), the other an "omnibus security" (as I shall term it for lack of a better name), for that advance and such prior advances as were represented by demand notes then outstanding (*i.e.*, not yet retired as above explained), a list of which was indorsed on the back. After the 29th of January, 1914, new forms of the omnibus security were used in which the goods are somewhat more fully described but no special allusion is made to the amount of the concurrent advance. Some ten advances, amounting in all to $17,000, appear to have been made between the 7th of March and the date of presentation of the petition for winding-up, the 25th of March, 1914. No document similar to the early "Demand Note Contracts" was

(1) 27 O.R. at p. 439.

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taken as security for any of the advances subsequent to the 6th of March. On the back of the omnibus security obtained when each of them was made was indorsed a list of the then outstanding notes, and the security was stated on its face to be given in consideration of their total amount, the last item in the indorsed list being uniformly the amount of the note for the actual concurrent advance. On the last of these securities taken before the winding-up—that of the 24th of March, 1914—77 of the 103 notes in the indorsed list bear dates between the 16th of August, 1913, and the 29th of January, 1914, and only 26 bear subsequent dates. Yet the document purports, as do all the securities taken after that date, to be given pursuant to a written promise or agreement of the 29th of January, 1914. I shall have occasion again to advert to this fact.

The securities taken before the 29th of January, 1914, contain no explicit reference to an antecedent written promise, although such a promise that security would be given under section 88 of the "Bank Act" had been obtained by the bank annually or oftener when the line of credit for the ensuing period of a year, or less, as the case might be, was arranged for. Whatever may be its value as security for previous advances, I know of no good reason why each of these documents taken on and after the 7th of March, 1914, should not be a perfectly good and valid security under section 88 (3) and clause (*a*) of subsection 1 of section 90 of the "Bank Act" for the actual concurrent advance.

I am satisfied that all prior securities were not discharged by substitution or merger as the result of the taking of the new general security given when each fresh advance was made. This in my view is really the crucial question in this case, and it is perhaps

regrettable that more attention was not given to it in argument. If there was no merger of earlier in later securities—if the securities taken concurrently with each advance are still alive and enforceable—the bank's position seems to me to be free from difficulty, since the requirements of clause (*a*) of subsection 1 of section 90 are met. On the other hand, if there was a merger or substitution—if the last security taken absorbed and extinguished all prior securities held for the advances for which the outstanding notes indorsed upon it had been given—the stated consideration included them—it is obvious that it would be necessary to establish that as to such prior advances—past indebtedness—the absorbing or substituted security was given pursuant to a promise or agreement that would satisfy clause (*b*) of subsection 1 of section 90. The question of merger or substitution is only of importance if the omnibus securities taken on the occasion of each advance cannot be supported in respect of the prior indebtedness included in the stated consideration; and it is on that assumption that it is now discussed.

Strong as the legal presumption of merger of an earlier security, which arises upon the taking of a new security of a higher nature for the same debt, undoubtedly is (*Price* v. *Moulton* (1)), it yields to satisfactory proof of a contrary intention (*Commissioner of Stamps* v. *Hope* (2)); and there is no such presumption where the new and the old securities are of equal degree. 7 Hals. Laws of England 457; *Preston* v. *Perton* (1601) (3).

A good prior security will not be held to merge in a later inoperative one.

Chetwynd v. *Allen* (4), at page 358, *per* Romer J.

(1) 10 C.B. 561, 574.
(2) [1891] A.C. 476, 483-4.
(3) Cro. Eliz. 817.
(4) [1899] 1 Ch. 353.

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Substitution, like merger, is largely a question of intention. *Ex parte Whitmore* (1). Where the taking of further security is the real purpose of the new instrument there is no extinguishment of the earlier security. *Twopenny* v. *Young* (2). The principle underlying the equitable doctrine that merger of estates and merger in the fee of a paid-off mortgage security on real estate are questions of intention actual or presumed, and that an intention to keep a charge alive will be presumed when that is for the benefit of the person against whom it is sought to set up merger; *In re Pride* (3); *Adams* v. *Angel* (4), may well be applied where merger or substitution of securities on personal property is claimed under circumstances such as those now before us. No reason can be suggested why the bank would willingly part with or permit the extinguishment of any security held by it in a case such as this. It would be so contrary to what is commonly well understood to be the practice of bankers—so obviously contrary to the bank's interest, that I should require clear and convincing evidence that such a merger or substitution was intended before admitting that it had in fact taken place.

In the securities taken before the 29th of January, 1914, the customer is made to represent that the goods pledged

are free from any mortgage, lien or charge thereon.

I take it that was intended to mean other than liens or charges held by the bank itself, although it would certainly have been more satisfactory had this exception been expressed as it is in the securities taken on the new forms in use after that date.

(1) 3 Deac. 365, 372.
(2) 3 B. & C. 208.
(3) [1891] 2 Ch. 135, 142.
(4) 5 Ch. D. 634, 641-2, 645.

I agree with the observation made by counsel for the plaintiffs in the course of the trial that

there is nothing in the documents themselves to shew whether they are in substitution or not.

Yet my inference from them, paying due regard to the surrounding circumstances, would be that no merger or substitution was intended.

The question of intention, however, is not left entirely to mere inference. The bank manager was called as a witness by the plaintiffs. In answer to questions put by their counsel on direct examination (of course without objection being taken on behalf of the defendant), he gives this evidence:—

Q.—Looking again at this last receipt (exhibit 8) taken under section 88 I see it is for $213,400? A.—Yes.

Q.—That amount represents the amount of notes going back to what date? A.—Represents the amount of notes going back to September 20th, 1913.

Q.—All those notes that are represented on the back of this contract were also represented in numerous other contracts which you took after the 20th day of September? A.—All the notes that were unpaid would be.

Q.—You took a new contract with every note? A.—With every note.

Q.—So that at the time you took this contract (exhibit 8) did you hold all these other contracts? A.—We held all those other contracts.

Q.—You held contracts dated the date of each of those notes? A.—We held contracts dated the date of each of those notes.

Later in his direct examination, in answer to a question pressed by counsel for the plaintiffs, notwithstanding objection, the witness first said positively that there was no substitution of new securities for older ones and, a moment or two later, that

it never entered into my head until now whether I took it (the later security) in substitution or not.

The plaintiffs can scarcely complain if this evidence elicited by them from their own witness is used against them. So far as it may be admissible it goes to confirm the inference that I should draw without it from the

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circumstances that merger of, or substitution for, earlier securities was not intended.

From the whole case I gather that the banker's idea in taking securities in this omnibus form after July, 1913, was that something of the kind was necessary in order to obtain security on the new goods brought in to replace those sold and taken away in the ordinary course of business. That I think may fairly be said to be the purport of the bank manager's testimony. Whatever advantages it may have had before the amendment to the "Bank Act" of 1913, this practice has been unnecessarily, and I cannot but think unwisely, continued since. Subsection 4 of section 88, first introduced at that time, provides that in the event of goods held under a security given for money loaned under that section being removed with the consent of the bank and similar goods brought in substitution therefor, the goods

> so substituted shall be covered by such security as if originally covered thereby,

i.e., by the security held upon the goods so removed. A new security is neither contemplated nor required. The nature of Thomas Brothers' business leaves no room for doubt that the sale and consequent "removal" of their products was "with the consent of the bank." See, too, the last clause of subsection 4. Securities held upon goods so removed attached automatically under that subsection to goods

> substantially the same in character * * * substituted therefor.

Yet we find in the new form of promise adopted by the bank in 1914, presumably drafted because of the amendment of 1913, this clause:—

> 6. If with the consent of the bank, the goods or any part thereof are removed, other goods, of substantially the same character and of at least the same value as those so removed, shall be thereupon forthwith substituted therefor and the customer hereby agrees, so often as every

such removal and substitution shall take place, to give and shall give warehouse receipts, bills of lading or securities under the "Bank Act," covering such substituted goods, all of which shall be subject to the provisions hereof.

Acting under this clause and taking the further security which it indicated as proper, if not necessary, the bank manager had no idea of relinquishing any security already in hand. To do so would never occur to him.

Elaborate (and perhaps in the respect indicated misleading) as the bank's new forms of 1914 are, the new form of pledge then adopted omits what should have been one of its prominent features, if, as was apparently the case, it was intended to continue the former practice of including in each new security all outstanding notes, namely, a clause explicitly providing that there should be no merger or absorption in it of, or substitution of it for, any securities given for past advances. Without such a clause the taking of securities in the omnibus form adopted by the bank is unavoidably fraught with the danger of affording some colour to the contention put forward in this case that substitution for, or merger and extinguishment of, prior securities was thereby affected.

That no such merger in fact took place was the view of the learned trial judge. He says:—

It is contended on the part of the plaintiffs that there was in reality the same course of dealing between the bank and its customer in this case as was held to be invalid in the *Halstead Case* (1). It seesm to me, however, from the evidence in this case, that the bank was from time to time making advances and taking security under section 88 of the "Bank Act" on the new goods which were coming in. The goods were from time to time changing as old stock was sold and new stock brought in to replace. A separate note and security was taken for each advance. A general security was also taken referring to all outstanding notes as to each of which a previous individual security had been taken. This it seems to me could not be called a substitution, but rather a consolidation.

(1) 28 Can. S.C.R. 235.

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There was consolidation, however, only in the sense that as a convenient method of keeping track of the total secured indebtedness and apparently as something erroneously thought to be necessary in order to secure the benefit in regard to them of subsection 4 of section 88, the outstanding notes were included in the statement of the consideration for each new omnibus security and were scheduled by indorsement upon it. There was no consolidation in the sense of any merger or absorption of the earlier securities such as would extinguish them or render them unenforceable.

This question is not dealt with in the opinion delivered by Maclaren J.A. in the Appellate Division probably because he held the omnibus securities good by virtue of the antecedent promises given under clause (*b*) of section 90, in respect of the past advances which they purported to cover as well as the advances made concurrently.

I am of the opinion that the lien taken on the occasion of obtaining each of the advances represented by notes that were still outstanding at the date of the commencement of the winding-up may be regarded as a valid and subsisting security on such of the goods covered by it as remained in the hands of the company at that date (including in the case of liens taken after the 1st of July, 1913, substituted goods), since each of such demand notes represented an actual present advance, and the security was given concurrently with the making of it as required by clause (*a*) of subsection 1 of section 90 of the "Bank Act," and was not merged in or otherwise extinguished by any of the securities subsequently taken in omnibus form.

Since the 1st of July, 1913, when subsection 4 of section 88 of the "Bank Act" (3 & 4 Geo. V. ch. 9) came into force, the advances by the bank amounted

to over $300,000. The goods within subsection 3 of section 88 on hand at the date when the winding-up began were valued at $83,637.92. The annual turnover of the company had been over $450,000. The earliest outstanding note when the winding-up began bore date the 13th August, 1913. There can be little room for doubt, therefore, having regard to the provision for substitution made by subsection 4, that all the goods in stock at that time were covered by valid securities in the hands of the bank.

In case there should be any difficulty in sustaining its claim under clause (*a*) of subsection 1 of section 90, counsel for the bank also contended that he was entitled to support each of the omnibus liens taken for all outstanding notes by the promises for security which the bank had obtained annually or oftener from the company. Counsel for the appellants challenged this position, maintaining that a promise in order to meet the requirements of clause (*b*) of subsection 1 of section 90 must be made contemporaneously with the advance in respect of which the promisor undertakes to furnish security. I am unable to read such a restriction into clause (*b*).

Section 90 so far as material reads as follows:—

> 90. The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any bill, note, debt or liability, unless such bill, note, debt or liability is negotiated or contracted:
>
> (*a*) At the time of the acquisition thereof by the bank; or
>
> (*b*) Upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank.

A promise to furnish security for advances to be made in the future is not within the mischief against which section 90 was meant to provide. The mischief aimed at is the taking of security for past indebtedness. The canon embodied in the maxim *expressio unius est*

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exclusio alterius would seem to preclude the narrow construction which the appellants seek to place on clause (*b*). Clause (*a*) and clause (*b*) are independent alternatives. Clause (*a*) explicitly prescribes that in the case of a security to which it applies, the bill, note, debt or liability, to secure which it is given, must be negotiated or contracted at the time the bank acquires the security. Clause (*b*) alternatively provides that, if not so taken, the security must be given pursuant to a written promise or agreement to give it, on the faith of which the bill, note, debt or liability has been negotiated or contracted. The mischief against which the section was designed to provide of course excludes from the purview of clause (*b*) a promise or agreement given or entered into after the advance has been made. But I find nothing to warrant excluding a prior promise —nothing to justify importing into clause (*b*) the restriction as to time which Parliament has placed in clause (*a*)—no reason for substituting for the introductory words of clause (*b*), "upon the," which clearly mean "on the faith of the," some such words as "at the time of obtaining a." The use in it of the preterite-subjunctive form of the verb, "would be given," tends to confirm this view of the proper construction of clause (*b*); if the construction contended for by the appellants were correct one would expect to find the verb in the future tense—"will be given."

Apart entirely from authority, my view of the proper construction of clause (*b*) is that the written promise or agreement for which it provides may be given prior to, or at, the time when the bill, note, debt or liability to be secured is negotiated or contracted. Of course it must be possible to identify the advance as one to which the promise was intended to apply, and the goods as property on which the security was promised by it.

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As Maclaren J.A. points out, however, although not explicitly referred to in the judgment of the Privy Council in *Imperial Paper Mills Co.* v. *Quebec Bank* (1), the question now raised as to the construction of clause (*b*) can scarcely have escaped their Lordships' attention in view of Lord Shaw's detailed statement, at page 92, of the course of business pursued, and of the fact that the judgment appealed from (2), at pages 645, 653, 655, itself shewed that in one instance, although the promise for security was made in August, 1905, the demand note for $120,000 and the security therefor were given only in February, 1906, the actual advances having been made from time to time in the interval. This security was upheld.

The decision of their Lordships is chiefly valuable, however, as affording an answer to the objection taken by the present appellants to the sufficiency of the description of the goods in the securities taken by the respondent bank.

No doubt the promise of the 29th of January, 1914, would not suffice under clause (*b*) of subsection 1 of section 90 to support the securities subsequently taken in so far as they were for advances represented by notes of earlier date. For that purpose the earlier promises should have been referred to as well. But if there was no substitution for the earlier securities, or merger of them in, or extinguishment of them by, the later securities taken, this omission is not of much moment. In any case, since the earlier written promises in fact existed, I think they might be proved and relied upon notwithstanding the fact that the promise of the 29th of January, 1914, is alone mentioned in the liens taken after that date.

(1) 110 L.T. 91; 13 D.L.R. 702.

(2) 26 Ont. L.R. 637; 6 D.L.R. 475.

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A more serious objection to supporting any of the liens as a security for any advance earlier than that actually made contemporaneously with it would seem to be that the promise to give security for such earlier advance was probably fulfilled and satisfied by the security taken at the time it was made and cannot, therefore, be relied on to support subsequent security for it. Except perhaps for the purpose of clause 6 of the "promise" of the 29th of January, 1914, which I have quoted, there was no promise for any further security.

But if the view I hold that the security taken for each advance at the time it was made was efficacious and continued in force is sound, it is unnecessary and it would probably be unwise to dwell further upon other phases of this case. I have referred to them merely to make it clear that I do not share the views upon the construction of clause (*b*) of subsection 1 of section 90 which I understand some of my learned brothers entertain.

As to the advances, amounting to $17,600, made by the bank after the presentation of the petition for winding-up (R.S.C. ch. 144, sec. 5) it can claim only in so far as the liquidator may have sanctioned them as necessary for a beneficial winding-up (*ibid.* sec. 20), or as the court may consider it entitled under the doctrine of equitable subrogation to the benefit of securities (including under them substituted goods within subsection 4 of section 88) held by it for so much of its indebtedness as was paid off during the same period.

I would dismiss the appeal with costs.

BRODEUR J.—This is an action by the liquidator and a large creditor of the insolvent company, Thomas

Brothers, Limited, to set aside certain securities held by the respondent bank on the goods of that company, and also to set aside two mortgages given in favour of the bank.

The courts below dismissed that action, except as to a small item which is not in issue in this appeal.

It is claimed by the appellant that those securities are contrary to the provisions of sections 88 and 90 of the "Bank Act," and that the mortgages were signed when the debtor was insolvent to the knowledge of the creditor and that the effect of those mortgages gave the bank an unjust preference over the other creditors.

Dealing first with the securities. I see that from 1906 until the petition for a winding-up order was presented by the bank on the 25th of March, 1914, the company was indebted to the bank for the sum of about $200,000. On the 24th of March, 1914, on the eve of the presentation of the petition, the indebtedness, as appears by the security given that day, was of $228,827. As stated in the document the security was given

> pursuant to a written promise or agreement of the undersigned (Thomas Brothers Limited), and especially of agreement dated 29th January, 1914,

and it was

> in consideration of an advance of $228,827 made by the Dominion Bank to the undersigned for which the said bank holds the following bills or notes:

and then follows a list of 103 notes ranging in amount from $127 to $5,500 and dated from the 16th of August, 1913, to the 24th of March, 1914. It appears rather peculiar that the security was given in virtue of a promise made in January, 1914, when most of the notes covered by the security were dated before this last date.

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The promise or agreement relied upon by the bank was in the form of a request signed by Thomas Brothers to the bank

> to makes advances to the undersigned (herein called the customer) from time to time and in consideration thereof the customer doth hereby promise and agree as follows: (1) To give from time to time to the bank security for every advance and interest by way of warehouse receipts, bills of lading or securities under sections 86-87-88 & 90 of the "Bank Act."

It cannot be pretended that a promise made under section 90 of the "Bank Act" could cover advances made before it was signed. Besides, the terms of the promise itself in this case were not to cover past indebtedness but future advances. So the promise of the 24th of March, 1914, could not validly cover the notes discounted or signed before the date of the promise.

Could that promise, however, validate notes negotiated after it was made? This is the main question at issue in this case.

By section 88 of the "Bank Act," it is provided in subsection 3 that

> the bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise upon the security of the goods, wares and merchandise manufactured by him or procured for such manufacture.

Section 90 of the "Bank Act" is the section which has to be construed in order to find out whether the promise above mentioned was valid or not. It provides that the bank shall not acquire any security

> to secure the payment of any bill, note, debt or liability, unless such bill, note, debt or liability is negotiated or contracted:
>
> (*a*) at the time of the acquisition thereof by the bank; or
>
> (*b*) upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank.

That provision of the "Bank Act" is a derogation from the prohibition in section 76 concerning lending

money upon the security of goods, wares and merchandise.

This section is also a derogation from the law concerning chattel mortgages. In some provinces, statutes relating to bills of sale, to chattel mortgages, etc., have been passed to recognize change of ownership or of legal relations respecting personal property without change of possession or change of possession without change of ownership. Those chattel mortgages have to be registered and are surrounded with provisions which, if not absolutely carried out, render the bills of sale or chattel mortgages null and void. The provincial law surrounds with extraordinary precautions the validity of chattel mortgages and where the procedure enacted by the legislature is not scrupulously followed those mortgages are held not to be valid against the assignee. *Gault Bros.* v. *Winter* (1).

The Canadian Parliament thought it advisable, however, with regard to the banks to give them the power to take security in the nature of chattel mortgages or bills of sales upon the property of the wholesale manufacturers; and those securities might be taken without any publicity being given to the existence of such chattel mortgages or such bills of sale.

Then I say, applying the principle that we have laid down in the case of *Gault Bros.* v. *Winter* (1), that the procedure which is enacted by the legislature should be followed entirely to render valid the securities taken by the bank.

The object of the law is not to give to the bank an authorization to take securities or bills of lading, for money which had been previously lent, in other words, for past indebtedness, but the loan must be made contemporaneously with the taking of the security or

(1) 49 Can. S.C.R. 541; 19 D.L.R. 281.

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the giving of the promise. The bill or note must be negotiated at the time the bank acquires the securities or at the time at which a written promise is made that security shall be given; otherwise the bank could for years in advance hold a promise that a security will be given and when they see that their customer is in financial difficulty take a security upon all his goods.

That was practically what was done in this case. The promise relied upon was given in the month of January, 1914, and similar promises had been made also in the previous years every time the customer was applying for a line of credit or for the continuation of his line of credit. Then on the 24th of March, 1914, on the day previous to the presentation of the petition for winding-up the company, the bank takes a security upon all the stock of the company. That security given on the 24th of March constituted not only a preference given by an insolvent debtor to one of his creditors who was aware of his insolvency but also constituted a formal violation of the provisions of section 90 of the "Bank Act."

Then applying the principle that we have laid down in the case of *Gault Bros.* v. *Winter* (1), the procedure which is enacted by the legislature should be followed entirely to render valid the securities taken by the bank.

As I have said the object of the law is to give to the bank an authorization to take securities for contemporaneous indebtedness. It may happen that a manufacturer has to pay cash for some goods, even before their delivery; then the "Bank Act" authorizes the bank to advance the money to the manufacturer on the promise then made that the latter will give it security on those goods. In such a case, the security would

(1) 49 Can. S.C.R. 541; 19 D.L.R. 281.

be valid. It is the case contemplated by subsection (*b*) of section 90.

It is contended, however, that if the security is not valid as a security based on a promise, it would be valid as a security based upon advances made at the time of its acquisition under the provisions of paragraph (*a*) of section 90.

In that respect it becomes necessary to examine the agreements made after the 29th of January, 1914, and those made before that date, since they were made in different ways.

After the 29th of January, 1914, the securities were all based on the promise of that day and they all contain this provision:—

> This security is given pursuant to the written promise or agreement of the undersigned and especially of agreement dated 29th January, 1914.

Those securities profess then to have been given under paragraph (*b*) of section 90. I do not see how we could now ignore that and say that they should be considered as having been given under paragraph (*a*) of that section.

If it were only a question of agreement between two parties, and there would be some ambiguity, we might perhaps try to find the true intention of the parties and apply with less stringency the ordinary rules of construction, but those securities affect not only the contracting parties but also all the creditors of the party who gave the security. The "Bank Act" enacts positively that the banks shall not lend money upon the security of any goods (art. 76, subsec. 2), except as specifically authorized by the Act. It is then of principle that the banks should make advances to their clients without looking for any special security. There are exceptions; but those exceptions must be strictly construed.

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In the case of a manufacturer the bank could, when they discount a note, take then a security on his stock for the amount of that note, or they could then take from him a promise that in a few days he would give them, to protect their claim, warehouse receipts, bills of lading, or other security; but the provisions of the law in that respect must be rigorously followed. If the customer and the bank have found it advisable to give and take a security based upon a promise, they could not substitute later on a security based upon advances.

This court has virtually laid down the above principle in the case of *Bank of Hamilton* v. *Halstead* (1). Mr. Justice Girouard, who rendered the decision for the court, stated that the Act does not authorize the substitution of one assignment for another.

As to the agreements made before the 29th of January, 1914, Thomas Brothers were, when they had an advance made, in the habit of giving a security on their goods for that specific sum. That was unquestionably valid.

But they were, at the same time, giving a security for all the notes previously discounted, including the one discounted on that day, and the agreement contained the following provision:—

> This security is given under the provisions of section 88 of the "Bank Act" and is subject to the provisions of said Act. The said goods, wares and merchandise are now owned by Thomas Brothers, Limited, and are now in possession of Thomas Brothers, *and are free from any mortgage, lien or charge thereon.*

The agreement with the provision that the goods of Thomas Brothers were free from any mortgage, lien or charge thereon was then handed over to and accepted by the bank. That constituted, according to my

(1) 28 Can. S.C.R. 235.

opinion, an implied renunciation, on the part of the bank, of the lien or charge which existed before on the goods of Thomas Brothers in its favour.

The bank, seeing evidently that this declaration on the part of Thomas Brothers that there was no previous lien or charge was a declaration which might affect the validity of their security, changed the provisions of the agreement and we find later on that the securities contain the following:—

> The goods, wares and merchandise are now owned by and are now in the possession of the undersigned and are free from any mortgage, lien or charge thereon (excepting only previous assignments to the said bank, if any.)

I am then on that point of opinion that the securities which have been given before the 24th of March, 1914, or before the petition for winding-up, are not valid and cannot be invoked against the liquidator and creditors of Thomas Brothers and should be set aside.

Now coming to the question of mortgages, I find that the trial judge—and in that respect he is confirmed by the Appellate Division—was of opinion that the mortgages are valid.

In 1912, Thomas Brothers had given a promise that the securities by way of mortgages would be given on or before the 1st of October, 1912. These mortgages were not given at the time stipulated.

In 1913, a statement was prepared which seemed to shew a considerable profit in the company's business to the end of August, 1912. But in the fall of 1913, the bank produced a note by Clarkson & Co. which seemed to shew that the previous statement was inaccurate.

This naturally made the bank more anxious and they became insistent as to the real estate securities. They then signed a first mortgage on property situate in Ontario.

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In view of the findings of fact made by the trial judge, and confirmed on that point by the Appellate Division, I would not be ready to disturb that judgment as far as the Ontario mortgage is concerned; but on the 22nd of January, 1914, just two months before the petition for winding-up was presented, a mortgage was taken upon a property situate in the Province of Quebec.

I am of opinion that with respect to that mortgage, the law of the place where the property was situate and where the mortgage has been given should govern. According to articles 2023 and 1032 *et seq.* of the Civil Code, where a creditor has knowledge of the insolvency of his debtor, he cannot take a valid mortgage on the property of his debtor.

There is no doubt that on the 22nd January, 1914, the bank knew that Thomas Brothers were unable to meet their liabilities. Then, according to my opinion, the Quebec mortgage should be set aside.

For these reasons, the appeal should be allowed with regard to the securities and with regard to the Quebec mortgage with costs throughout.

MIGNAULT J.—I agree with my brother Anglin that there was no merger of previous securities given by Thomas Brothers, Limited, to the respondent by the fact that the prior advances by the latter were mentioned along with the contemporaneous advance made on the date when the new security was given to the bank. Each security was good for the contemporaneous advance and void as to the prior advances, but inasmuch as each of these prior advances was accompanied by the giving of security under section 88 of the "Bank Act," and as these prior securities were not merged in the subsequent security taken by the bank

for another advance, the respondent holds securities for all its advances which meet the requirements of clause (*a*) of subsection 1 of section 90 of the "Bank Act."

It may, however, be remarked that the form of these securities is most misleading. Taking, for example, that of the 12th May, 1914, on which date an actual advance of $200 only was made, the contract or security begins by the words:—

> In consideration of an advance of two hundred and thirteen thousand four hundred dollars, made by the Dominion Bank to the undersigned, for which the said bank holds the following bills or notes:

This was almost inviting disaster in view of the imperative terms of clause (*a*), for out of this so-called advance of $213,400, the sum of $213,200 represented bills, notes, debts or liabilities which were not

> negotiated or contracted at the time of the acquisition thereof by the bank.

It is only because the subsequent security did not supersede the prior securities given to the bank at the time of each advance, that the respondent can claim to have security under section 88 of the "Bank Act" for more than the amount actually advanced by it at the time the last security was given by Thomas Brothers, Limited.

It was contended, however, by Mr. McCarthy that each security was covered by a prior promise given by Thomas Brothers, Limited, and that this would validate the security as to the prior advances under clause (*b*) of subsection 1 of section 90. This clause, taken in connection with the first paragraph of subsection 1, states that

> The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any bill, note, debt or liability, unless such bill, note, debt or liability is negotiated or contracted:
>
> (*a*) .....
>
> (*b*) upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank.

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I think the meaning of section 90, as a whole, is that there must be, when the bill or note is discounted by the bank, either

(a) The giving of security under section 88 contemporaneously with the discounting of the note; or

(b) An existing written promise to give such security to the bank at some future time.

In my opinion this written promise must be a specific promise to give a specific security at a subsequent date, and not a general promise to give security for any advance which the bank may make to the customer from time to time. It does not appear necessary that the note be discounted at the time the promise is made, provided that the note be discounted by the bank upon, *i.e.*, in pursuance of, such a promise. When this written promise has been given, security may be taken by the bank to cover prior advances made by the bank upon such a specific promise.

Referring again to the security of the 12th May, 1914, it states:—

> This security is given pursuant to the written promise or agreement of the undersigned, and especially of agreement dated 29th day of January, 1914.

The written promise of 29th of January, 1914, says:—

> The Dominion Bank (herein called the "bank") is hereby requested by the undersigned to make advances to the undersigned (herein called the "customer") from time to time, and in consideration thereof, the customer doth hereby promise and agree as follows:—
>
> 1. To give from time to time the bank security for every such advance and interest by way of warehouse receipts, bills of lading, or securities under sections 86, 87, 88 and 90 of the "Bank Act."

In my opinion this promise being a general promise referring to no specific security to be given in pursuance of the promise, but merely undertaking to give security for any advance which the bank may make from time to time, does not meet with the requirements of clause

(*b*). I may add that if clause (*b*) were construed so as to validate securities for any prior advances which the bank might have made to the customer from time to time in pursuance of such a general promise made possibly years before the advances, the whole object of section 90 would be defeated.

Fortunately, however, for the respondent each security taken by it is good for each contemporaneous advance, and the prior securities are not merged into the subsequent ones, so that the claim against Thomas Brothers, Limited, is secured.

I have referred to the security given to the bank on the 12th May, 1914, merely as an example of the course of dealing between the respondent and Thomas Brothers, Limited. I must say, however, that there is nother difficulty in the way of the respondent. Thee petition putting Thomas Brothers into liquidation was filed on the 28th of March, 1914. Subsequently to that date, the bank advanced to Thomas Brothers, Limited, the sum of $17,600, and took security therefor. The winding-up order bears the date of 1st May, 1914. I have duly considered the supplemental factums filed by the parties with regard to these advances and I fully concur in the opinion of His Lordship the Chief Justice as to the declaration that should be made in the judgment.

I think that the appeal should be allowed with respect to the hypothec taken by the bank on the Montreal property on the 22nd January, 1914. I have no doubt that at the date of this mortgage Thomas Brothers, Limited, were insolvent. I am also of the opinion that this state of insolvency was known to the bank, for the latter then controlled the business of Thomas Brothers, Limited, and had received a report on their financial position up to August, 1913, shewing

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a considerable deficit on their operations during the preceding year. This question of the validity of the Montreal hypothec must be determined under the provisions of the Civil Code of the Province of Quebec. Reading article 2023 C. C. with articles 1032 *et seq.*, I think that where a creditor has knowledge of the insolvency of his debtor, whether this state of insolvency be notorious or not, he cannot take a valid hypothec on the property of his debtor.

On the whole, therefore, I think the appeal should be allowed to the extent stated in the opinion of His Lordship the Chief Justice.

Appeal allowed in part with costs.

Solicitor for the appellant: *John B. Davidson.*
Solicitors for the respondent: *Osler, Hoskin & Harcourt.*

ROBERT GRANGER (PLAINTIFF).....APPELLANT;

AND

ARTHUR BRYDON-JACK (DEFENDANT).....RESPONDENT.

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*May 19

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Evidence—Finding of facts by trial judge—Appeal—Mortgage—Given as security or payment—Parol evidence—Time of payment not fixed—Reasonable time.

B., having bought from G. a four-fifths interest in a yacht, gave him a mortgage on real estate for the amount of the purchase-price. The deed provided that "the principal (should) be paid out of the first proceeds of the sale of the equity of the mortgagee," and there was no covenant of the mortgagor to pay the debt. The evidence of both parties was in direct conflict as to whether the mortgage had been given in payment of the purchase-price or merely as security.

Held, that under the circumstances the Court of Appeal was not justified in reversing the finding of fact of the trial judge, who had declared the mortgage to have been given as security only.

Per Davies C.J.—The absence in the deed of a covenant as to the personal liability of the mortgagor to pay the debt is not material.

Per Idington and Anglin JJ.—The result of the failure to fix a time for payment is that the debt became payable within a reasonable time according to the intentions of both parties and having regard to all the circumstances.

Judgment of the Court of Appeal reversed.

APPEAL from the judgment of the Court of Appeal for British Columbia, reversing the judgment of Grant J. and dismissing the plaintiff's action with costs.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Geo. F. Henderson K.C. for the appellant.

F. H. Chrysler K.C. for the respondent.

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*Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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THE CHIEF JUSTICE.—The trial judge in this case in all matters where the evidence of the appellant and the respondent was at variance accepted that of the appellant plaintiff and discredited that of the respondent.

The action was one brought to recover the price of four-fifth shares in a yacht claimed to have been sold to the defendant respondent by the plaintiff and to have been secured by a third mortgage on certain lands of the defendant.

The issues were whether the mortgage was taken and accepted by plaintiff as security only or in payment by way of exchange of the yacht shares for the mortgage, as contended by the defendant. The mortgage, which was drawn up by the defendant respondent, did not contain the usual covenant to pay the amount for which it was given.

On the findings of fact made by the trial judge, which I do not think we should disturb or set aside, and the admissibility of the evidence as to what the real bargain between the parties was, as to which I do not entertain any doubt, such evidence not contradicting the written documents, I am satisfied there was not merely an exchange of properties between the parties, nor do I think the acceptance by the plaintiff of the mortgage without a personal covenant to pay which mortgage had been prepared by the defendant discharged the debt which, in my opinion, the facts shew the mortgage was taken to secure.

I think the payment of the interest on the mortgage for the two years preceding the action admitted by the defendant in his examination for discovery quite inconsistent with his claim that there had been merely an exchange of properties between the parties or an absolute sale of the shares in the yacht without any

personal liability on defendant's part to pay the agreed price.

The evidence admitted to explain the real bargain did not contradict the written documents.

As to the absence of any personal liability of the mortgagor to pay the debt for which a mortgage is given, in which there is not a personal covenant to pay, see Canadian Edition of Fisher on Mortgages (1910), pp. 7, 413, 415, and Halsbury, vol. 21, p. 70.

I would allow the appeal and restore the judgment of the trial judge with costs in this court and in the Court of Appeal.

IDINGTON J.—I am of the opinion that the questions raised herein ought to be determined by the facts of whether or not the mortgage taken was accepted as payment or merely as security for the payment of the price agreed on.

I cannot see how the undoubted principle of law, that when an agreement between parties has been reduced to writing that writing must govern, can help us herein.

The actual question to be first determined is whether or not the agreement has been reduced to writing or at all events whether or not what has been reduced to writing was really in truth intended to cover the entire contractual relations in question or not.

The reliance placed upon the receipt clause of the bill of sale has very little to support it if we bear in mind the history of our law and its final results in relation thereto. At common law a man signing and sealing a document of that kind was estopped from denying such an acknowledgment. In equity it counted for little and standing alone without a duly

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endorsed receipt was held to put third parties on inquiry.

A concise statement of the relevant law and authorities is to be found in Elphinstone on the Interpretation of Deeds, pp. 151 *et seq.*

I admit it is a circumstance, even though of minor import, to be had in mind when all the surrounding circumstances have to be considered in order to determine which party's story is correct.

Then there is another circumstance, also of very minor import, in the absence of a covenant for payment.

The general principle of law applicable to a mortgage debt, as stated by Fisher on Mortgages, 5th ed., at par. 8, implying a recoverable debt because it is presumed to be given for a loan, is *primâ facie* applicable. And I do not think that the express statement of the consideration being the price of the sale of same article entirely eliminates the need for observing the general rule.

I may remark, in passing, that is none the less so, when the instrument has been drawn by a professional man a party thereto to be tendered to another, and contains no restriction upon said rule of law or explanation of what was really intended.

Moreover in this case the respondent paid the interest from time to time for four years, although he had not covenanted to do so.

The following contains the peculiar terms of payment:—

> Provided this mortgage to be void on payment of two thousand dollars ($2,000) of lawful money of Canada, with interest at seven (7) per cent. per annum, as well after as before maturity, as follows: the principal to be paid out of the first proceeds of the sale of the equity of the mortgagee in the said land, the first payment of interest to be made on the nineteenth day of January, 1915, interest thereafter to be paid annually on the 19th day of January in each and every year.

The interest was to run, apparently from date, and to continue "as well after as before maturity;" but when was maturity? We may try to assume that it was meant to be when the sale of the equity was obtained. Are we on such assumption to conclude that unless and until such a sale was effected as would produce $2,000 there could be no maturity?

If we observe literally the language used that would seem to be the case. But if it was found impossible to get more, who was to pay the interest? Was respondent to be presumed bound to supply it? Or was the provision for payment of interest after maturity a mere mockery? And if no more than say $1,000 or $1,500 could be got, what was the purpose of providing for payment of seven per cent. on $2,000 for that is clearly implied? Who was to pay it?

Again was all that a solemn mockery? And if only say $100 to $500 was ever, or within a reasonable time, realizable, are we to suppose the parties had so contracted that the four-fifths of the value of the yacht was to pass for that trifle?

Such a gamble is conceivable but does the story told, by either party, indicate that such was the nature of the transaction? All these and many more like considerations press upon one in considering what in truth was the essential nature of the bargain entered into.

The appellant swears he never considered or inquired what the value of the property was but took the respondent's word as to the probabilities and estimates relative thereto, and there is no attempt made to contradict this statement, or shew facts and circumstances which would furnish contradiction and thereby indicate the intention of the appellant to accept a gambling proposition.

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Surely if a gamble of that sort really was what the parties were negotiating, he who drew the instrument, and against whom it must, therefore, be most strongly construed, should and would have applied his professional skill to frame something entirely different from that presented for our consideration.

It would, I submit, be much more like what the stories given by either or both, so far as reconcilable, should lead us to expect, to infer that the deal was one of bargain and sale at a named price, with a mode and nature of security to be given, for carrying it out, in harmony and consistently with the relations between old friends, whereby there should be a mutual trust and forbearance to be limited by the bounds of what might and should in law be held reasonable.

To so interpret the conduct and purpose of the parties and their intentions towards each other under such circumstances that neither suffer an injustice, is what we should aim at, in order to do justice between them, when unfortunately they have been led to entertain what are probably unjust views of each other's conduct.

Following out that line of thought, and bearing in mind the findings of fact by the learned trial judge, it seems to me that there was an actual sale of the four-fifths of the Ailsa at $2,000, and that, not as evidence of contract but to secure the carrying out thereof, there was a rather crudely framed mortgage, intended only as a security, for the execution of the contract, and thus leaving much to be supplied or fulfilled, by the application of the rule of what was, under the circumstances, reasonable.

It seems to me that if the parties had not fallen out, there would have been either an earlier sale of the property so put up as security, or greater forbearance

in enforcing the claim for the payment. Should the case not have been tried out and treated on some such basis?

I regret to say that such views received little attention at the trial, and some evidence on that, and other points bearing on the possibilities of realization of the security, has not been presented. We are then left to determine the question of whether or not a reasonable time has elapsed or not to carry out what was the evident intention of the parties.

To blame the war for the condition of things during a year preceding it is not very satisfactory.

I am quite clear the bargain was concluded a year before the war broke out and the execution of the document only postponed to enable respondent to complete his final arrangements with others.

The conclusions I have reached are, that there was an actual bargain and sale by which the appellant agreed to pay $2,000 for four-fifths of the yacht; that there was to be given a mortgage to secure such payment; that the time for payment was not specified; and hence must be taken to be within what would be a reasonable time within the contemplation of the parties; that such time was not wholly dependent upon the will of the respondent; that having regard to all the circumstances such reasonable time had elapsed at the time of the institution of this action, and hence the appeal should be allowed and the judgment of the learned trial judge restored with costs herein and of the Court of Appeal.

ANGLIN J.—The issue in this case is whether a mortgage on real estate made by the respondent to the appellant was intended to be given and accepted merely as security for the payment by the respondent of the purchase-price of a four-fifths interest in a yacht

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bought by him from the appellant or was intended to be given and taken in payment and satisfaction of such purchase-price. Upon that issue parol evidence was, in my opinion, admissible. It in nowise contradicts or varies the written instruments which passed between the parties. The outcome rests entirely upon the credit to be attached to the evidence of the parties themselves who are in direct conflict. The learned trial judge had the advantage of seeing and hearing them, and his conclusion was that the evidence of the appellant was entitled to credit while that of the respondent could not be accepted.

So far as the probabilities may be taken into account they would appear to be almost equally balanced. While it is most improbable that the vendor intended to accept a third mortgage on highly speculative real estate as payment, it is at first blush difficult to account for the omission from the mortgage of a covenant for payment if a personal obligation on the part of the purchaser had been assumed. But it must not be forgotten that the mortgage was taken only many months after the sale, when the obligation (if any) to pay the purchase-price had been assumed. On the whole, I incline to think the probabilities rather favour the vendor's contention, because otherwise he would not only have to wait indefinitely for payment, but his prospects of ever receiving anything would depend entirely upon the sale of the mortgaged property for a sum over and above what would be sufficient to satisfy the two prior incumbrances upon it. He would be taking all the risk of the defendant's real estate speculation without any prospect of advantage from it beyond his purchase-price. He might get nothing at all and in no case could he hope for more than his $2,000. The admitted agreement to pay

interest on that amount almost implies an obligation to pay the principal.

But assuming the probabilities to be equally balanced, which, I think, is the view most favourable to the respondent of which the circumstances admit, with respect, it was, in my opinion, to quote Viscount Haldane, "a rash proceeding on the part of the Court of Appeal" to reverse on an issue of pure fact such as that presented, the finding of a trial judge necessarily and expressly made to depend upon the credit to be given to the conflicting evidence of the parties to the transaction whom he saw and heard testify. *Nocton* v. *Ashburton* (1).

The chief difficulty in the case is to determine when the purchase-price became payable, no definite time for payment having been fixed. In my opinion the result of the failure to fix a time for payment was that the money became payable within a reasonable time having regard to all the circumstances. I think the purpose of the parties was to allow the respondent what might be regarded as a reasonable time in which to make a sale of the mortgaged property in order to place himself in funds to meet the appellant's claim. Such a time, in my opinion, expired long before this action was brought and the purchase money was then exigible.

I would, therefore, allow this appeal with costs here and in the Court of Appeal and would restore the judgment of the learned trial judge.

BRODEUR J.—The respondent having paid interest on the mortgage for which he is sued cannot now claim that the mortgage was given in payment of his obligation.

(1) [1914,] A.C. 932, at p. 945.

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This case was principally a question of credibility of the parties. The trial judge having found in favour of the appellant, it seems to me that the Court of Appeal should not have disturbed that finding. The appeal should be allowed with costs.

MIGNAULT J.—In this case I am of the opinion that the appeal should be allowed and the judgment of the learned trial judge restored.

I cannot take the bill of sale, which falsely states that the price of the four-fifths share of the yacht Ailsa II. was paid by the respondent to the appellant, nor the mortgage signed by the respondent as correctly expressing the terms of the agreement of the parties. The learned trial judge has found what this agreement really was, and I would not disturb his finding on this question of fact. It would require stronger evidence than that afforded by these documents to make me believe that the appellant agreed to sell an interest in his yacht on terms that would have given the respondent the right to defer payment until he obtained a satisfactory price for his property in Vancouver, an event which might never occur. The mortgage, like any other mortgage, is an accessory contract and a security for a debt. What this debt was is shewn by the testimony of the appellant, which the learned trial judge accepted in preference to that of the respondent.

I would, therefore, allow the appeal and restore the judgment of the trial court with costs here and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Bowser, Reid, Wallbridge, Douglas & Gibson.*
Solicitor for the respondent: *E. M. N. Woods.*

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*May 19.

DUNCAN GAVIN (PLAINTIFF).....APPELLANT;

AND

THE KETTLE VALLEY RAILWAY CO. (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence—Joint negligence—Proper direction to jury—Practice and procedure—New ground on appeal—Costs against appellant—Statutory right—Question of costs—Duty of the Supreme Court to interfere—"Supreme Court Act" of British Columbia, R.S.B.C. 1911, c. 58, s. 55.

In an action for damages, the jury found negligence on the part both of the defendant's employees and of the plaintiff's wife who was driving his automobile; and also found that, after these employees became aware, or should have become aware, that the automobile was in danger of being injured, they could have prevented such injury by the speedy application of the brakes.

Held, that the jury should also have been required to find whether or not the appellant's wife after she became, or should have become, aware of danger could herself have avoided the accident by the exercise of reasonable care, and therefore the Court of Appeal was justified in ordering a new trial.

Brodeur J. dissenting on the ground that, upon the evidence, the accident was entirely due to the negligence of appellant's wife; but

Held, Idington and Brodeur JJ. dissenting, that, as the "ground of objection" before the Court of Appeal had not been "taken at the trial," the order should have been granted with costs against the then appellant, now respondent, pursuant to section 55 of the "Supreme Court Act" of British Columbia.

Per Davies C.J., Anglin and Mignault JJ.—It is within the jurisdiction and duty of the Supreme Court of Canada to reverse an order as to costs, when a party, having a statutory right to receive his costs of certain proceedings from his opponent, has, on the contrary, been ordered to pay that opponent's costs, especially when the appeal to this court, its merits being arguable, was evidently not brought merely for the purpose of introducing the question of costs.

Judgment of the Court of Appeal, (43 D.L.R. 47; (1918) 3 W.W.R. 385,) affirmed as to merits, but reversed as to costs, Idington and Brodeur JJ. dissenting.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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APPEAL from a judgment of the Court of Appeal for British Columbia (1), rendered on an appeal from a judgment of Macdonald J. at the trial (2), and ordering a new trial.

The action is one for damages to a motor car driven by the wife of the appellant, through a collision between the car and a passenger train of the respondent. The questions put to the jury and the answers were as follows:—

Q.—Was the damage to the plaintiff's automobile caused by the negligence of the defendant? A.—Yes.

Q.—If so, in what did such negligence consist? A.—In delaying the application of brakes.

Q.—Could the driver of the automobile, by the exercise of reasonable care, have avoided the accident? A.—Yes.

Q.—If she might, in what respect was such driver negligent? A.—In not exercising sufficient watchfulness by looking to the right as well as to the left.

Q.—If, after the employees of defendant became aware or ought (if they had exercised reasonable care) to have become aware that the automobile was in danger of being injured, could they have prevented such injury by the exercise of reasonable care? A.—Yes.

Q.—If so, in what manner or by what means could they have prevented the accident? A.—By the speedy application of brakes.

Q.—Amount of damages? A.—$1,485.

After hearing argument the trial judge directed that judgment be entered for the appellant for $1,485 and costs of the action.

From this judgment the present respondent appealed to the Court of Appeal for British Columbia; and one of its grounds of appeal was that the trial judge should have submitted a further question to the jury

as to whether, when the driver of the automobile in question became aware, or ought, if she had exercised reasonable care, to have become aware, that the automobile was in danger of being hit by the train, she could have prevented the injury by the exercise of reasonable care.

Section 55 of the "Supreme Court Act" of British Columbia, R.S.B.C. (1911), c. 58, provides

(1) 43 D.L.R. 47; (1918) 3 W.W.R. 385.

(2) (1918) 1 W.W.R. 251.

that in the event of a new trial being granted by the Court of Appeal upon ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant * * *

The Court of Appeal, in this case, ordered a new trial, but directed the present appellant, then respondent, to pay the costs of the appeal.

Martin Griffin for the appellant.

W. N. Tilley K.C. and *A. J. Thomson* for the respondent.

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

IDINGTON J. (dissenting).—The question raised herein is whether or not the learned trial judge in his charge to the jury so adequately dealt with the problems of law presented by the facts for the consideration of the jury, that there was no necessity for a new trial as directed by the Court of Appeal.

If the finding of contributory negligence on the part of the appellant's agent in charge of the automobile, did not, as there is much reason for holding it did, deprive him of any right to recover, it could only be so by some very special circumstances, by no means self-evident in the case, requiring direction containing an explanation of the relevant law to enable the jury properly to deal with the possibilities of such a case.

If the facts had been such as to permit of the application of the principle acted upon in the *Loach Case* (1), referred to in the judgments below and properly held inapplicable, one might have expected an exposition of the law bearing thereon.

(1) (1916) 1 A.C. 719; 23 D.L.R. 4.

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There was nothing in the charge that would adequately fit such a case; probably because of the want of facts calling therefor.

If, as may possibly be arguable, the facts called for the application of the principle proceeded upon in the case of *Davies* v. *Mann* (1), and many like cases since then, there should have appeared in the charge something more than does appear.

The allusion to the illustration of the running down of the donkey tethered in the street should suffice for the lawyer conversant with the law of negligence, but I doubt if even the most intelligent jury would be enabled from what was said, intelligently to apply the principle in question. Indeed the result strongly suggests they did not.

I suspect it was the absence of the necessary facts in the case that caused the learned judge's terseness of allusion.

It is quite possible that the view suggested by Mr. Justice McPhillips which, strictly adhered to, would have involved a judgment of dismissal of the action, should have been the result in appeal. I pass no opinion thereupon, for as I view the case as presented to us there must be a new trial and the less said the better.

Had there been a cross-appeal claiming a dismissal, I should have felt bound to examine the evidence closely and determine for myself such issue.

The appellant is not, in my opinion, entitled to maintain the judgment so obtained and hence the new trial should be proceeded with.

The appellant's counsel submitted that in such event he was entitled to the costs of appeal because, as he alleged, and the Chief Justice seemed to admit, the

(1) 10 M. & W. 546.

counsel for respondent at the trial did not take the objection to the charge which he should have done.

In answer to my inquiry why he did not call the attention of the Court of Appeal to the non-application of the provision of the statute in that behalf, an explanation was given which leads me, in light thereof and of the fact that an objection was taken to the learned judge's charge which he practically disregarded, to infer there had been a misunderstanding.

There is, in fact, no ground in this case to apply the new rule adopted in British Columbia for penalizing the party who is silent in presence of a misdirection.

The substantial ground of quarrel with the learned judge's charge is that he did not adequately deal with the subject-matter and not that it was absolutely necessary in law to have two or more specific questions submitted than he saw fit to submit.

Though the learned Chief Justice expressed the view that when such supplementary questions were put another should also be put, the court did not adopt or carry out or proceed thereon, but exercised its substantial power to grant a new trial as it properly might by resting upon the view that it was necessary in order that justice might be done.

We have long observed a very salutary rule borrowed from the practice of the court above, never to entertain appeals either for mere errors of practice or procedure or judgments as to costs, unless in some extreme case which, in view of the grounds upon which the majority of the court proceeded, this is not.

The decisions are collected at pages 86 *et seq.* of Cameron's Practice, beginning at foot of said page 86.

It is not a question of jurisdiction but of the need to confine the litigious spirit within proper bounds.

The appeal should be dismissed with costs.

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ANGLIN J.—The jury having found negligence on the part both of the defendants' employees and of the plaintiff's wife, who was driving his automobile, in answer to two further questions (Nos. 5 and 6) found that after the employees of the defendants became aware, or ought to have become aware, that the automobile was in danger of being injured, they could have prevented such injury, in the exercise of reasonable care, by the speedy application of the brakes. On these findings the learned judge entered judgment for the plaintiff.

The Court of Appeal ordered a new trial. Galliher J.A. and Eberts J.A. assigned no reasons for this order. Martin J.A., while at first inclined to the view that the answers of the jury to the 5th and 6th questions could not be supported on the evidence, thought it safer to order a new trial apparently because in his opinion the trial judge should have complied with the request of counsel for the defendants to direct the jury in accordance with the views expressed by the Supreme Court of Nova Scotia in *Morrison* v. *Dominion Iron & Steel Co.* (1). McPhillips J.A., while stating at some length reasons which would appear to warrant a judgment dismissing the action on the ground that the evidence did not sustain the answers to the 5th and 6th questions, and that the accident was ascribable solely to the reckless carelessness of the driver of the automobile, concurred in the order for a new trial on the ground that the jury should have been instructed that it was the duty of the driver of the motor car as well as that of the railway employees to have taken all reasonable care to avoid the collision when the danger of it became, or should have been, apparent, and that questions as to her conduct at that stage of the occurrence similar

(1) 45 N.S.R. 466.

to those with regard to the conduct of the railway employees (Nos. 5 and 6) should have been submitted to the jury. The learned Chief Justice bases his judgment solely on the failure of the learned trial judge to instruct the jury as to

> the duty of the driver of the automobile to take reasonable care to avoid the collision after she became aware of the danger. * * * As the case was left to the jury, though the obligation of the defendants was submitted, that of Mrs. Gavin was ignored. While no objection in this connection was taken by defendant's counsel at the trial yet it was the duty of the learned judge to leave the issues to the jury with proper and complete directions on the law and as to the evidence applicable to such issues: "Supreme Court Act," sec. 55.

The court ordered a new trial and directed that the costs of the appeal be paid by the plaintiff and that those of the former trial should abide the event of the new trial.

On examining the charge of the learned trial judge, I find that while it might, no doubt, have been more definite and explicit on these points, it contains the substance of the law as stated in the *Morrison Case* (1), referred to by Martin J.A., both as to the duties of a traveller on the highway and as to the rights and responsibilities of those in charge of railway trains when approaching highway crossings. An order for a new trial based solely on the ground of non-direction in these particulars, in my opinion, could not be supported. But although the learned trial judge alludes to the duty of a traveller on a highway to be more than ordinarily alert and observant when approaching a railway crossing, and to the allegation of the defence that Mrs. Gavin,

> after she became aware of the danger, was not able, or could not, on account of incompetency, avoid the danger, and thus brought the accident on herself,

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adding,

> There are two phases you have to consider in connection with her conduct that afternoon, *i.e.*, first as to her conduct before she saw the car or was aware of the approach of the car, and as to her conduct afterwards. I think I can hardly be of any further assistance to you on that branch of the case,

when dealing with the 5th and 6th questions, while he discusses the duty of the brakesman to have taken all reasonable means to stop the train when he came, or should have come, to the conclusion that there was danger of collision, he says not a word of the corresponding obligation of the driver of the motor car. As the case was left to the jury the true issue as to "ultimate negligence" under the circumstances in evidence, in my opinion, was not fairly submitted to them. I agree, therefore, that a new trial was properly ordered on that ground.

But the appellant complains, and I think with reason, that he has been ordered to pay the costs of the appeal to the Court of Appeal in contravention of an explicit provision of sec. 55 of the "Supreme Court Act" (R.S.B.C. 1911, ch. 58). That section is as follows:—

> 55. Nothing herein, or in any Act, or in any Rules of Court, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial with a proper and complete direction to the jury upon the law and as to the evidence applicable to such issues: provided also that the said right may be enforced by appeal, as provided by the "Court of Appeal Act," this Act, or Rules of Court, without any exception having been taken at the trial; provided further that in the event of a new trial being granted upon ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant, and the costs of the abortive trial shall be in the discretion of the court.

I have carefully read the objections taken by counsel at the close of the learned judge's charge and I find the statement of the learned Chief Justice, as is usual, fully borne out that

no objection in this connection was taken by defendants' counsel at the trial.

The questions put to the jury had been submitted to counsel before they made their addresses and counsel for the defendants accepted them as satisfactory. The order for a new trial, if not granted by the Court of Appeal on a "ground of objection not taken at the trial," is, in my opinion, maintainable only on such a ground and it follows that under section 55 of the "Supreme Court Act" of British Columbia the appellant (plaintiff) was entitled to the costs of the appeal to the Court of Appeal and was wrongfully deprived of them by that court, either through inadvertence or possibly because the majority of the court (Martin, Galliher and Eberts JJ.A.) were of the opinion that the ground indicated by Mr. Justice Martin, which had been taken by counsel for the defendant in his objections to the learned judge's charge, sufficed to support the order for a new trial.

While this court ordinarily refuses to entertain an appeal which merely involves costs, where, as here, a party entitled by statute to receive his costs of certain proceedings from his opponent has been ordered to pay that opponent's costs, I think it is our duty to interfere. The disposition of the costs in question was in no wise in the discretion of the Court of Appeal. They were erroneously disposed of because of a mistake on a matter of law which affected them. *Archbald* v. *DeLisle* (1); *Delta* v. *Vancouver Railway Co.* (2). If not, this is an extreme case; a statutory right has been ignored and a gross error would appear to have been made. The jurisdiction and duty of this court under such circumstances to reverse an order as to costs, although not interfering with the disposition

(1) 25 Can. S.C.R. 1, at pages 14-15.

(2) Cameron's S.C. Practice 90.

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made of the case itself, has, so far as I am aware, never been disaffirmed. See *Smith* v. *Saint John City Rly. Co.* (1). Moreover, the present appeal was not for costs only. On the merits it was fairly arguable that the answers to the 5th and 6th questions entitled the plaintiff to judgment. This appeal was not brought on colourable grounds merely for the purpose of introducing the question of costs. *Inglis* v. *Mansfield* (2).

While sustaining the order for a new trial, therefore, I would set aside the order as to the costs of the appeal to the Court of Appeal and would substitute for it an order that the appellant's (plaintiff's) costs of that appeal should be paid by the respondents (defendants). The plaintiff was obliged to come to this court for redress and is, therefore, entitled to his costs of this appeal.

BRODEUR J. (dissenting). — This action was brought by the appellant to recover damages for the destruction of his automobile as the result of a collision with a train of the railway company respondent, on Winnipeg Street, in the Town of Penticton.

The action was tried by a jury which found:—

1. That the damage was caused by the negligence of the defendant in delaying the application of the brakes;

2. That the driver of the automobile was also guilty of negligence in not looking properly before attempting to cross the railway track; and

3. That the employees of the railway company could have prevented the injury by a speedy application of brakes after they had become aware that the automobile was in danger of being injured.

(1) 28 Can. S.C.R. 603, at p. 605.

(2) 3 Cl. & F. 362, at p. 371.

The evidence shews that the train which struck the automobile was moving reversely and, as required by sec. 276 of the "Railway Act" there was stationed, on the part of the train which was then foremost, employees to warn persons crossing, or about to cross, the track of the railway.

The speed at which the train was moving was a moderate one and was likely less than the one at which it is authorized to run in the towns.

No negligence on the part of the railway company could be found, or has been found in that respect.

It seems to me that the only cause of the accident was that the driver of the automobile, Mrs. Gavin, did not look properly to see whether there was danger for her in crossing the track. She gives us an excuse that she had been informed that no train was expected from the right and that she had been looking only to her left.

A person approaching a highway crossing a railroad track should look and listen for approaching trains with the care and caution of an ordinarily prudent man. She must make a vigilant use of her senses, and she must look in every direction from which danger may be apprehended, and it would be very imprudent for her to rely then on the information of some person who has nothing to do with the administration of the railway. Some judgments go so far as to state that if the person does not look and listen, the court will draw the inference that his act contributed to the injury and will apply this rule although the railway company failed to give the proper cautionary signals, or was guilty of other acts of negligence concurring to cause the injury. *Damrill* v. *St. Louis & San Francisco Ray Co.* (1). A railway train

(1) 27 Mo. App. Reports 202.

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is not bound to stop or to moderate its speed at every highway crossing. The law imposes upon the company the obligation to make some signals. However, it is an obligation on the company to use ordinary care and prudence to protect the person at a highway crossing after discovery of his presence.

The travellers and employees who were on the platform of the train when they first saw the automobile never suspected that there was danger of the machine running upon the railway track. They all thought it would stop and in fact it would certainly have stopped if the driver had not been so negligent. When the brakesman of the train saw, however, that there was danger, he warned the driver of the automobile and some pedestrians near by did the same thing. The brakesman at the same time signalled the engineer of the train to stop the train. The brakes were applied, but, unfortunately, it was too late.

The evidence, according to my opinion, is very conclusive and discloses the fact that the accident was due entirely to the negligence of the driver of the automobile. The action, in my opinion, should have been dismissed.

The Court of Appeal ordered a new trial on the ground that some additional question should have been submitted to the jury as to whether Mrs. Gavin, after she became aware of the danger, could have prevented the accident by the exercise of reasonable care and also on the ground that the trial judge should have charged, as he was asked to do, that those in charge of the train were entitled to rely upon the driver using due care.

It seems to me that the evidence does not justify a finding of negligence on the part of the company. There is no cross-appeal on the part of the company

and I must, therefore, purely and simply, dismiss the appeal. A new trial will then have to take place.

The appeal should be dismissed with costs.

MIGNAULT J.—The Court of Appeal of British Columbia has ordered a new trial in this case, on the appeal of the present respondent. The latter is apparently satisfied with the judgment and has not cross-appealed to this court. For that reason I will refrain from expressing any opinion as to the liability, on the findings of the jury, of the respondent.

After the verdict, the railway company appealed from the judgment of the learned trial judge condemning it to pay $1,485 to Gavin. Its grounds of appeal were five in number. The two first were grounds for the dismissal of the action. The third ground, referring to the alleged improper admission of evidence, and the fourth, pretending that the trial judge should have submitted a further question to the jury

> as to whether, when the driver of the automobile in question became aware, or ought, if she had exercised reasonable care, to have become aware that the automobile was in danger of being hit by the train, she could have prevented the injury by the exercise of reasonable care.

were grounds for ordering a new trial. The fifth ground,

> all other grounds appearing in the proceedings at the trial.

notwithstanding its generality, was urged, I should think, as a reason for demanding a new trial.

The learned Chief Justice of British Columbia adopted the fourth ground of appeal, and was of the opinion that a new trial should be ordered. Mr. Justice Martin favoured granting a new trial on the ground that a direction should be given to the jury as to the commonsense duty of persons crossing railway tracks and the reasonable anticipation of employees in charge of trains in accordance with the judgment of

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the Supreme Court of Nova Scotia in *Morrison* v. *Dominion Iron & Steel Co.* (1). Mr Justice Galliher and Mr. Justice Eberts gave no reasons, and although Mr. Justice McPhillips' opinion seems to lead to a conclusion favourable to the dismissal of the plaintiff's action, he concurred in ordering a new trial.

I take it that the charge to the jury of the learned trial judge was sufficient, but I am of the opinion that he should have put the question suggested by the fourth ground of appeal of the present respondent. I, therefore, think that a new trial was rightly ordered on that ground only.

But this ground was raised, not at the trial, but on the appeal. This brings me to consider the effect of sec. 55 of the "Supreme Court Act" of British Columbia, R.S.B.C., 1911, ch. 58, which reads as follows:—

55. Nothing herein, or in any Act, or in any Rules of Court, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law and as to the evidence applicable to such issues; provided also that the said right may be enforced by appeal, as provided by the "Court of Appeal Act," this Act, or Rules of Court, without any exception having been taken at the trial; provided further that in the event of a new trial being granted upon ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant, and the costs of the abortive trial shall be in the discretion of the court.

This section directs that in the event of a new trial being granted upon grounds of objection not taken at the trial, the costs of the appeal *shall be paid by the appellant.*

Instead of following this imperative direction the Court of Appeal of British Columbia condemned the respondent on that appeal (the present appellant) to pay the costs of the appeal. I am of the opinion that it could not do so.

(1) 45 N.S.R. 466.

This adjudication of the costs of the appeal was not a matter lying within the discretion of the court below, which was bound to grant the costs of that appeal to the present appellant. The only discretion that the court below had was as to the costs of the abortive trial, and it directed that those costs abide the event of the new trial. But it could not, under the circumstances, condemn the present appellant to pay the costs of and occasioned by the appeal.

Much as I feel reluctant to interfere with a judgment on a question involving costs, I cannot escape doing so here, for the imperative requirement of the statute above referred to has been disregarded. I would, therefore, affirm the judgment appealed from in so far as it orders a new trial, but I would vary it so as to condemn the present respondent to pay the costs of his appeal to the British Columbia Court of Appeal. He should also pay the costs of the appellant here.

Appeal allowed in part with costs.

Solicitors for the appellant: *Martin Griffin & Co.*
Solicitor for the respondent: *N. F. Tunbridge.*

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JOHN FINDLAY (DEFENDANT).....APPELLANT;

AND

SYDNEY P HOWARD (PLAINTIFF)...RESPONDENT.

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

Evidence—Admissibility—Breach of contract—Action in damages—Facts posterior to institution of action.

In an action for damages for loss of future profits arising out of a wrongful breach of partnership contract, events which happened between the date of the commission of the wrong and the time of the trial must be taken into account in estimating the loss for which the plaintiff is entitled to compensation and in determining what actually was the value of the contract to him at the date of the breach. Brodeur J. dissenting.

APPEAL from a judgment of the Court of King's Bench, appeal side (1), Province of Quebec, varying a judgment of the Superior Court, sitting in review, at Montreal (2), and maintaining the plaintiff's action.

The plaintiff sued to recover damages from the defendant for a breach of a five year partnership contract in a real estate business in Montreal, about twenty-one months before it would have terminated by effluxion of time. The plaintiff's claim was for $350,000. The trial judge assessed his damages at $80,000; the Court of Review reduced them to $22,000 and the Court of King's Bench gave judgment for $40,000. The appellant seeks the restoration of the judgment of the Court of Review; and the respondent, by way of cross-appeal, demands the restoration of the judgment of the trial judge.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 27 Que. K.B. 375.

(2) Q.R. 51 S.C. 385.

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An important question of law was in issue: Is the court, in assessing damages for wrongful termination by a partner of a partnership, entitled to consider facts subsequent to the action, or must it ignore them and assess the damages according to conditions existing at the date of the action? The trial judge adopted the second alternative and the Court of Review the first; the Court of King's Bench did not expressly pass upon the question, although appearing to have proceeded on the principle laid down by the Court of Review.

Eug. Lafleur K.C., *Aimé Geoffrion K.C.* and *G. H. Montgomery K.C.* for the appellant.

W. N. Tilley K.C., *J. L. Perron K.C.* and *Cook K.C.* for the respondent.

THE CHIEF JUSTICE.—I agree with the principles stated by Mr. Justice Lamothe (now Chief Justice of the Court of Appeal of Quebec) in delivering his reasons for judgment in this case in the Court of Review (1), as to the proper method of estimating and assessing damages in such a case as the present. I would myself, however, in applying those principles have increased the amount of the damages somewhat, but I will not dissent on that ground alone and I concur n a lowing the appeal with costs and restoring the judgment of the Court of Review.

IDINGTON J.—The appellant had established a real estate business in Montreal. On the 26th May, 1910, there was incorporated a company to carry on said business under the name of "Findlay & Howard." On the 22nd of August, 1910, an agreement was entered into between the parties hereto who were in fact the substantial members of the aid incorporation, wherein it was stated

(1) Q.R. 51 S.C. 385.

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that in reality the said company was formed by the said parties hereto for the sake of enabling them to more conveniently carry on their business, but as between themselves they intend to operate the said company in somewhat the same manner as if they were co-partners carrying on business under the name of "Findlay & Howard" and not merely officers of the company.

This agreement was to have continued in force for five years.

They carried on business under said name accordingly until the 11th of September, 1913, when appellant requested a termination of same.

There ensued a correspondence between them which terminated on the 12th December, 1913, by the forcible ejection of respondent by appellant from the premises wherein the business was carried on.

Immediately thereupon the respondent instituted this action for damages for breach of the said agreement.

Meantime, on the 7th October, 1913, a company was incorporated under the name of "John Findlay, Limited," to carry on the business of dealing in real estate and under cover of that name appellant took possession gradually of the entire business which the parties hereto had carried on as aforesaid and continued thereafter to exclude the respondent from any interference therewith, save and except such rights as conceded to him by a partial settlement of their difficulties.

All the pretensions of appellant in way of justification for his conduct have been decisively rejected and are not now in question. All that is in question herein is the amount of damages which respondent is entitled to.

The last clause of the respondent's declaration which, I think, for reasons I am about to state, seems to have been overlooked, reads as follows:—

41. The plaintiff expressly reserves his right to recover his share and proportion of the assets of Findlay & Howard, Limited, and further expressly reserves his right to take such other proceedings in the premises as may be necessary or advisable for the protection of his interests.

Inasmuch as the business carried on by the parties hereto was carried on in the name of "Findlay & Howard, Limited," and the fruits thereof passed to it, though the subsidiary agreement, on which in a technical sense their action rests, provided for the term of five years' control, and distribution of profits of said corporate business, we should not have to concern ourselves with anything but such loss of profits as the respondent suffered by his exclusion.

Yet I suspect there has, by a confusion of thought, entered into the estimate thereof much that should not have done so.

All the profits made by the carrying on of the business of "Findlay & Howard, Limited," became part of the assets thereof and should not enter into consideration in determining the problem of how much the respondent's share of its profits has been impaired by the wrongful conduct of the appellant.

It is that problem and nothing else that we have to solve.

The remarkable diversity of judicial opinion which this litigation has developed impresses me with the need of emphasizing this proposition which I have laid down for my guide.

It sometimes happens that when partners disagree and one excludes the other, the community in which they live take sides and thus the business is seriously impaired.

The respondent seems to have possessed so much strong common sense that he did not lend himself to anything necessarily productive of such results. He

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relied upon this action properly taken, if he could not have obtained an injunction, to preserve his rights and recover his share of whatever loss of profits the business sustained by his exclusion.

The learned trial judge finds the business though carried on, after the exclusion, under the name of "John Findlay, Limited," was the same business, only the name being changed.

The same staff (substituting one Parker for respondent), the same kind of business and the same prestige, and admittedly the same clientele should, under a continuation of same circumstances, have produced same results in way of profits. But everyone knows the circumstances had changed so remarkably that to estimate the profits on the basis of former years must be illusory.

If the trial had been postponed for nine months and appellant then had been forced to produce his books a nearly absolutely correct assessment of damages could have been arrived at.

The misfortune is that the trial was too early for that and hence necessarily the result had to be determined by evidence which, in any such like case, must be more or less of a speculative character.

Added to this was the view of the law taken by the learned trial judge which has not been shared in by any of the other judges who have had to consider the case. Hence his judgment for $80,000 has been set aside

The Court of Review reduced that to $22,000 upon an entirely different view of the law which has been given expression to by Mr. Justice Lamothe, with whose main point of view I agree.

In the details thereof I cannot say that I entirely agree.

There was before the court an account of the business of "John Findlay, Limited," for the year from the 4th November, 1913, to 30th October, 1914, which was audited by same accountant as had been employed in former years by the parties hereto.

The net profits were shewn thereby to have been $13,353.86 which, if presumed to have continued for the balance of the five years' partnership now in question, would have produced to respondent a great deal less than the Court of Review awarded him.

That court, however, eliminated certain items of expense from that amount and seems to have assumed that the war conditions pending would have resulted in no profit. I am not quite satisfied with the details by which the award thus reached was fixed at $22,000. I think they are open to some criticism yet the substantial result reached is one I should not if in the place of the Court of Appeal have disturbed.

The basis taken was a much more satisfactory one than that taken by the Court of Appeal which took the year ending 30th November, 1913. And apart from other considerations it included many questionable items which should not have entered into a basic computation of the probable profits from current earnings in the following period. Indeed, it seems to me far from furnishing a safe basis for computation.

Had its record been sifted in such a way as to eliminate items in respect of which there could be nothing analogous in the later period now in question and the case threshed out at the trial on some such basis, it might have been made useful, but I hardly think would have justified the result reached by the Court of Appeal.

Again, the Court of Appeal took into consideration the goodwill of the business and in a way that I can find nothing in law or fact to uphold.

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Goodwill is sometimes a valuable asset of an old partnership. That, however, was the asset of the corporate company and hence excluded by the pleading.

If you choose to imagine a valuable asset in a five year term I much doubt its existence.

I quite agree that the possibility of a more satisfactory result in an amicable dissolution might have been reached, but I cannot say that respondent would have reaped much from that factor in this instance even if the partnership had run its full term.

A man might, by misconduct, so wreck a firm as to give rise to such a claim, but here it is something intangible.

The field was just as open for the respondent at the expiration of the term from all that appears as it ever would have been I imagine.

As an outside man, as it were, he never had the same chance of securing a share of the clientele in the end as the inside man who had founded the business as appellant had.

As to the respondent not seeking some other occupation or business this was not a case in which any such rule or principle as relied upon can be properly applied.

If nothing else, his position as outside man had become such that when the stage of decline in business had been reached he would have been, if staying on in that event, almost in the condition of a gentleman of leisure, as his active occupation would have been gone, and he was entitled to reap that reward with other earnings which his energetic efforts in the outside field had helped to make so successful.

I would allow the appeal and restore the judgment of the Court of Review, but I should hesitate to give costs.

The cross-appeal should be dismissed.

ANGLIN J.—The plaintiff Howard sues to recover damages from the defendant Findlay for what the latter now admits to have been an unwarranted breach by him of a five year partnership contract on the 30th November, 1913, about twenty-one months before it would have terminated by effluxion of time. The plaintiff's claim was for $350,000, and he expressly excepted from this action, and reserved his right to recover, his share and proportion of the assets of the partnership, and to take such other proceedings as might be necessary or advisable for the protection of his interests. The trial judge assessed his damages at $80,000; the Court of Review, on an appeal by the defendant, at $22,000; and the Court of Appeal, on appeal by the plaintiff, at $40,000. From the latter assessment the defendant appeals to this court seeking a restoration of the judgment of the Court of Review, from which he had not appealed. By a cross-appeal the plaintiff demands the restoration of the judgment of the trial judge.

Although "Findlay & Howard, Limited," was an incorporated company, by an agreement between the plaintiff and the defendant it was arranged that they should

> operate the said business in somewhat the same manner as if they were co-partners carrying on business under the name of "Findlay & Howard" and not merely as officers of the company.

This action has, therefore, been treated as a claim made by one partner against his co-partner; and I shall so deal with it. Although the defendant's notice of termination of partnership was given on the 11th of September, 1913, to take immediate effect, for convenience the date of breach has been treated as the 30th of November, 1913—the actual date of the closing of the books of the partnership.

While it does not formulate a definite basis for the assessment of the damages, the Court of Appeal

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appears to have proceeded on the principle laid down by the Court of Review and to have differed merely in its application to the facts in evidence. On the other hand, the difference in principle between the Court of Review and the learned trial judge is fundamental.

A *considérant* in the judgment of the trial judge reads in part as follows:—

> Considérant que le juge doit, quand il rend sa sentence, se rapporter à l'état de chose existant, au moment de la demande, et placer les parties, dans la situation où elles se seraient trouvées respectivement, s'il avait pu statuer immédiatement, les plaideurs ne devant pas souffrir des lenteurs de la justice, qui ne leur sont pas imputables, et que de même que des dommages réclamés par suite d'une rupture illégale de contrat, ne sauraient recevoir d'augmentation, par suite de circonstances subséquentes, comme une législation nouvelle, ou de récentes découvertes de la science apportant de nouveaux moyens d'exploitation, de même qu'ils ne sauraient recevoir de diminution, par suite de circonstances subséquentes et d'une nature temporaire, comme le relachement des affaires ou une guerre soudaine, et que si la rupture du contrat que le défendeur a voulu dissoudre, malgré les protestations de son associé, n'a pas été aussi fructueuse qu'il se l'était imaginé, par suite d'évènements qu'il n'a pas su ou n'a pas pu prévoir, il ne saurait en avoir le bénéfice, et que le demandeur a droit aux dommages causés par le défendeur et existant, autant qu'il est possible de les constater, à la date du 11 septembre 1913, jour de la rupture violente par le défendeur du contrat de société.

Very early in the course of the trial the learned judge said:—

> We have to decide the right of the parties at the date of the pleadings, so that what happens subsequently to that we have nothing to do with.

He accordingly assessed the plaintiff's damages on the assumption that but for the defendant's breach the partnership would have endured for nineteen months longer (the learned judge was somewhat in error in this computation of time), and that its profits during that period would have been proportionate to the $104,000 earned by it during the twelve months immediately preceding the breach; and on that footing he valued the plaintiff's loss of his share of the profits of the partnership business at $80,000.

The following passages from the formal judgment of the Court of Review, on the other hand, indicate the basis on which it proceeded:—

Considérant que dans l'estimation des dommages-intérêts réclamés par le demandeur, la cour doit tenir compte du passé de la dite société, des profits qu'elle avait faits jusqu'à la dissolution et des profits qu'elle devait rapporter aux associés, et cela en prenant en considération non seulement les faits qui existaient lors de la dissolution, mais encore les faits survenus depuis la dite dissolution, qu'il était possible d'établir au moment où s'est faite l'enquête;

Considérant qu'il est établi par la preuve que depuis 1911 jusque vers le printemps de 1913, le commerce d'immeubles que faisait la société a été très prospère, mais que depuis cette époque le commerce a subi une dépression graduelle jusqu'à la déclaration de guerre qui a eu lieu au commencement d'août 1914;

* * * * *

Considérant que les tribunaux sont censés connaître l'existence de l'état de guerre et sa continuation;

Mr. Justice (now Chief Justice) Lamothe, in his opinion, thus states the view of the court:—

L'action a été intentée en décembre 1913; et la Cour Supérieure a posé en principe qu'elle ne devait pas prendre connaissance des faits postérieurs à cette date. Ce principe existe; il doit recevoir son application dans toutes les causes où la réclamation est basée purement sur des faits arrivés ayant fixé d'une manière définite la responsabilité des parties. Mais dans les cas où la réclamation est faite pour des dommages futurs, dommages basés sur des faits futurs et probables (savoir sur la continuation présumée d'une certaine série de faits et de circonstances), la cour doit s'éclairer à la lumière des faits survenus subséquement, et, alors, au lieu de simples probabilités, la cour a devant elle des faits certains.

He also points out certain misleading elements included in the statement of earnings for the twelve months' period before the breach relied on by the learned trial judge. The formal judgment discloses the method of calculation by which the court reached its assessment of $22,000. Of this I shall have something further to say when discussing the *quantum* of the damages.

The Court of King's Bench, without disapproving of the basis of assessment in the Court of Review, finds:

Que le cour de première instance lui a accordé un montant trop élevé et que la cour de révision a accordé un montant insuffisant;

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and after alluding to certain alleged oversights in the estimate made by the Court of Review continues:—

Considérant que le montant le plus probable et le plus équitable, devrait être un juste milieu entre le montant accordé par la Cour Supérieure et celui alloué par la cour de révision, ce qui ferait une somme d'à peu-près $50,000; mais que, à tout événement, il est certain, vu la preuve, que le demandeur appelant droit à un chiffre minimum de $40,000;

While claiming by his cross-appeal the restoration of the judgment of the trial court, counsel for the respondent in his factum appears partially to admit the soundness of the basis of assessment adopted by the Court of Review in this passage:—

It is not pretended that the past profits must be taken as a fixed and settled basis for settling the amount of future profits, for naturally all business is subject alike to periods of prosperity and depression and revenue from business in hand must necessarily be considered as subject to the ordinary trade contingencies, but the earnings of the firm in the past, especially if such earnings cover a period of years, are a good criterion of probable earnings in the future and deserve most serious consideration.

Citing the case of *Wakeman* v. *Wheeler & Wilson Manufacturing Co.* (1), he quotes these two sentences from the judgment:—

When the contract is repudiated the compensation of the party complaining of its repudiation should be the value of the contract. * * * His damages are what he lost by being deprived of his chance of profits.

The same principle is enunciated by the Judicial Committee in *Wertheim* v. *Chicoutimi Pulp Co.* (2):—

The general intention of the law in giving damages for breach of contract is that the plaintiff should be placed in the same position he would have been in if the contract had been performed.

An apt illustration of the application of these principles is afforded by the House of Lords in *British Westinghouse Electric & Manufacturing Co.* v. *Underground Electric Railways Co. of London* (3), the head note of which is as follows:—

(1) 101 N.Y. 205.
(2) [1911] A.C. 301, at p. 307.
(3) [1912] A.C. 673.

Held, that the pecuniary advantage which the railway company derived from the superiority of the substituted turbines (*i.e.*, substituted for turbines supplied by the defendant which were deficient in value), was relevant matter for the consideration of the arbitrator in assessing damages.

In Mayne on Damages, 8th ed., at p. 141, the author says:—

> Where the action is to recover damages for some loss arising from the defendant's acts, evidence is admissible to shew that the injury is not so great as would at first appear.

In Arnold on Damages, at p. 23, after referring to the authorities, the learned author says:—

> The conclusion to be arrived at is that where a contract is broken the cause of action at once accrues. The plaintiff may immediately sue for damages, and the measure of damages must be assessed as being the loss or injury sustained at the date of the breach of contract. But for the purpose of estimating the present loss, probable future events must be considered, and if the bringing of the action be delayed, evidence as to actual subsequent consequential damage or subsequent relevant facts in mitigation of damage may be given.

In *Batten* v. *Wedgwood Coal & Iron Co.* (1) where a solicitor acting for a receiver failed to fulfil a duty to have money invested in consols he was held liable for loss of interest which would have been earned by the investment, but he was allowed to set off a gain to the client resulting from a fall in the price of consols between the date that the investment should have been made and the date of hearing. The receiver is only entitled to be recouped what he has actually lost.

In *Laishley* v. *Goold Bicyle Co.* (2), in allowing an appeal from Ferguson J., Garrow J.A., speaking for the Ontario Court of Appeal, thus discusses, at p. 324, the proper basis for the computation of damages analogous to those here claimed:—

> The breach is clear and admitted, and the only reason, apparently, for not permitting the ordinary consequences of adequate damages being adjudged to the plaintiff, is because such damages are, it is said, too vague and conjectural, which is the question to be determined on

(1) 31 Ch.D. 346. (2) 6 Ont. L.R. 319.

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this appeal. Damages are very seldom capable of exact calculation, and yet I think many cases can be found in which damages have been awarded where the basis for a calculation was less certain than in this case. To begin with, there is the undisputed fact of the plaintiff's past earnings from commissions in 1898 and 1899; certainly some evidence of what he would probably have earned in 1900 and, indeed, in my opinion, strong evidence, unless affected by counter evidence on the part of the defendants to shew that these past earnings were abnormal, or that the business had depreciated or come to an end. But we have here not merely the past earnings but the fact that the bicycle business was continued under the new company after the plaintiff's dismissal, during the year 1900, but with, it is said, a diminished market. The manager for the new company puts this depreciation at about 40% of the previous year's demand; and another witness called by the defendants at about 50%. Giving credit to these witnesses, it appears to me that there is proper and even sufficient material for a reasonably correct calculation of the amount of the damages in question to which the plaintiff is entitled, having regard, of course, to what the situation and outlook were at the time of the breach in November, 1899.

The decision of this court in *Cockburn* v. *Trusts & Guarantee Co* (1), proceeds on the same view of the aw as does also our decision in *Wood* v. *Grand Valley Railway Co.* (2).

I have cited the foregoing authorities decided upon English law because many of them are relied on by the parties and because there appears to be a dearth of French authority on the matter under consideration. The principles under which damages are awarded under the law of Quebec in a case such as this are to be found in the following passages from the Civil Code:—

Art. 1065.—Every obligation renders the debtor liable in damages in case of a breach of it on his part * * *

Art. 1073.—The damages due to the creditor are in general the amount of the loss which he has sustained and of the profit of which he has been deprived * * *

Art. 1074.—The debtor is liable for the damages which have been foreseen, or might have been foreseen, at the time of contracting the obligation, when his breach of it is not accompanied by fraud.

(1) 55 Can. S.C.R. 264; 37 D.L.R. 701.

(2) 51 Can. S.C.R. 283; 22 D.L.R. 614.

Art. 1075.—In the case even in which the inexecution of the obligation results from the fraud of the debtor, the damages comprise only that which is an immediate and direct consequence of its inexecution.

Before proceeding to consider the quantum of damages justified by an application of these principles to the facts in evidence, I shall say a word on the merits, merely to indicate how far they influence me in the assessment. The trial judge found that

la société qui a été en existence entre les parties pendant environ trois ans et demi, avec un succès phénoménal, a été dissoute par le defendeur, illégalement, sans raison ni cause, d'une façon brutale, injuste, déloyale et malhonnête, que le défendeur, volontairement et délibérément, a renversé le superbe édifice élevé par l'activité, le zèle, l'industrie et l'habilité des associés, afin d'en faire sortir le demandeur, qui en était le propriétaire conjoint, et en devenir le seul maître et propriétaire, etc.

The Court of Review held

que le demandeur a prouvé l'allégation essentielle de sa demande, à savoir; que le défendeur a mis fin, sans cause légitime, au dit contrat de société, et que le défendeur n'a pas établi ses allégations sur ce point.

The Court of Appeal expressed its view in these terms:—

Considérant que l'intimé a mis fin au contrat de société existant entre lui et l'appelant et cela 21 mois avant l'expiration du terme convenu;

Considérant que la conduite de l'intimé sous ce rapport était arbitraire, injustifiable et inexplicable.

Considérant qu'aucune raison n'a été donnée par l'intimé pour justifier sa conduite, lorsqu'il a prétendu mettre fin à la dite société.

Having declined to hear argument by his counsel on the question how far the defendant's conduct should be deemed morally reprehensible, we should not, in my opinion, treat him as deserving of censure more severe than that pronounced by the judgment of the Court of Review in which he acquiesced.

But however gross the violation of the plaintiff's right, however discreditable the defendant's motives, the damages cannot be other than

compensation for pecuniary loss naturally flowing from the breach.

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No punitive or vindictive consideration may enter into the assessment. Art. 1075 C.C. must be obeyed. In the case of fraudulent breach of contract actual damages sustained, though unforeseen at the date of the contract, must be made good. Where the breach is not accompanied by fraud damage which could not have been foreseen cannot be recovered. Whatever may have been the motive that induced the defendant to break the partnership contract, he took that step freely and deliberately and it must be ascribed to a determination to serve some purpose of his own. In the absence of proof of justification, such a breach should, I think, be regarded as falling within art. 1075 C.C. rather than within art. 1074.

Assuming the conduct of the defendant to merit no more emphatic denunciation than that pronounced by the Court of Review, in regard to such elements of damage as cannot be measured with mathematical exactitude but must be determined on such probabilities as a jury is justified in proceeding upon, he is not entitled to expect that the amount of the plaintiff's compensation shall be weighed in golden scales or to have the sum allowed interfered with on appeal merely because of some trifling error in its computation. On the other hand, he would be entitled to complain of any palpable substantial excess in the award, even were his conduct properly characterized by the vigorous terms employed by the learned trial judge.

Under art. 1075 C.C. the plaintiff would have been entitled to any unforeseen damages which were an immediate and direct consequence of the breach although they would not have arisen but for the happening of some events which could not have been anticipated when the contract was entered into. I have no doubt whatever that events which happened after the breach and would have adversely affected the

profits that the plaintiff would have made had the contract been carried out until the end of the five year term must likewise be taken into account in estimating the loss for which the plaintiff is entitled to compensation and in determining what actually was the value of the contract to him at the date of the breach.

The purpose of awarding damages being to compensate for a loss sustained by the plaintiff, it seems to me, with great respect for those who take the contrary view, to be repugnant to common sense that he should be permitted to recover for loss which facts within the cognizance of the court at the time of the trial shew he did not suffer merely because upon the facts as they stood at the date of the commission of the wrong which subjected the defendant to liability, or even at the time the action was begun, it seemed probable that such loss would be sustained.

If there had not been any clear error in the basis of computation in the judgment of the Court of King's Bench, although it increased the amount of the damages allowed by the Court of Review by $18,000, I should have been loath to disturb it on a mere question of quantum, in a case where it is so obviously impossible to ascertain with anything approaching exactitude the amount of the damage actually sustained. But unfortunately for the plaintiff that court, as appears from the opinion of Mr. Justice Pelletier, made the mistake of taking the $104,000 of earnings (which represented $67,000 of profits proper to be taken into account in the opinion of that learned judge) for the year ending the 3rd of November, 1913, the period immediately preceding the breach, as having been received during the year which followed the breach, *i.e.*, the year ending on November 30th, 1914. Pro-

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ceeding on this erroneous footing the learned appellate judge estimated that the net profits for the latter period, had the plaintiff Howard continued to act as a member of the partnership during it, would have been not the $67,000 actually earned by the defendant, as he understood, but $33 000 more, *i.e.*, $100,000. It was by adding one-hal of this additional amount, $16,500, to the estimated earnings for the twelve months following the breach (November 30, 1913, to November 30, 1914) and a further sum of $9,000 ($750 per month), to cover what would have been Howard's probable share of the earnings for the last year of the partnership term (August, 1914, to August, 1915), for which the Court of Review had allowed nothing, to the $22,000 allowed by that court that Mr. Justice Pelletier reached a sum approximating $60,000 as the amount of the plaintiff's damages which, in order to be "*bien sûr de ne pas commettre d'erreur*," he fixed at $40,000. The learned appellate judge apparently quite overlooked the fact that the allowance for profits in the $22,000 and $16,500 was based on figures carried down to the 30th of November, 1914, and that the $750 a month, if a proper addition, should, therefore, have been for nine months and not for twelve months. Of course a judgment based on such a manifest and fundamental error as that in regard to the year in which the $104,000 was earned cannot be sustained. There is nothing to shew that had it not been for this mistake the Court of King's Bench would have disturbed the assessment of the damages made by the Court of Review.

But it does not follow that the amount allowed as damages by the Court of King's Bench was clearly wrong or that the assessment of the Court of Review ought to be restored. The judgment of the latter court has been set aside and before we can restore it

we must be satisfied that the respondent is not entitled to a larger sum than it awards. We are simply left without the assistance of the opinion either of the trial court or of the Court of King's Bench as to the quantum of the damages, the assessment of the former having been based on an erroneous conception of the law, and that of the latter on a mistaken view of the facts. Under these circumstances we must determine for ourselves, proceeding largely as a jury, what is a fair amount to compensate the plaintiff for the loss of the profits that he would have received had the partnership business been continued until the 22nd of August, 1915, as the contract of the parties contemplated.

Inasmuch as the judgment of the Court of Review is based on a correct appreciation of the law as to the measure of the damages recoverable and has not been appealed from by the defendant, it might at first blush seem to be not unreasonable to limit the inquiry to ascertaining by what sum, if any, the $22,000 which it awards should be increased. On the whole, however, I think this would not be a satisfactory mode of dealing with the case. The basis on which the Court of Review estimated the plaintiff's profits for the eight months from November 30th, 1913, to August 1st, 1914, at $17,800 seems to me, with respect, to be too fanciful. Moreover, there is a patent mistake in its calculation. Estimating the profits of the business from November 30th, 1913, to November 30th, 1914, at $25,663 (as hereinafter indicated), the court in making its calculation took one-half of this amount, $12,800, instead of $8,500 as the plaintiff's share of them for eight months. I, therefore, incline to think it will not be advisable to take as a starting point the $22,000 assessed by it as the plaintiff's damages.

In arriving at what would probably have been the profits for the year from November 30th, 1913, to

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November 30th, 1914, however, the Court of Review, very properly in my opinion, added to the $13,353 profits made by the defendant during that period, as shewn by his statement, several amounts which should not have been deducted from the gross earnings as against the plaintiff, thus bringing the profits actually earned by Findlay in that year for the purpose of its calculation up to $25,633. Having regard to the evidence of the witnesses DeCary, Beausoleil, Browne and Davis that the real estate market was, if anything, better between August, 1913, and August, 1914, than it had been during the preceding twelve months and giving due weight to the testimony of Messrs. Peloquin (50% decline in eight months before the war), Short (falling off began in the summer of 1913), Kirkpatrick, Casgrain, Ogilvy and Avard, in view of the enormous earning capacity of Findlay and Howard during the three years when both partners were co-operating, and especially to the profits of at least $67,000, or $33,500 for each partner, made during the twelve months ending November 30th, 1913, I think there should have been allowed for the diminution of earning capacity due to Howard's absence during the latter twelve months over and above the $4,800 salary paid by Findlay to Parker, who replaced him, an additional sum of about $12,000, making the total probable profits for the year from November 30th, 1913, to November 30th, 1914, had Howard continued in the business, $37,633 instead of the $25,633 estimated by the Court of Review. On that basis the plaintiff's share would have been $18,800.

No doubt the sales branch of the real estate business, formerly its most profitable part, amounted to little or nothing during the first year of the war. But, according to the evidence, collections continued to be good. I incline to think that had the partnership

business of "Findlay & Howard" been conducted during that year, having regard to the volume of its outstanding business, and its very extended connections, by cutting down expenses and "carrying on" on a conservative basis some substantial profits might have been realized. Placing them at one-fifth of the earnings in the preceding period of one year (obviously the approximation of a juryman), the plaintiff's share for eight months would have been $2,500—about $300 a month in lieu of the $750 a month which Mr. Justice Pelletier was disposed to allow.

If the goodwill of the business of "Findlay & Howard" should not be regarded as one of the partnership assets as to which the plaintiff expressly reserved his rights, I am unable to find any appreciable value in it having regard to the character of the business and the events which followed the improper breaking up of the partnership.

I am not disposed to make any deduction on account of the plaintiff's receipts from assets taken over by him—the effect of that has been already allowed for in the reduced profits—or because of his failure to take steps to earn money in some other capacity than as a real estate agent.

Fully realizing that my estimate of the damages is quite as likely to be inaccurate as that of the Court of Review or of the Court of King's Bench, but discharging the functions of a juryman as best I can, I would, therefore, estimate the plaintiff's damages at $18,800 plus $2,500, or, say, $21,300 in all.

It follows that the judgment of the Court of Review for $22,000 should be restored. The appellant should have his costs here and in the Court of Appeal.

BRODEUR J. (dissenting)—Il s'agit dans cette cause de dommages-intérêts réclamés par le demandeur-

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intimé, Howard, contre le défendeur appelant, Findlay, parce que ce dernier aurait illégalement mis fin à la société qui existait entr'eux.

Le 22 août 1910, par acte notarié, les parties se mettaient en société pour tenir une agence d'immeubles à Montréal. La durée de la société était fixée à cinq ans. Les trois premières années ont été des plus prospères et la société a réalisé des profits au montant d'environ $450,000.

Le 11 septembre 1913, l'appelant Findlay mettait fin à la société sans donner de raisons valables. Howard protesta naturellement contre cette dissolution prématurée. Des négociations eurent lieu pour amener une dissolution à l'amiable. On s'entendit sur le partage de l'actif; mais on ne put réussir à déterminer la quotité des dommages que Howard réclamait pour cette dissolution illégale. De là la présente action.

La Cour Supérieure a accordé $80,000 à Howard. La Cour de Revision a réduit les dommages à la somme de $22,000. Howard a alors porté sa cause en Cour d'Appel qui lui a accordé $40,000. Les deux parties appellent de ce dernier jugement. Findlay accepterait cependant le jugement de la Cour de Revision et ne voudrait être condamné qu'à $22,000; Howard voudrait avoir les $80,000 qui lui ont été accordées par la Cour Supérieure. Nous avons alors un appel de la part de Findlay et un contre-appel de la part de Howard.

La Cour Supérieure n'a pas voulu prendre en considération les faits qui ont eu lieu postérieurement à l'institution de l'action mais elle a déclaré.

que le juge doit, quand il rend sa sentence, se rapporter à l'état de choses existant au moment de la demande.

La Cour de Revision a, au contraire, décidé de prendre en considération les faits survenus depuis la

dissolution de la société et qui ont été établis au moment où s'est faite l'enquête. Voilà les deux points de vue différents auxquels ces deux cours se sont placées.

Si nous avions à disposer de cette cause d'après les principes du droit anglais, il y a de nombreuses décisions à l'effet que l'enquête peut porter sur les faits antérieurs aussi bien que postérieurs à l'institution de l'action et aux plaidoiries. *Sowdon* v. *Mills* (1); *British Westinghouse* v. *Underground Electric* (2); *Cockburn* v. *Trusts & Guarantee Co.* (3); Halsbury, vol. 18, No. 522.

Mais cette cause ayant originé dans la province de Québec, elle doit être décidée suivant les principes du droit en force dans cette province; et, par conséquent, à moins que les deux législations ne soient semblables, je ne puis accepter les nombreuses autorités anglaises citées par l'appelant dans son factum.

Il est de principe élémentaire en droit civil que les jugements ont un effet rétroactif et remontent, en général, au jour de la demande et des plaidoiries.

Si les parties veulent faire adjuger sur des faits postérieurs à leurs plaidoiries respectives, ils doivent se pourvoir en conséquence. Ainsi le demandeur peut pendant l'instance former une demande incidente pour demander un droit échu depuis l'assignation (art. 215 C.P.C.). Il en est de même pour le défendeur qui peut faire une demande reconventionnelle pour une réclamation de deniers qu'il peut avoir résultant d'autres causes (art. 217 C.P.C.). Si certains faits sont survenus depuis la contestation, le juge peut permettre de faire valoir, par voie de plaidoyer ou de réponse *puis darrein continuance* ces faits nouveaux (art. 199 C.P.C.).

(1) 30 L.J.Q.B. 175, at pages 176 and 177.
(2) [1912], A.C. 678.
(3) 55 Can. S.C.R. 264; 37 D.L.R. 701.

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Schiller v. *Daoust* (1); *Duhaut* v. *Pacaud* (2); Rapport des codificateurs sur art. 199 C.P.C.—La preuve doit ensuite se faire sur les faits mentionnés dans la demande et la défense et dans les demandes, incidentes ou reconventionnelles ou défenses ou réponses *puis darrein continuance.* (Arts. 286, 334, 339 C.P.C.)

Le jugement qui est ensuite rendu a un caractère déclaratif et a pour objet de constater un droit préexistant.

Il résulte de là, dit Dalloz, Répertoire Pratique, No. 585, vo. Jugement,

que les jugements ont un effet rétroactif et que le droit qu'ils constatent est censé avoir existé *ab initio. C'est au jour de la demande qu'il faut se placer pour apprécier la situation juridique des parties.*

Nous voyons le même principe énoncé dans Garsonnet, par. 1161; Garsonnet & Bru, No. 737; et dans les décisions suivantes; Dalloz, 1868-1-397; Dalloz, 1901-1-621.

Il résulte de cela que les droits des parties dans cette cause doivent être déterminés de la date de l'institution de l'action et non pas suivant les faits et les circonstances qui sont postérieurs. Ainsi la Cour de Revision a réduit les dommages parce que le commerce d'agence d'immeubles, dans lequel les parties étaient engagées, s'est trouvé sérieusement affecté par la guerre.

La guerre a été déclarée en août 1914. L'action avait été instituée en décembre 1913; et, suivant moi, les droits des parties doivent être déterminés et les dommages doivent être évalués de cette dernière date, c'est-à-dire du mois de décembre 1913. Si des événements postérieurs ont influé sur la prospérité ou l'insuccès du commerce des parties, nous n'avons pas à nous en préoccuper.

(1) Q.R. 12 S.C. 185. (2) 17 L.C.R. 178.

Le juge, en évaluant les dommages résultant de l'inexécution d'une obligation, doit prendre en considération les événements passés et les perspectives de l'avenir. Par exemple, dans le cas actuel, il pouvait bien examiner les profits que les associés avaient faits dans le passé, les tendances du commerce à augmenter et à diminuer, et les prévisions ordinaires qui peuvent être faites dans ces circonstances pour l'avenir. Mais il doit se placer à l'époque de l'institution de l'action et voir quels étaient les dommages que les parties pouvaient s'attendre de payer et de recevoir à raison de l'inexécution de l'obligation. Pouvait-on alors prévoir qu'une guerre mondiale éclaterait d'ici à quelques mois? Il n'y en avait aucun indice. Vouloir, maintenant que la guerre a été déclarée, prendre en considération l'effet de la guerre sur les opérations commerciales des parties, c'est violer, suivant moi, un des principes élémentaires du droit civil.

Findlay a jugé à propos, dans l'automne de 1913, de ne pas exécuter son obligation, qui était de maintenir ce contrat de société jusqu'au 22 août 1915. Alors on doit le condamner aux dommages qui pouvaient être prévus et déterminés quand il a poursuivi.

Dans le cas des expropriations où la loi détermine une date à laquelle la valeur d'une bâtisse expropriée devrait être déterminée, si une guerre survient subséquemment qui détruit cette bâtisse, on doit alors déterminer la valeur de cette bâtisse non pas au jour de la sentence arbitrale mais au jour fixé par le statut. *McCarthy* v. *City of Regina* (1); Crisp on Compensation, p. 70.

La Gazette des Tribunaux rapporte une décision de la Cour de Paris qui est à l'effet qu'il faut se placer pour calculer l'étendue du préjudice à une époque

(1) 58 Can. S.C.R. 349; 46 D.L.R. 74.

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voisine du terme fixé pour l'exécution du marché. Il s'agissait dans cette cause de marchandises dont le prix avait été affecté par la guerre. (1917-2-119.)

J'en suis donc venu à la conclusion que la Cour de Revision a fait erreur en prenant en considération l'effet de la guerre sur le commerce des parties.

Maintenant quels sont les dommages auxquels le demandeur Howard a droit?

Par les articles 1073 et suivants du Code Civil, les dommages-intérêts sont le montant de la perte qu'il a faite et du gain dont il a été privé; et si le débiteur n'est pas coupable de dol, il n'est tenu que des dommages qu'on a prévus au moment du contrat; et, dans tous les cas, les dommages-intérêts ne comprennent que ce qui est une suite immédiate et directe de cette inexécution.

Findlay avait un contrat de société qui le liait pour cinq ans. Après un peu plus de trois ans il met fin à ce contrat; et, au lieu de poursuivre pour le faire résilier s'il avait des raisons valables, il se fait justice à lui-même en formant une nouvelle compagnie et en transportant ou faisant transporter à cette nouvelle compagnie toutes les affaires de l'ancienne compagnie Findlay & Howard.

Cette conduite de la part de Findlay le constitue de mauvaise foi; et alors on doit lui appliquer les règles édictées par l'article 1075 C.C. qui punit le débiteur qui se rend coupable de dol. Le dol dont parle cet article ne consiste pas dans ces manœuvres frauduleuses qui ont pour but d'amener quelqu'un à contracter et dont il est question dans l'article 993 C.C., mais c'est le fait par lequel le débiteur frustre le créancier de ses droits. Baudry-Lacantinerie, vol. 11, no. 483. Boileux sous art. 1151 C.N.

Les profits avaient été dans l'année de la dissolution de $104,000. Dans ce chiffre, se trouve le guide le plus sûr que les tribunaux doivent suivre pour déterminer la perte que Howard a subie par la dissolution de la société. On a prétendu que dans l'automne de 1913, c'est-à-dire lors de la dissolution, le commerce d'immeubles avait une tendance vers la baisse. Sur ce point la preuve est contradictoire. Je vois, entre autres témoins, M. Décary qui jouit d'une très grande réputation, qui affirme le contraire. Mais si on prend les profits faits par les associés les années précédentes et ceux faits en 1913, il est évident que le commerce d'immeubles subissait une dépression. Et alors nous devons prendre ce fait en considération.

Il convient de mentionner que de cette somme de $104,000 on doit déduire certains profits que Howard devra recevoir sur la part de l'actif qui lui est échu par le partage. Ces profits ont été estimés par le Cour de Revision à environ $37,000.

En déduisant ces $37,000 des $104,000, nous arrivons à une somme de $67,000 pour l'année, ou $5,500 par mois. Du 30 novembre 1913, date à laquelle cet état a été préparé, jusqu'au 22 août 1915, date où la société se terminait, il y avait encore plus de vingt mois. En multipliant la somme de $5,500 par 20 j'arrive à un profit probable, que la société aurait fait, de la somme de $110,000, soit pour Howard une somme de $55,000. On devait présumer, comme je l'ai dit plus haut, que les profits seraient un peu moindres que cela à cause de la tendance du marché vers la baisse. Je crois donc qu'en accordant $40,000, c'est-à-dire la même somme que celle qui a été accordée par la Cour d'Appel, nous rendrions pleine et entière justice aux parties.

Je serais donc d'opinion de renvoyer l'appel et le contre-appel avec dépens.

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MIGNAULT J.—This case raises some important questions on which notable differences of opinion have existed between the different courts that have dealt with it, although in each court the judgment was unanimous. There is before this court an appeal and a cross-appeal shewing that neither party is satisfied with the judgment rendered by the Court of King's Bench. The main respondent and cross-appellant, Howard, would, however, accept the latter judgment if he cannot get the judgment of the Superior Court restored. On the other hand, the main appellant and cross-respondent, Findlay, is now satisfied to abide by the judgment of the Court of Review, which, moreover, is conclusive against him inasmuch as Howard alone appealed from it. The only question at issue under these circumstances is the amount of damages, the liability of Findlay to pay to Howard at least $22,000, the amount granted by the Court of Review, being conclusively established.

Findlay and Howard had entered into a partnership to carry on a real estate business in Montreal for a term of five years from the 22nd August, 1910, which business they conducted by means of a joint stock company, "Findlay & Howard, Limited." Their profits were phenomenal, especially at first, owing to the real estate boom then prevailing in Montreal and vicinity. The partnership had nearly two years to run when, on the 11th September, 1913, Findlay put an end to it without cause or reason. Howard now claims damages and these must run from a minimum of $22,000, allowed by the Court of Review, to a maxiumum of $80,000 granted by the Superior Court. The Court of King's Bench awarded $40,000.

There is, however, an important question of law on which the Superior Court and the Court of Review took opposite sides, but which was not expressly

passed upon by the Court of King's Bench. Is the court, in assessing damages for Findlay's wrongful termination of this partnership, entitled to consider facts subsequent to the action and shewing what profits the partnership would have earned had there been no dissolution? Or must it ignore all such facts, the most important of which is the European war which paralyzed the real estate business in Montreal, and assess these damages on the basis of conditions as they existed on the 11th September, 1913, date of the breach of contract? The Superior Court adopted the second alternative, the Court of Review the first.

The learned trial judge lays down the rule that damages being, in general, according to art. 1073 C.C.,

le montant de la perte faite par le créancier et du gain dont il a été privé,

the court must, in rendering its decision, go back to the conditions existing at the date of the action, and place the parties in the situation in which they would have been had the judgment been rendered immediately, and that the damages for breach of contract can neither be increased by reason of subsequent circumstances, such as new legislation or recent discoveries of science, nor diminished on account of subsequent facts of a temporary nature, such as a slackening of business or a sudden war.

I would not feel disposed to quarrel with this rule rightly applied to a proper case. But, as I construe Howard's action, he is claiming, not the value of his share in the partnership as it stood at the date of the breach, for he expressly reserves his right to recover his share and proportion of the assets of Findlay & Howard, Limited, but the value of his share of the profits the partnership would have realized had not Findlay's wrongful act brought it to an end. That is to say, Howard demands really future damages, and I cannot

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follow the learned trial judge when he estimates the value of the future profits of the partnership by considering only its past profits, as if they were sure to continue, and closes his eyes to events which had happened since the action, but before the trial, and which shewed that these future profits would in no wise have been comparable to those made before the date of the breach. Where future damages are claimed, future conditions must necessarily be considered, and what better evidence of conditions, which were in the future at the date of the breach, can be made than by shewing, at the date of the trial, what has actually occurred since the breach of contract?

I, therefore, think that in his estimation of the damages granted to Howard, the learned trial judge has adopted an erroneous principle, and consequently his judgment cannot be restored.

The Court of Review, on the contrary, lays down a rule which I fully accept as applied to this case, and which I quote:—

Considérant que dans l'estimation des dommages-intérêts réclamés par le demandeur, la cour doit tenir compte du passé de la dite société, des profits qu'elle avait faits jusqu'à la dissolution et des profits qu'elle devait rapporter aux associés, et cela en prenant en considération non seulement les faits qui existaient lors de la dissolution, mais encore les faits survenus depuis la dite dissolution, qu'il était possible d'établir au moment où s'est faite l'enquête.

The judgment of the Court of King's Bench, I have said, does not expressly pass upon the question to which I have just referred, but holding that both the Superior Court and the Court of Review were in error, the former in granting too much, the latter in allowing too little, it comes to the conclusion that

le montant le plus probable et le plus équitable devrait être un juste milieu entre le montant accordé par la cour supérieure et celui alloué par la cour de revision, ce qui ferait une somme d'à peu près $50,000, mais que, à tout événement, il est certain, vu la preuve, que le demandeur appelant a droit à un chiffre minimum de $40,000.

If I may say so, with deference, this selection of a *juste milieu* between the amounts allowed by the Superior Court and the Court of Review, is rather a too rough and ready way of determining the amount which Howard ought to receive, and I cannot feel that I should adopt it. Moreover, Mr. Justice Pelletier, who alone gave reasons for judgment, seems to take it that the partnership realized $104,000 for the year which followed the breach, whereas these profits were for the year which preceded the breach and had only a couple of months to run when Findlay broke the partnership.

I would, therefore, apply the rule adopted by the Court of Review, and consider the profits made by the partnership during the past up to the date of the breach, and those which it would have made had it continued for its full term, estimating the latter in the light of the circumstances disclosed by the evidence as having happened up to the date of the trial, some of which, like the gradual decline of the real estate boom in Montreal, could have been foreseen in September, 1913, and others, like the European war, were of such a nature that no man not versed in the secrets of diplomacy and of continental politics could have ventured to predict them.

In my view, the question of good or bad faith or of fraud, or what the French text of the Civil Code calls "dol" in articles 1073, 1074 and 1075 C.C., has little application here, for I am willing to grant that Findlay acted in bad faith in breaking his contract, and he is liable for all damages foreseen or not which Howard suffered through the breach, provided that they directly resulted therefrom. If he is liable for the unforeseen but direct consequences of his breach of contract, he should at least, in an action claiming

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future damages, have the benefit of unforeseen circumstances, ascertained at the trial, shewing that these future damages were not incurred, or were incurred in a less degree that seemed probable at the date of the breach. This, moreover, is not a case where I would deem myself justified in granting punitive damages, although the conduct of Findlay was very reprehensible, or anything more than real damages, for Howard, who, I repeat, claims damages for the loss of future profits, should not be placed in a better position by reason of the breach of his contract than he would have found himself had the breach not occurred.

Taking now the past profits of the partnership, they are as follows:—

For the first 18 months.....	$203,318.53
For the year ending on the 30th November, 1912.....	161,216.83
For the year ending on the 30th November, 1913.....	104,121.05

and from the latter sum certain amounts mentioned by the Court of Review should be deducted.

The evidence shews that the boom was at its height up to the close of 1912, that it then began to decline, and that the bubble—because, like so many other land booms, it was only a bubble—was rapidly nearing the bursting point when the war suddenly broke out to the astonishment of the whole world. The war killed it, and thenceforth, the witnesses say, the real estate business was dead.

The decline of the boom is shewn by the figures I have given as it affected Findlay & Howard, Limited. After the breach, Findlay continued the same business in the same premises, with the same subsidiary companies or syndicates formed by the parties, with also the same employees, with the exception of Edward C.

Parker whom he engaged to replace Howard, while the latter did not go in the real estate business fearing, he states, had he competed with Findlay, that he might endanger his security for his claim for damages against Findlay, and yet Findlay's profits, for the year ending on the 30th November, 1914, are shewn by his balance sheet to have been only $13,353.86.

But the Court of Review refused to take the latter figure as being a fair statement of the profits made by Findlay in the year ending on the 30th November, 1914. It deducted from the amounts indicated by Findlay's balance sheet as expenses the following items:—

Salary of Parker who replaced Howard	$4,800.00
Deduction on automobile expenses and depreciation, comparing these expenses to those mentioned during the three years and half of Findlay & Howard	2,000.00
Expenses of stationery which seemed unjustifiable when comparing 1914 with previous years	1,000.00
Travelling expenses which were, in comparison with previous years, considered too high	4,500.00
Making in all	$12,300.00
Which added to the profits declared by Findlay's first balance sheet	13,353.86
would give a real profit of	$25,653.86

Then the Court of Review compared the eight months of pre-war conditions in Findlay's first year, considering the business as having been dead during the four months of war, to the corresponding period in Findlay & Howard's last year, and found that Howard received for the latter

period about	$22,300.00
and that he would have been paid for the former period about	12,800.00
Making a total of	$35,100.00

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This would be, if Howard's share of profits were averaged, as the Court of Review averaged them, an amount of $17,550 for each period, so the court fixed Howard's share of profits for the year ending on the 30th November, 1914, had the partnership continued, at $17,500.

To this figure it added the sum of $4,500, which is estimated as Howard's share of the additional profits which he would have brought to the partnership had he not been excluded therefrom, and thus arrived at the total figure of $22,000 which it considered as representing Howard's loss of future profits through the breach of the contract of partnership.

I must confess that, in my opinion, the Court of Review dealt liberally with Howard. Its figures would shew that, the business having been at a standstill since the 1st of August, 1914, on account of the war, Howard would have received, for the year 1914, one-half of $25,633.86, or $12,816.93, and not its average of $17,500, which would decrease the damages it allowed by nearly $5,000. I fail to see the reason for averaging two years during which the land boom gradually and very rapidly declined, but Findlay is bound by the judgment of the Court of Review, and the amount this judgment granted to Howard cannot be decreased.

I have said that the judgment of the Superior Court cannot be restored, so the choice is between the judgment of the Court of Review and that of the Court of King's Bench.

I cannot, with deference, agree with the latter court when it endeavours to arrive at a *juste milieu* between the judgment of the Superior Court, which proceeded on an entirely wrong principle, and that of the Court of Review whose governing rule as to these

future damages I fully accept. And I fail upon due consideration to find any satisfactory reason for the figure of $40,000, allowed by the Court of King's Bench, which it merely says the evidence fully justifies. Had it referred more in detail to this evidence, which after all, is the evidence furnished by the balance sheets, I would have felt more hesitation in rejecting its estimate of Howard's loss, but, with all respect, I must say that Mr. Justice Pelletier seems to me to have been in obvious error when he stated that the Court of Review adopted as its basis $104,000 for the year following the breach of contract, and made thereto certain additions and therefrom certain subtractions, which reduced this figure of $104,000 to $67,000. Then the learned judge adopts $67,000 as the basis of his own calculation of Howard's loss of profits. The error here is that the Court of Review, with reference to the $104,000, reduced to $67,000, was dealing with the year preceding the breach for which Howard received his share of profits, and not with the year following it, and that Mr. Justice Pelletier used the figure of $67,000 as the foundation for his calculation of the profits which would have accrued during the year following the breach.

The judgment of the Court of King's Bench also criticises the judgment of the Court of Review because the latter judgment allowed nothing for the goodwill of the partnership. This is a matter of some difficulty, because by the supplementary agreement of the parties, dated the 9th January, 1913, the goodwill of "Findlay & Howard, Limited," was valued at $12,500 in the case of one of the partners dying during the partnership, and the survivor purchasing the concern. But the goodwill of "Findlay & Howard" formed a part of its assets and Howard's right to claim his share of these assets was

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reserved by him, so I cannot look upon it as properly included in his action. It is true that Howard alleges that he has been deprived of all his right and interest in the future profits and goodwill of the partnership, which goodwill, he says, has been utterly destroyed by Findlay's wrongful acts. I am not satisfied, however, that after the beginning of the war this goodwill had any value. Moreover, the goodwill mainly consists in the name and Findlay did not use the name of "Findlay & Howard, Limited," and he agreed to give Howard the first offer of the leases of the business premises. Under these circumstances I do not feel justified in adding anything to the amount allowed by the Court of Review.

My opinion in this very difficult case is, therefore, that the appeal of Findlay should be allowed and the cross-appeal of Howard dismissed, with costs in favour of Findlay here and in the Court of King's Bench, and that the judgment of the Court of Review should be restored.

Appeal allowed with costs; Cross-appeal dismissed with costs.

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

Solicitors for the respondent: *Cook, Duff, Magee & Merrill.*

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*Feb. 19, 20.
*May 6.

ROBERT SHEPARD AND THE MERCHANTS BANK OF CANADA (PLAINTIFFS) ..... APPELLANTS;

AND

THE BRITISH DOMINIONS GENERAL INSURANCE CO. OF LONDON, ENGLAND (DEFENDANT) ..... RESPONDENT.

ROBERT SHEPARD AND THE MERCHANTS BANK OF CANADA (PLAINTIFFS) ..... APPELLANTS;

AND

GLENS FALLS INSURANCE CO., OF GLENS FALLS, NEW YORK (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Insurance—Fire—Policy—Conditions—Notice of loss—Proofs of loss—Irregularity—Relief—Specified delay to begin action—Action premature—"The Fire Insurance Policy Act," R.S. Sask., 1909, c. 80, s. 2—"The Saskatchewan Insurance Act," Sask. S., 1915, c. 15 s. 86.

Insurance policies against fire were issued by the companies respondent on buildings owned by the appellant Shepard with loss, if any, payable to the appellant bank, assignee of a mortgage on the property. The buildings were subsequently destroyed by a fire occurring on the 1st or 2nd April, 1915, of which the agent of the bank informed the companies respondent. In the course of their investigation they suspected some incendiary origin and declined payment for a considerable period. The proofs of loss were furnished on the 29th February, 1916. The statutory condition No. 13 required that the assured should "forthwith" give notice in writing to the companies, and, "as soon afterwards as practicable," deliver a detailed account of the loss accompanied by a

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin and Mignault JJ. and Cassels J. *ad hoc.*

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statutory declaration as to the truth of his statements. According to another condition, no action could be brought after the expiration of one year from the date of the loss. The statutory condition No. 17 also provided that "the loss shall not be payable until thirty days" in the case of one policy and sixty days in the case of the other policy "after completion of the proofs of loss." The present actions were commenced on the 22nd March, 1916, before the lapse of the required period, in order that they might be instituted within one year from the date of the fire.

Held, that this court should not interfere with the discretion exercised by the trial judge in deciding that the non-performance of condition No. 13 had been due to mistake and that relief should be granted to the assured under sec. 2 of "The Fire Insurance Policy Act."

Per Idington J.—As the notice was not given "forthwith after loss" and the proofs were not delivered as soon afterwards "as practicable," they cannot be regarded as made in compliance with the terms of the policy and, therefore, cannot be used to fix the time when the actions should be brought.

Per Anglin and Cassels JJ.—The proofs of loss became of value and were "completed" only when the trial court exercised its statutory power to give relief; and the effect of granting it was to put the assured in the same position for all purposes as if the proofs had been furnished as required by the statutory condition No. 13. Accordingly, the respective periods, prescribed by statutory condition No. 17, should be deemed to have elapsed and the loss under each of the policies to have been payable before the action upon it was begun.

Per Mignault J. (dissenting).—Sec. 2 of "The Fire Insurance Policy Act" did not give power to the courts to relieve against the requirements of statutory condition No. 17.

Judgment of the Court of Appeal (11 Sask. L.R. 259; 42 D.L.R. 746), reversed, Davies C.J. and Mignault J. dissenting.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of the trial court, Newlands J. (2), and dismissing the plaintiff's actions with costs. The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported

J. A. Allan K.C for the appellant.

Travers Sweatman for the respondent.

(1) 11 Sask. L.R. 259; 42 D.L.R. 746; (1918) 2 W.W.R. 985.

(2) 10 Sask. L.R. 421; (1918) 1 W.W.R. 85.

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THE CHIEF JUSTICE (dissenting).—Concurring as I do with the judgment of the Court of Appeal of Saskatchewan and with the reasons for that judgment stated by Mr. Justice Elwood J.A., concurred in by Chief Justice Haultain, I would dismiss these appeals with costs.

IDINGTON J.—These cases were argued together. The actions were brought to recover insurance moneys respectively due on policies assuring against fire and issued by the respondents respectively in September and October, 1912, to the appellant Shepard, providing in each case for the loss, if any, being payable to the appellant bank.

The only questions raised must turn upon the power of the court before which the actions were tried when applied to the relevant facts in evidence, under and pursuant to sec. 2 of "The Fire Insurance Policy Act" of Saskatchewan (R.S. Sask. ch. 80), which reads as follows:—

> Where by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in Saskatchewan as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with or were, after a statement or proof of loss has been given in good faith by, or on behalf of, the assured in pursuance of any proviso or condition of such contract the company, through its agents or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions, or does not, within a reasonable time after receiving such statement or proof notify the assured in writing that such statement or proof is objected to and what are the particulars in which the same is alleged to be defective and so from time to time or where for any other reason the court or judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proof or amended supplemental statement or proof as the case may be shall in any such cases be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into; but this section shall not apply where the fire has taken place before the first day of January, 1904.

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The fire in question destroyed, on the first or second of April, 1915, the entire properties insured. The agent of said bank, on or about the fifth of said April, informed the local firm of insurance agents of the said insurance companies, of the said loss, and asked them if there was anything further to be done by him in regard thereto, and was told not.

The insurance agents at once communicated by wire and letter with their respective principals (now respondents herein) informing them of the loss.

That resulted in the said companies intrusting jointly the investigation and adjustment of the loss to Patterson & Waugh, a firm of professional adjusters in Winnipeg, with local agents in Saskatchewan and Alberta.

That firm and the companies turned the matter of investigation and adjustment over to one O'Fallen, a local agent of said firm at Saskatoon, who went on or about the 8th of April to Margo, where the fire occurred and Shepard lived, and spent a day there engaged in the necessary work of investigation.

On that occasion Shepard met him and answered all his inquiries and gave him all the information he could.

In the course of doing so there were some things said by Shepard which led to a suspicion of some incendiary origin being the cause of the fire. This led in turn to the matter of the origin of the fire being reported to the Superintendent of Insurance for the Province of Saskatchewan, who took some part in making inquiries. Another officer, called a fire commissioner, also took part.

O'Fallen, on his visit to Shepard and the scene of the fire at Margo, took from him, in order that such investigation as his firm might desire might "be as

full and complete as possible" a document agreeing that everything done or demand made theretofore or thereafter should not be claimed as a waiver on the part of the insurance companies of any of the terms or conditions of their policies.

This only, to my mind, concerns us now as an indication of the thorough nature of the investigation to be made and which, if so made, would reduce the need for the usual formal notice of loss and proof thereof to something utterly superfluous.

Yet it is alleged by respondents that because of the assured's non-compliance with the literal terms of the condition requiring same, his right and those of his co-appellant have been destroyed.

Hence the questions raised as to the power of the court to give the relief provided by the section above quoted. To estimate properly the weight to be attached to this condition under the foregoing circumstances and many others which appear in evidence, let us consider it as gravely as we can.

Condition No. 12 says:—

Proof of loss must be made by the assured, although the loss be payable to a third party.

Condition No. 13, so far as involved herein, is as follows:—

13. Any person entitled to make a claim under this policy is to observe the following directions:—

(a) He is, forthwith, after loss, to give notice in writing to the company.

(b) He is to deliver, as soon afterwards as practicable, as particular an account of the loss as the nature of the case permits.

(c) He is also to furnish therewith a statutory declaration, declaring:—

1. That the said account is just and true.

2. When and how the fire originated, so far as the declarant knows or believes;

3. That the fire was not caused by his wilful act or neglect, procurement, means or contrivance;

4. The amount of other insurance;

5. All liens and incumbrances on the subject of insurance.

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6. The place where the property insured, if movable, was deposited at the time of the fire.

Unless for approximately fixing a date and fact, or as a trap, the importance of the notice being in writing is not of any great value, when assuredly there was not only from the bank but from Shepard also oral notice. And the document O'Fallen got him to sign contained all the notice required by the said requirement in subsection (a) of the condition need contain.

Indeed I submit that in face of such document the plea of want of notice (a) seems unfounded if not improper.

As to the requirement in (b), there is not the slightest pretence that the oral statement given by Shepard was incorrect or wanting in particularity and doubtless was noted in writing by O'Fallen.

Such pleas under such circumstances formerly were so common that legislation was found necessary to deal with them.

The requirement by sub-section (c) of a statutory declaration is a more reasonable requirement and its absence under some circumstances might become a very important omission.

Its absence in this particular case is reduced in importance almost to nothing; for the respondents were by means of legal assistance placed by law at their disposal enabled to make their investigation thorough, indeed, much more thorough than any declarations such as required by above conditions.

Not a word is adduced in evidence to indicate that the oral account given as stated failed to supply what items Nos. 1, 2 and 3 require, or were untrue.

The evidence does not shew that there was no other insurance and the information was given by the appellant bank as to that and other liens and encum-

brances on the subject of the insurance in answer to inquiries of respondents' agents.

More than that, the respondents on the trial produced through their cross-examination of appellants' witnesses, very much illuminating correspondence which, taken with that adduced by the appellants, leaves a rather unpleasant impression as to the conduct of respondents or their representatives in relation to the very probable reason for appellant's non-compliance with the condition I am dealing with.

I do not intend to elaborate or write at length upon all that which a perusal of the entire evidence suggests.

It is clear, however, that in fact the bank was the party most deeply interested in the loss and the party most urgent and insistent upon the inquiry coming to a decision or close and evidently was lulled into acquiescence of delay by such representation as reported in the letter from its manager at Saskatoon, to him managing at the agency in Edmonton as follows:—

> They ask for a full settlement of the bank's claim, but it will not be necessary to make the customary affidavit.

The appellant Shepard had enlisted, in July following the fire, to go to the front. Supposing he had reached there shortly after so enlisting, then been killed or taken prisoner, and the respondents' construction of the law being upheld that the bank could not make proof, could any court be got to hold that it could not give relief under said section? I hope not.

Yet wherein does this contention set up differ? It is idle to answer this as counsel did that his agent could make it. No agent in all likelihood ever would have been left to look after what in fact had got to be looked on as the bank's own business.

It is clear to my mind that under the circumstances in evidence in this case the failure to put in the

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necessary proof in conformity with the condition was one of those mistakes from the consequences whereof, whatever they may be, the statute enabled relief to be given.

And as to the pretension that the giving such proofs in February changes the issue to one of not bringing either action within given delays, I agree with Mr. Justice Newlands' view that as the giving such proofs at that time availed nothing, it must be treated as if non-existent.

I am of the opinion that the power given by the statute covers a defective proof of any kind even if oral or written, and that there is no room for the contention of the respondents' counsel herein and I need not perhaps examine the statute microscopically.

I may observe that, in looking at the authorities cited in respondents' factum, I find *Anderson* v. *Saugeen Mutual Fire Ins. Co. of Mount Forest* (1), contains, to my mind, a decision by the late Chancellor followed by an able judgment of the late Mr. Justice Ferguson, which, in principle, maintains when analyzed the conclusion I have reached so far as the bank is concerned, only by another road.

There the condition No. 12 was held as it reads that the assured, being the mortgagor, must make the proof; and hence the usual clause giving the mortgagee entitled to the insurance the right to recover, though the mortgagor had lost his remedy, by reason of sixty days not elapsing from the time when prescribed before expiration of the year.

There the learned judges acted upon the said clause. Here, though the clause does not exist, the learned trial judge was right in acting by virtue of the statute in an analogous situation.

(1) 18 O. R. 355.

If the Glens Falls Company respondent instead of denying everything and pleading as it did, had admitted fully the validity of the declaration in February, 1916, as a fulfilment of the conditions 12 and 13, it might have presented an arguable objection based on the condition respecting limit of time to bring an action. That limit means from a valid delivery of proof, which in the case in question never took place and had to be substituted by the relief which the learned trial judge gave.

In view of the failure to present a tittle of evidence relative to the charge of arson set up in the pleading, it is to be hoped the law, as claimed to be expressed in the *Juridini* v. *National British and Irish Millers Ins. Co.* (1), is, as argued, applicable to such a case, but I have not had time to form an opinion founded thereon which, in my view herein, is unnecessary.

I think the appeal should be allowed with costs throughout and the judgment of the learned trial judge be restored. But there should be no costs allowed for printing an appeal case that so grossly offends the rules of this court as it does.

ANGLIN J.—The facts of these cases sufficiently appear in the judgments of the Court of Appeal for Saskatchewan (2).

By sec. 2 of "The Fire Insurance Policy Act" (R.S. Sask. ch. 80), the court is under certain circumstances enabled to decline to give effect to a defence based on an "objection to the sufficiency of (the) statement of proof" of loss required by statutory condition No. 13. In the present case proofs of loss were furnished on the 29th of February, 1916, the loss

(1) [1915] A.C. 499.

(2) 11 Sask. L.R. 259; 42 D.L.R. 746.

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having occurred on the night of the 1st-2nd of April, 1915. The only defence which, in my opinion, need be seriously considered on this appeal is based on the 17th statutory condition providing that "the loss shall not be payable until 60 (in the case of the Glens Falls policy, 30) days after completion of the proofs of loss * * *"

These actions were begun on the 22nd of March, 1916. Under statutory condition No. 22, the last day for commencing them would have been the first or the second of April, 1916.

The learned trial judge (1) took the view that upon the facts in evidence the insured was entitled to be excused from strict compliance with condition 13 under the powers conferred by sec. 2 of the statute, and granted relief accordingly. The sufficiency of the case made to justify this course was not questioned by the Court of Appeal. The existence of the power itself is undoubted (*Bell* v. *Hudson Bay Ins. Co.* (2); *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (3)), and after carefully considering all the facts in evidence I am satisfied that the discretion exercised by the trial judge should not be interfered with.

But the majority of the appellate judges (Haultain C.J. and Elwood J.), in this reversing the learned trial judge, held that the power conferred by section 2 does not extend to relieving the insured from a disability created by the 17th statutory condition; and when the case is one of disability arising solely out of that condition I entirely concur in their view.

With great respect, however, I am of the opinion that there has been a misconception of the true nature of the defences in these actions based on condition No. 17.

(1) 10 Sask. L.R. 421. (2) 44 Can. S.C.R. 419.
(3) 44 Can. S.C.R. 40.

They are that the actions were prematurely brought because the period after the completion of proofs of loss which, under that condition, must elapse before action, had not in either case expired. Otherwise stated, the pleas are that the proofs of loss had been completed too late to permit of the actions being begun when they were. They, therefore, rest upon an "objection to the sufficiency of the statement of proof." The assumption of these pleas is that the proofs were completed when delivered to the companies on or about the 29th February. In the case of the British Dominions' policy, if the view taken by the Appellate Court is correct, the necessary result would be a forfeiture of the policy by reason of imperfect compliance with condition 13, since action could not have been brought more than 60 days after the 29th of February and yet within one year from the date of the loss as required by condition No. 22. In the case of the Glens Falls policy, however, if the delivery of the proofs on the 29th of February was a good delivery in compliance with that condition, action might have been brought on it after the lapse of the 30 days prescribed by condition 17 and yet before the expiry of the limitation of one year imposed by condition 22.

But the delivery of proofs on the 29th of February was not a compliance with the requirement of the 13th statutory condition prescribing that proofs of loss shall be made "as soon as practicable," and the companies declined to accept these proofs as sufficient for that reason. That is one of the defences in each of the records in these actions. The proofs of loss became of value and were "completed" only when the court exercised its statutory power to relieve against the failure to comply strictly with the 13th condition. That necessarily took place after the actions were

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brought. The effect of granting relief under sec. 2 of the "Insurance Act" was, in my opinion, to put the insured in the same position for all purposes as if proofs of loss had been furnished, as was required by the 13th statutory condition, "as soon as practicable afterwards," *i.e.*, after the giving of the notice in writing directed to be given "forthwith after loss," with the result that, treating the proofs as having been completed, *nunc pro tunc*, "as soon as practicable" after the loss, the respective periods prescribed by the 17th condition should be deemed to have elapsed and the loss under each of the policies to have been payable before the action upon it was begun. To hold otherwise would be to enable defendants to take advantage of their own wrong-doing since it was their misleading conduct that produced the situation which rendered it inequitable that they should be allowed to insist on anything resulting from the plaintiffs' non-compliance with the 13th statutory condition as a defence.

MIGNAULT J. (dissenting):—The same questions arise in both these cases, the point mainly argued being whether the actions of the appellants could be maintained in view of conditions 13 and 17 of the insurance policies, being statutory conditions of the Province of Saskatchewan.

These conditions read as follows:—

13. Any person entitled to make a claim under this policy is to observe the following directions:—

(a) He is, forthwith after loss, to give notice in writing to the company.

(b) He is to deliver, as soon afterwards as practicable as particular an account of the loss as the nature of the case permits.

(c) He is also to furnish therewith a statutory declaration declaring:—

1. That the said account is just and true.

2. When and how the fire originated, so far as the declarant knows or believes;

3. That the fire was not caused through his wilful act or neglect, procurement, means or contrivance;

4. The amount of other insurance;

5. All liens and incumbrances on the subject of insurance.

6. The place where the property insured, if movable, was deposited at the time of the fire.

(d) He is, in support of his claim, if required and if practicable, to procure books of account, and furnish invoices and other vouchers, to furnish copies of the written portion of all policies, and to exhibit for examination all the remains of the property which was covered by the policy.

(e) He is to produce, if required, a certificate under the hand of a justice of the peace, notary public, or commissioner for oaths, residing in the vicinity in which the fire happened, and not concerned in the loss, or related to the assured or sufferers, stating that he has examined the circumstances attending the fire, loss or damage alleged, that he is acquainted with the character and circumstances of the assured or claimant and that he verily believes that the assured has by misfortune and without fraud or evil practice sustained loss and damage on the subject assured to the amount certified.

17. The loss shall not be payable until sixty days (in the case of Glens Falls Co., this delay is 30 days, in that of the British Dominions Co. it is, as above indicated, sixty days) after the completion of the proof of loss, unless otherwise provided for by the contract of insurance.

Section 2 of "The Fire Insurance Policy Act," ch. 80, Revised Statutes of Saskatchewan, 1909, which has since been re-enacted as sec. 86 of "The Saskatchewan Insurance Act, 1915," is in the following terms:—

2. Where by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in Saskatchewan as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with or where after a statement or proof of loss has been given in good faith by or on behalf of the assured in pursuance of any proviso or condition of such contract the company through its agents or otherwise objects to the loss upon other grounds than for imperfect compliance with such conditions or does not within a reasonable time after receiving such statement or proof notify the assured in writing that such statement or proof is objected to and what are the particulars in which the same is alleged to be defective and so from time to time or where for any other reason the court or judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions no objection to the sufficiency of such statement or proof or amended or supplemental statement or proof, as the case may be, shall in any of such cases be allowed as a discharge of the

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liability of the company on such contract of insurance wherever entered into; but this section shall not apply where the fire has taken place before the first day of January, 1904.

The fire in question occurred on the 1st of April, 1915, and the proofs of loss, although dated the 29th February, 1916, were furnished, Mr. Allan stated, on the 1st of March, 1916. The actions were taken on the 22nd of March. Among other contentions made at the argument, the respondents claimed that condition 13 was not complied with; that even granting that the trial court could, under sec. 86 of "The Saskatchewan Insurance Act," treat the filing of the proofs of loss on the 1st March as a sufficient compliance with condition 13, the appellants were required by condition 17 to allow a delay of 30 days, in the case of the Glens Falls Company, and of 60 days, in the case of the British Dominions Company, to elapse before taking their action, and further that inasmuch as any action would be absolutely barred, under condition 22, on the 1st April, 1916, no action was possible on the 22nd March against the British Dominions Co., although the appellants, by waiting until the 31st March—and thus giving a full delay of 30 days for the the completion of the proofs of loss—might have taken an action against the Glens Falls Company, assuming that they could be relieved from non-compliance with condition 13.

The learned trial judge, Mr. Justice Newlands, relieved the appellants from the consequences of non-compliance with condition 13 in the following terms:—

I also find that the notice of loss and proofs of loss were not given according to the terms of the policy.

As plaintiffs have asked to be relieved under sec. 2 of the "Fire Insurance Policy Act," and as I am of the opinion that it was through mistake that the plaintiffs did not perform these conditions, I will relieve them from the consequences thereof.

Then as to the defence of the respondents that the actions were premature under condition 17, he said:—

This action was brought on the 22nd of March, less than thirty days after such formal notice and proofs were given. These were not given forthwith nor as soon afterwards as practicable, and were, therefore, not a compliance with the terms of the policy and as I cannot accept them as such, they cannot be used to fix the time when the action should be brought.

This judgment was set aside by the Court of Appeal, Mr. Justice Lamont dissenting.

I have carefully read all the correspondence filed by the parties, and I cannot help thinking that the appellants have only themselves to blame if they filed the proofs of loss at as late a date as the 1st March, 1916. Shepard was in the premises at the time of the fire, as he stated in his statutory declaration of the 29th of February, 1916, yet he took no steps whatever to claim the insurance, probably because no moneys thereunder would go to him. He subsequently enlisted in the Canadian Expeditionary Forces, but the other appellant, the Merchants Bank, located him with apparent ease at Regina when it became concerned about the furnishing of the proofs of loss. It is a matter of surprise that this concern only came to the bank about February 12th when its solicitors addressed a letter to Shepard at Margo, where he no longer was, inquiring whether he had sent in proofs of loss. The whole matter was in the hands of the bank's solicitors as early as October, 1915, and it must have been perfectly obvious to them that it would be necessary to take legal proceedings to recover the amount of insurance.

However, the learned trial judge, under the authority conferred by sec. 86 of "The Saskatchewan Insurance Act," relieved the appellants from the consequence of their failure to furnish notice and proofs of loss according to the terms of the policy. I am not inclined to interfere with the discretion of the learned judge. But I cannot see how this can deprive the respondents

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of the benefit of the delay for payment which must, under condition 17, run from the completion of the proofs of loss. The learned trial judge has not ordered —if indeed he could do so—that the proofs of loss furnished on March 1st be taken as having been given *nunc pro tunc*, but he says that these proofs were not given forthwith "nor as soon afterwards as practicable," and were not, therefore, a compliance with the terms of the policy, and as he could not accept them as such, they could be used to fix the time when the action should be brought. With all deference, I cannot concur in this reasoning, which would mean that when the assured has given notice and furnished proofs of loss several months after a fire, he could take his action the very next day, provided the judge was satisfied that, by reason of necessity, accident or mistake, the condition of the contract as to the proof to be given to the insurer after the occurrence of the event insured against has not been strictly complied with. Indeed, the reasoning of the learned trial judge would lead to the consequence that the assured would be in a better, and the insurer in a worse, position when the proofs of loss have, as in the present case, been furnished several months after the fire, provided the assured can obtain the indulgence of the court as to the strict compliance with condition 13. I can find no authority in section 86 to dispense with the requirements of any condition of the contract, save that obliging the assured to give notice and proofs of loss to the insurer. It certainly does not allow me to disregard a condition granting a delay to the insurer to pay the loss insured against after proofs and particulars of loss have been furnished him by the assured. Even in this case the appellants could have given the Glens Falls Co. a delay of thirty days to pay the insurance without allowing a full year

to elapse before taking their action, while, with regard to the British Dominions Company, they furnished proofs of loss at a date when it was impossible to allow the company a delay of sixty days and take their action within the year. I cannot, upon due consideration, think that I can come to their assistance under section 86, and it is, therefore, my duty to give effect to condition 17 which has not been complied with.

I have carefully considered two previous decisions of this court in which a provision similar to section 86 was construed and applied.

In *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (1), the question was whether sec. 2 of "The Manitoba Fire Insurance Act" applied to a condition of the insurance policy obliging every person entitled to make a claim "forthwith after loss to give notice in writing to the company," and it was decided that under this section the court could relieve the assured from non-compliance with this condition.

In *Bell Bros.* v. *The Hudson Bay Ins. Co.* (2), it was held that the N.W. Terr. Ord., 1903 (1st sess.), ch. 16, sec. 2, applied to non-compliance by the assured with conditions requiring prompt notice of loss to the company and obliging the assured, in making proofs of loss, to declare how the fire originated so far as he knew or believed.

While I am undoubtedly bound by these decisions so far as they go, I think, with all possible deference, that they should not be extended to a condition such as the one here in question giving to the insurer a certain delay to pay the loss after he has been furnished with notice and proofs of loss. If section 86 can be extended to such a condition, there would really

(1) 44 Can. S.C.R. 40. (2) 44 Can. S.C.R. 419.

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be no condition of the insurance contract that could not be brought under its provisions. This would virtually permit the court, in any case where strict compliance with the statutory conditions might appear inequitable, to remake the contract for the parties. I cannot agree that such a power is given to the court, and in declining to apply section 86 to condition 17 of these policies, so as to deprive the insurers of the delay therein stipulated, I do not believe that I am in any way in variance with these decisions so far as they go, for they are clearly distinguishable from the case under consideration.

It is, of course, conceivable that a case may arise where the insurer has himself fully investigated the cause of the fire and the damage thereby caused—and I think that was what had happened in the cases referred to—so that it would be unnecessary for the assured to furnish any proofs of loss under condition 13. In such an event, it might be difficult to determine the starting point of the delay mentioned in condition 17, so that it might not be reasonable to apply this condition as regards an insurer who has voluntarily undertaken such an investigation, thus implicitly relieving the insured from the duty incumbent on him under condition 13. But here the assured has himself furnished proofs of loss and the insurer has done nothing to free him from this obligation, so assuming that section 86 would permit the court to declare that there has been a sufficient compliance with condition 13, I cannot find any satisfactory reason for disallowing an objection based on condition 17 which clearly provides that the loss shall not be payable until the delay of thirty or sixty days has elapsed.

For these reasons, I am of the opinion that the appeal should be dismissed with costs.

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CASSELS J.—I have had the privilege of perusing the reasons of judgment of Mr. Justice Anglin. I concur entirely both in his reasons and his conclusions. If it were necessary for the decision of this case I would go further.

In my opinion, under the circumstances of this case, the proofs of loss were entirely dispensed with.

The companies took upon themselves, through the assistance of adjusters, to ascertain the amounts of the loss and dispensed with the proofs.

One cannot read the correspondence as I read it without coming to this conclusion.

Furthermore, it seems to me that as the defendants repudiate the whole contract on the ground of arson, they cannot avail themselves of the defences. I am not basing my opinion solely upon the allegation in the defence.

Before action the correspondence shews that the companies had pointed out as a reason why the settlement was not likely, viz., on account of arson. *Jureidini* v. *National British and Irish Millers Ins. Co.* (1) may be referred to.

Appeal allowed with costs.

Solicitors for the appellants: *Allan, Gordon & Gordon.*
Solicitors for the respondents: *McCraney, MacKenzie & Hutchinson.*

(1) (1915) A.C. 499.

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*Nov. 4, 5, 6.
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HARRIET W. SMITH AND OTHERS (DEFENDANTS) ..... APPELLANTS;

AND

THE PROVINCIAL TREASURER FOR THE PROVINCE OF NOVA SCOTIA (PLAINTIFF) ..... RESPONDENT;

AND

THE PROVINCE OF QUEBEC ..... INTERVENANT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Constitutional law—Succession duties—Bank stock—Mobilia sequuntur personam—Head office of bank—Local registry—Situs of property—"Bank Act," 3 & 4 Geo. V. c. 9, s. 43.

To determine the situs of personal property liable to succession duties on the death of the owner the rule to be applied is that expressed in the maxim *mobilia sequuntur personam.*

The head office of the Royal Bank is in Montreal, but under sec. 43 of the "Bank Act" a share registry office has been established in Halifax, where all shares owned by persons residing in Nova Scotia must be registered and all transfers made.

Held, per Davies C.J. and Idington and Brodeur JJ., Mignault J. *contra,* that if the maxim *mobilia sequuntur personam* cannot be applied, the situs of shares of the stock of the bank transmitted by death of the owner, a resident of Halifax, is in Halifax, the place of registration, rather than in the place where the head office is located.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1), in favour of the respondent on a case stated for the opinion of the court.

The appellants are executors of the estate of the late Wiley Smith, of Halifax, N.S., and the question for decision is whether the Province of Nova Scotia or the Province of Quebec is entitled to collect succession duties on stock of the Royal Bank held by the executors. The Province of Quebec intervened in this appeal.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 35 D.L.R. 468.

Henry K.C. for the appellant. Section 43 of the "Bank Act" was never intended to deprive one province, in this case Quebec, of its right to tax property of great value and give that right to another.

The situs of the property must be determined by the rule as to partnership. See Lindley on Partnership (7 ed.) pages 628-9.

As to partnership property the situs is the place where the partnership business is carried on. *In re Goods of Ewing* (1), at page 23; *Laidlay* v. *Lord Advocate* (2), at page 483; *New York Breweries Co.* v. *Attorney General* (3), at pages 69 and 70.

If section 43 was intended to change the situs of property it is *ultra vires*. Lefroy on Canada's Federal System, page LX. No. 48. *Attorney-General of Ontario* v. *Attorney-General for Canada* (4), *per* Lord Watson, at pages 359-60; *City of Montreal* v. *Montreal Street Railway Co.* (5), at pages 345-6, *per* Lord Atkinson.

Geoffrion K.C. and *Lanctot K.C.* for the Province of Quebec, intervenant, supported the argument for appellant citing *Nickle* v. *Douglas* (6); *Hughes* v. *Rees* (7), and *City of Montreal* v. *Montreal Street Railway Co.* (5).

Newcombe K.C. and *Jenks K.C.* for the respondent. Section 43 is *intra vires* as parliament can pass laws for purposes ancillary to banking. *Cushing* v. *Dupuy* (8), at page 415; *Grand Trunk Railway Co.* v. *Attorney-General of Canada* (9).

(1) 6 P.D. 19.
(2) 15 App. Cas. 468.
(3) [1899] A.C. 62.
(4) [1896] A.C. 348.
(5) [1912] A.C. 333; 1 D.L.R. 681.
(6) 35 U.C.Q.B. 126.
(7) 5 O.R. 654.
(8) 5 App. Cas. 409.
(9) [1907] A.C. 65.

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The situs should be at the place where the property can be effectively dealt with. Dicey on Conflict of Laws (2 ed.), page 310. See also *Attorney-General* v. *Higgins* (1); *In re Clark* (2).

In any case the situs should follow the rule *mobilia sequuntur personam. Fernandes' Executors, Case* (3); *Rex* v. *Lovitt* (4), *per* Lord Robson, at page 218.

THE CHIEF JUSTICE.—This appeal comes to us from a judgment delivered by the Supreme Court of Nova Scotia on a special case stated under the provisions of the Nova Scotia "Judicature Act."

The facts agreed upon which are essential for decision of the appeal are that one Wiley Smith departed this life intestate at Halifax, Nova Scotia, on the 28th day of February, 1916, and at the time of his death had his domicile within the said Province of Nova Scotia; that the aggregate value of the property passing on the death of the said intestate exceeded (within the meaning of the "Succession Act," 1912) one hundred thousand dollars, consisting *inter alia* of 2,076 shares of capital stock of the Royal Bank of Canada of the value of $442,168 or thereabouts; that the bank had its head office in Montreal, Province of Quebec, and at the time of the passing of said property, and previously thereto, had maintained within the Province of Nova Scotia a share registry office under the provisions of section 43 of the "Bank Act" (Canada), at which the shares of shareholders resident within the Province of Nova Scotia were required to be registered, and that the shares in question were so registered there.

The question for our opinion is whether under the circumstances stated the said shares are subject to succession duty for the use of the province.

(1) 2 H. & N. 339.
(2) [1904] 1 Ch. 294.
(3) 5 Ch. App. 314.
(4) [1912] A.C. 212.

I am of opinion that inasmuch as the deceased died intestate domiciled in Nova Scotia owning these shares in the bank the shares are liable to succession duty in that province.

The judgment now in question was based on the ground that as the shares were registered in the Province of Nova Scotia in the registry established pursuant to the 43rd section of the "Bank Act," where alone they could be registered, transferred or otherwise effectively dealt with, their situs was in Nova Scotia and succession duty was payable on them there.

The only doubt I have had is whether that ground is the true and proper one on which to base the conclusion the court reached. In other words, whether the liability to pay succession or legacy duty does not depend upon the application of the principle *mobilia sequuntur personam.* I am inclined to think that that principle is the one that should govern and that the law of domicile prevails over that of the locality of the property taxed.

In the case of *Harding* v. *Commissioner of Stamps for Queensland* (1), which was approved of in the case of *Lambe* v. *Manuel* (2), it was held that section 4 of Queensland's "Succession and Probate Duties Act," 1892, defining a "succession" (being the same as section 2 of the English "Succession Duty Act" of 1853) must be read in the sense affixed to the English Act by the English tribunals; and that it did not include movables locally situated in Queensland which belonged to a testator whose domicile was in Victoria; and it was held further that the amendment Act of 1895, section 2, was not retrospective in its operation.

(1) [1898] A.C. 769.
(2) [1903] A.C. 68.

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The amendment which was held not to be retrospective provided that succession duty was chargeable with respect to all property within Queensland although the testator or intestate may not have had his domicile in Queensland, but that if it had been retrospective it would have been conclusive. This finding of the Judicial Committee no doubt was reached because the powers of the legislature in that colony were plenary and not limited, and they could, if they chose to do so, displace the domicile rule.

But I am of opinion that the powers granted to the provinces of Canada under the 92nd section of the "British North America Act," 1867, are not plenary but limited.

Among the legislative powers granted to them under sec. 92 of the said Act is subsec. 2

direct taxation within the province for the raising of revenue for provincial purposes.

The taxation imposed, therefore, must be on property "within the Province" and what is personal property "within the Province" must be determined by the rule so firmly established in Great Britain with respect to it at the time of the passing of the "British North America Act" as that embodied in the maxim *mobilia sequuntur personam* under which all the decedent's personal property wheresoever situate is brought within the province or country of his domicile and made liable for all succession or legacy duties there imposed upon it.

After a careful study, not for the first time, of all the cases cited at bar bearing upon the question before us, I have reached the same conclusion with respect to the domicile being the determining factor as to what property is liable for succession and legacy duties as my brother Anglin and I concur in his reasons for the conclusion reached by him.

The broad ground on which that judgment rests is that the maxim *mobilia sequuntur personam* embodies the principle applicable to the succession of property of a domiciled decedent of any province of Canada for succession and legacy duties, as distinct from probate or estate duties; that in regard to those special succession and legacy duties the domicile of the decedent and not the physical or artificial situs of the property must prevail; that this was the law in England decided in a series of cases before the "British North America Act" was passed and that the power of taxation within the province granted to the provinces in subsec. 2 of sec. 92 of that Act must be construed in accordance with the English law as it then was decided to be; that accordingly each province has the power of levying succession and legacy duties only upon the personal property passed by a domiciled decedent of the province, which either is locally situate therein physically or by virtue of the maxim *mobilia sequuntur personam* is drawn into such province by reason of the domicile; that while the Imperial Legislature itself or a colony possessing plenary powers of taxation could at any time overrule the principle embodied in the maxim (see *Harding* v. *Commissioner of Stamps for Queensland* (1), above quoted), the several provinces of Canada being limited in their powers cannot do so or by any enactment of their own enlarge or extend the powers of taxation granted to them by section 92 of the "British North America Act;" that any other construction of these powers of taxation would create endless, if not insuperable, difficulties and would subject the same property to possible double liability to succession duty taxation, one in the province where the domiciled decedent owned the property and the other

(1) [1898] A.C. 769.

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in which it was locally situated at his death. The result of the holding, in which I concur, would be that the domicile of the decedent would be the test in Canada of the right to levy succession duties upon his personal property wherever it might be locally or physically situate and that such taxation could only be levied by the province of the domicile.

If I am wrong in my concurrence with my brother Anglin that the domicile of the decedent is the determining factor on the right of the province to levy succession and legacy duties, then I would uphold the judgment appealed from on the ground it is based, namely, that the bank shares in question were at the time of the death of the domiciled decedent registered in the Province of Nova Scotia where alone "they could be registered" and where alone "and not elsewhere" they could be transferred or effectively dealt with.

I do not think the mere fact of the head office of the bank being in Montreal and the board of directors meeting there to manage the affairs of the bank, could be held to affect or alter the situs of the shares from their place of registry where alone they could be effectively dealt with.

IDINGTON J.—The question raised herein by a stated case is the right of respondent to collect, from appellants, succession duty upon shares held by the testator in the Royal Bank of Canada, having at his death its head office in Montreal.

In the stated case it is, with other things, admitted as follows:—

1. Wiley Smith departed this life intestate at Halifax, in the County of Halifax, Province of Nova Scotia, on the 28th day of February, A.D. 1916, and at the time of his death had his permanent domicile and residence within the said Province of Nova Scotia.

2. Letters of administration were on the 6th day of March, 1916, duly granted to Harriet W. Smith, L. Mortimer Smith, and the Montreal Trust Company by the Probate Court for the probate district of the County of Halifax.

* * * * *

6. The said the Royal Bank of Canada, on and previous to the said 28th day of February, 1916, as well as after the said date, had its head office in Montreal, in the Province of Quebec.

7. The said The Royal Bank of Canada, at the time of the passing of said property, and previously thereto, maintained within the Province of Nova Scotia a Share Registry Office under the provisions of section 43 of the "Bank Act" (Canada), at which the shares of shareholders resident within the Province of Nova Scotia were required to be registered.

The claim to collect succession duties must rest upon the following sections of the Act:—

The "Succession Duty Act," 1912 (Nova Scotia), being chap. 13 of the Acts of 1912 as amended by chap. 57 of the Acts of 1913, and chaps. 14 and 36 of the Acts of 1915.

Section 2. For the purpose of raising a revenue for provincial purposes, save as is hereafter otherwise expressly provided, there shall be levied and paid, for the use of the province, a duty at the rates hereinafter mentioned upon all property which has passed on the death of any person who has died on or since the 1st day of July, 1892, or passing on the death of any person who shall hereafter die, according to the fair market value of such property at the date of the death of such person.

Section 6. The following property, as well as all other property subject to succession duty, shall be subject to duty at the rates hereinafter imposed:

(1) All property situate in Nova Scotia, and any income therefrom passing on the death of any person whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere.

The place of residence of the executors is not stated, but in argument as I understood admitted, as to the Smiths, to be in Nova Scotia.

The Supreme Court of Nova Scotia held that the appellants were liable.

The answer to the question submitted seems to me to be concluded by the case of *Lambe* v. *Manuel* (1), and in principle the case of *The Attorney-General* v. *Higgins et al* (2). The former decision was upon a

(1) [1903] A.C. 68.

(2) 2 H. & N. 339.

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claim by the appellant therein representing the Province of Quebec and claiming upon its behalf succession duties upon shares held, by a testator residing in Ontario, in the Merchants Bank of Canada, having its head office in Montreal, as well as in respect of other bank shares. The Quebec courts held respondent there was not liable to pay duties, in respect of such shares, to the Province of Quebec, and this holding was maintained by the court above in a judgment written by the late Lord Macnaghten, whose opinion alone must ever be held as entitled to the highest respect.

True the Quebec Act has been changed since and rendered more intelligible, as the result, I presume, of the case of *Cotton* v. *The King* (1).

But in principle, so far as relates to the claim of that province herein, I am unable to see any distinction resting upon such amendment that can be made relevant to this case distinguishing it from *Lambe* v. *Manuel* (2).

The domicile of the testator in question there was in Ontario, and that of the testator in question herein was in Nova Scotia. And as far as the "Banking Act" and its operation is concerned in relation to the situs of the property in shares, the Act has been amended by section 43 of that Act rendering it imperative to have a local provincial register where shares can be transferred, and thereby strengthening the claim of the province where the testator at death was domiciled.

In conformity with such requirement the bank in question had, as stated, a provincial register in Nova Scotia. That provision seems to put beyond doubt what, in the then doubtful frame of the Act, very able counsel in the *Manuel Case* (2) had at their hand, to

(1) 45 Can. S.C.R. 469; 1 D.L.R. 398; [1914] A.C. 176; 15 D.L.R. 283.
(2) [1903] A.C. 68.

press, and no doubt did press for all it was worth, the argument founded upon the registry for transfers of shares there in question being in Quebec.

I have considered the constitutional argument put forward relative to the limitations of the Dominion Parliament in regard to property and civil rights.

I cannot accede thereto. Indeed it seems to me futile in view of the language of section 91 of the "British North America Act" assigning to

the exclusive authority of the Parliament of Canada

by subsection 15

banking, incorporation of banks, and the issue of paper money,

and ending that section as follows:—

> And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

There does not seem to me to be the slightest foundation for pretending that the power conferred by this enactment has been exceeded by the requirement for a local registry of shares. I repeat that this case falls in principle within the case of the *Attorney-General* v. *Higgins* (1), so far as what has to be determined under the Nova Scotia "Succession Duties Act" can be affected by legislation defining the character and situs of shares in a corporation, but the respondents' claim does not rest upon that alone.

The *primâ facie* effect of the observance of the maxim *mobilia sequuntur personam*, subject to its many limitations which have to be borne in mind, when the necessity arises, for determining what may or not fall within the legislative jurisdiction of a province to impose a succession duties tax supports respondents' claim.

(1) 2 H. & N. 339.

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For example, we had to determine recently the situs of a debt due under an Alberta mortgage, registered there, and payable there, to a testator dying in Ontario. We held its situs to be in Alberta and that province entitled, under an Act worded similarly to that of the Nova Scotia Act here in question, to recover the succession duties alleged to be payable in respect of said mortgage.

And in passing I may say that the supposed case presented in argument, of shares in an insolvent bank being wound up might, though I express no definite opinion in that regard, in like manner give rise to very different considerations from those we have herein to deal with.

Again, on the other hand, we should bear in mind the provision in the "Banking Act," sec. 51, subsecs. (*a*), (*b*) and (*c*), which read as follows:—

Section 51:—

Notwithstanding anything in this Act, if the transmission of any share of the capital stock has taken place by virtue of the decease of any shareholder, the production to the directors and the deposit with them of

(*a*) Any authenticated copy of the probate of the will of the deceased shareholder, or of letters of administration of his estate, or of letters of verification of heirship, or of the act of curatorship or tutorship, granted by any court in Canada having power to grant the same, or by any court or authority in England, Wales, Ireland, or any British colony, or of any testament, testamentary or testament *dative expede* in Scotland; or

(*b*) An authentic notarial copy of the will of the deceased shareholder, if such will is in notarial form according to the law of the Province of Quebec; or

(*c*) If the deceased shareholder died out of His Majesty's dominions, any authenticated copy of the probate of his will or letters of administration of his property, or other document of like import, granted by any court or authority having the requisite power in such matters, shall be sufficient justification and authority to the directors for paying any dividend, or for transferring or authorizing the transfer of any share, in pursuance of and in conformity to the probate, letters of administration, or other such document as aforesaid.

I submit it impliedly recognizes the place where probate should issue as the situs of the property, and I infer the registration of any transfer by the executors must be transferred by registration in the province at all events when the executors resided there.

I asked counsel if anything more explicit in the Act but they could not refer me to anything further on the subject.

The argument put forward as to the bank shares being analogous to property in a partnership, I submit to be effective must be addressed elsewhere, in light of the decision we arrived at in the recent case of *Boyd* v. *The Attorney-General for British Columbia* (1).

Like the *mobilia sequuntur* rule we found that the ordinary rule as to the situs of what had been partnership property, could not have a universal application determining either the situs of such property or its taxability by a province.

This case is not within the lines presented in *The King* v. *Lovitt* (2), though regard may well be had to what was in fact involved therein, when it was held that a deposit in a New Brunswick branch of a bank was taxable within the terms of the Act there in question. The testator there in question was domiciled in Nova Scotia.

If the proposition put forward by appellants and left by them to be maintained by the Province of Quebec, appearing as an intervenant herein, be tenable, that all shares in banks having a head office in Montreal are properly situate there, then not only can that province tax all such bank shares by way of death duties, but also from year to year for ordinary purposes. I imagine such an exercise of its alleged power which would apply also to the Canadian Pacific

(1) 54 Can. S.C.R. 532; 36 D.L.R. 266. (2) [1912] A.C. 212.

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Railway Company shareholders, might awaken some people and they might produce a realization of how little dependence can be placed on mere theories no matter how plausible, and only useful as arguments to be tried on a court.

A business tax has been successfully imposed in some such like cases (see *Bank of Toronto* v. *Lambe* (1)), but I respectfully submit that proceeded upon an entirely different basis.

I am of the opinion that the appeal should be dismissed with costs of the respondent, and that the intervenant should have no costs.

ANGLIN J.—The late Wiley Smith, who was domiciled and died intestate at Halifax, in the Province of Nova Scotia, owned 2,076 shares in the Royal Bank. The head office of that bank is at Montreal, in the Province of Quebec, but it maintains a share registry office at Halifax, under subsec. 4 of sec. 43 of the "Bank Act," and, as prescribed by that subsection, Smith's shares were registered and transferable there and not elsewhere. The question presented by the stated case before us is whether these shares are liable to taxation under the Nova Scotia "Succession Duties Act" (2 Geo. V. ch. 15). Had they a situs in contemplation of law at Montreal or at Halifax? If at Montreal, does the Nova Scotia statute, properly construed, apply to them? If it does, is such taxation within the legislative power of the province under sec. 92 (2) of the "British North America Act"—is it

direct taxation within the province in order to the raising of a revenue for provincial purposes?

These were the questions discussed at bar.

(1) 12 App. Cas. 575.

I cannot agree with Mr. Newcombe's suggestion that bank shares may have no situs other than the Dominion of Canada at large because that is

> the locality of the business of the bank, of its legislative control, and of probate or administration for any purpose looking to the realization or enjoyment of the property.

For the purposes of taxation, probate and succession bank shares must have a local situs. Neither can I accede to Mr. Henry's contention that if change of situs would result from the operation of section 43 (4) of the "Bank Act," as enacted in 1913, that fact would render it *ultra vires*. The control exercised by that provision over the registration and transfer of bank shares is, I think, undoubtedly within the legislative jurisdiction conferred on the Dominion under subsec. 15 of sec. 91—"banking (and) the incorporation of banks"—a power which, as Lord Watson says in *Tennant* v. *Union Bank of Canada* (1),

> is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers (p. 46),

and

> may be fully exercised although with the effect of modifying civil rights in the province (p. 48).

See, too, *Cushing* v. *Dupuy* (2), and compare *Grand Trunk Railway Co.* v. *Attorney-General of Canada* (3).

"The pith and substance" of the enactment being clearly *intra vires* any interference with civil rights which follows as an incidental consequence cannot affect its constitutional validity. Whether section 43 (4) in fact changes or affects the situs of bank shares to which it applies is, of course, quite another question and one by no means free from difficulty.

As at present advised I am not convinced that for some purposes the situs of the shares now in question

(1) [1894] A.C. 31. (2) 5 App. Cas. 409, 415.
(3) [1907] A.C. 65, 68.

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was not at the head office of the bank. The authorities cited by the learned judge who delivered the judgment of the Supreme Court of Nova Scotia are certainly not conclusive in favour of a situs at the place of registry. The case chiefly relied upon as

most directly in point, if not on all fours with the present case,

was *Attorney-General* v. *Higgins* (1). The question there at issue was liability for probate duty, not succession duty. The head office and the place of registration were identical. Of three learned judges who heard the case only one, Martin B.—no doubt a judge of eminence—took the place of registration of the railway shares there in question as decisive of their situs. Watson B. merely alludes to the fact that "the railway is in Scotland." Pollock C.B. only determines that the shares did not cease to be property in Scotland because a statute intended to facilitate their transfer provided for the registration of it on production of an English probate. That was indeed all the case really decided. In *Attorney-General* v. *Sudeley* (2), at p. 361, Lord Esher M.R. says of *Attorney-General* v. *Higgins* (1):—

> The head office of the railway company was in Scotland. The shares were, therefore, payable in Scotland.

A reference to the foot-note (*d*) will shew that the passage cited by the learned Nova Scotia judge from 13 Halsbury Laws of England, at p. 310, likewise affords little or no assistance. In *Attorney-General* v. *New York Breweries* (3), a modern case cited for its approval of the *Higgins* decision, both the head office and the registry of shares were situated in England—as both had been in Scotland in the *Higgins Case* (1). Liability to probate duties was likewise the question at issue. The situs for that purpose was held to be in England.

(1) 2 H. & N. 339.
(2) [1896] 1 Q.B. 354.
(3) [1898] 1 Q.B. 205; [1899] A.C. 62.

In the view I take, however, I find it is not necessary to determine the situs of these bank shares for any purpose other than their liability to succession duties under the Nova Scotia statute. In none of the taxation cases cited in the judgment below did the statute under consideration resemble it.

Although the duty is imposed by the Nova Scotia Act on the principal value of all property which passes on the death of the owner and is made payable at his death, or within eighteen months thereafter, but before distribution, by his personal representative to the extent of the property received by him—in these respects somewhat resembling an estate duty—having regard to the exemption of all bequests under $500, of all bequests for religious, charitable or educational purposes to be carried out in the province, and of bequests to certain classes of relatives where the estate does not exceed $25,000, to the higher rate of duty imposed where property passes to beneficiaries other than immediate relatives of the decedent owner, and to the fact that the legislature has itself styled the statute a succession duty Act, I am disposed to think that the taxes imposed by it should be classed as succession duties rather than estate duties. *In re Earl Cowley's Estate* (1), at pages 374-5; *Winans* v. *Attorney-General* (2), at pages 39-41. Lord Gorrell thus sums up the difference between the two classes of Acts:—

> The broad point with regard to the duties is that the first three ("probate duty," "account duty" and "temporary estate duty") dealt with the duty on the amount of property passing, whatever its destination, while the other two ("legacy duty" and "succession duty") dealt with the duty on the value of the interests taken, and the duty varied with the relationship of the person taking to the person from whom the interest was derived or the predecessor.

Although the Nova Scotia statute does not impose the tax on the transmission itself, as is the case in the

(1) [1898] 1 Q.B. 355. (2) [1910] A.C. 27.

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Quebec legislation (*Lambe* v. *Manuel* (1); *Cotton* v. *Rex* (2)), it imposes it on the property transmitted—the property passing on the death—"the succession"—as was the case under the English "Succession Act" of 1853 (16 & 17 Vict. ch. 51, secs. 1 and 10; Hanson's Death Duties, 6th ed., p. 614), and the duty varies with the relationship of the person taking to the person from whom the interest is derived or the predecessor.

The features of the New Brunswick "Succession Duty Act" which led Lord Robson in *Rex* v. *Lovitt* (3) at p. 223, to treat it as imposing a tax rather in the nature of probate duty than a succession duty are entirely absent from the Nova Scotia statute.

The actual situs of tangible effects, the situs imputed by law to intangible effects, without regard to the domicile of the owner, carried with it liability to probate or estate duty. But under the English "Legacy Act" and "Succession Duty Act" the contrary rule has prevailed and the maxim *mobilia sequunter personam* has been applied to subject to these imposts foreign movables of domiciled decedents and to exempt from their operation the English assets of foreigners. *Winans* v. *Attorney-General* (4), at pages 31-34. Succession duty is exigible only in respect of movables which pass under English law—to which the beneficiary obtains title under English law. *Wallace* v. *Attorney-General* (5), at pages 6-9; Dicey on Conflict of Laws (2nd ed.), pp. 750 *et seq.*

By the law of England, therefore, which obtains in Nova Scotia, for the purpose of succession duties, as distinguished from probate duties and estate duties,

(1) [1903] A.C. 68.
(2) [1914] A.C. 176; 15 D.L.R. 283.
(3) [1912] A.C. 212.
(4) [1910] A.C. 27.
(5) 1 Ch. App. 1.

personal property has its situs at the domicile of the decedent owner. I therefore reach the conclusion that whatever should be deemed their situs for other purposes, for that of the succession duties imposed by the Nova Scotia statute the bank shares in question had a situs under English law at Halifax, because of the applicability of the maxim *mobilia sequuntur personam* —because title to them passed under the law of Nova Scotia.

Although the Nova Scotia Act is not expressly made applicable, as was the New Brunswick statute dealt with in *Rex* v. *Lovitt* (1),

> to all property whether situate in this province or elsewhere,

there are in it some indications of an intent to subject foreign personal property of a domiciled decedent to its operation. Thus by section 2 the duty is declared to be leviable and payable in respect of all property which passes on the death of any person. By clause (*b*) of subsec. 1 of sec. 3 property includes everything real and personal capable of passing on the death of the owner. Section 6 enacts that "the following property" (*inter alia* "property situate in Nova Scotia"),

> as well as all other property subject to succession duty shall be subject to duty at the rates hereinafter imposed.

Sections 3 (*a*) and 6 (1) ,on the other hand, leave no room whatever to doubt that the intention of the legislature was that the personal property of a non-domiciled decedent situate in Nova Scotia should be liable for the duties imposed by the Act. The intention to exclude the application of the maxim *mobilia sequuntur personam* in regard to such personal property is abundantly clear. With the validity of the imposts on this class of property, however, we are not now

(1) [1912] A.C. 212.

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concerned. But see *Boyd* v. *Attorney-General for British Columbia* (1). The presence of these latter provisions, however, does not suffice to take from the statute its distinctive character as a succession duty Act.

Although the statute makes no distinction between real and personal property it would seem to me impossible that the legislature meant to attempt to tax foreign real estate of a domiciled decedent. Following the principles established by *Thomson* v. *Advocate-General* (2); *In re Ewing* (3); *Wallace* v. *The Attorney-General* (4); and *Harding* v. *Commissioner of Stamps for Queensland* (5), at pages 773-4, I would also be inclined to hold that the words "person" and "property" in section 2 should be restricted respectively to a person domiciled in Nova Scotia and to property which may properly be made the subject of succession duties according to English law. For the same reason I would construe "all property situate in Nova Scotia" in clause 1 of section 6 as meaning property having a physical situs in that province; (*Cotton* v. *Rex* (6), at p. 186); and the words

all other property subject to succession duty

in the opening paragraph of section 6 as intended to bring in personal property which, although it has not a physical situs in the province, English law would regard as within it for the purpose of succession duties. While, having regard to the constitutional limitation on its powers of taxation, I should, if it imposed probate or estate duties, hesitate to find in the provisions of the Nova Scotia Act to which I have referred a

(1) 54 Can. S.C.R. 532; 36 D.L.R. 266.
(2) 12 Cl. & F. 1.
(3) 1 C. & J. 151.
(4) 1 Ch. App. 1.
(5) [1898] A.C. 769.
(6) [1914] A.C. 176; 15 D.L.R. 283.

sufficiently clear expression of intention to subject to them personal property having a physical situs or an artificial situs in contemplation of law outside of the province, there is certainly nothing in the Act calculated to prevent the maxim *mobilia sequuntur personam* having the full operation given to it by English law for the purpose of succession duties in the case of all personal assets of the domiciled decedent.

The only authority at all in conflict with this view is *Woodruff* v. *Attorney-General for Ontario* (1). But the conflict is more apparent than real. The property there in question consisted of bonds and debentures of a foreign company which were at the date of their transfer and remained in the custody of a New York deposit company. The transmission of them was not by will or upon an intestacy but by instruments *inter vivos* which took effect under the law of the State of New York. There was no succession or transmission by virtue of Ontario law. The ground on which the maxim *mobilia sequuntur personam* is applied in this case, therefore, did not exist in *Woodruff's Case* (1). Moreover, in speaking of that case in *Cotton* v. *Rex* (2), at p. 196, Lord Moulton delivering the judgment of the Judicial Committee said:—

> The circumstances of that case were so special, and there is so much doubt as to the reasoning on which it is based, that their Lordships have felt that it is better not to treat it as governing or affecting the present decision.

Before parting with this appeal I desire to reiterate my dissent already expressed in *Lovitt* v. *The King* (3), at p. 161, and *Boyd* v. *Attorney-General for British Columbia* (4), at p. 536-7, from the view that a provincial legislature whose powers of taxation are restricted to "taxation within the province" may, for

(1) [1908] A.C. 508.
(2) [1914] A.C. 176; 15 D.L.R. 283.
(3) 43 Can. S.C.R. 106.
(4) 54 Can. S.C.R. 532; 36 D.L.R. 266.

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purposes of taxation, give to property a situs within the province although according to the general law of the province applicable under the circumstances its situs would be outside. If it can, the words "within the province" are practically deleted from subsec. 2 of sec. 92 of the "British North America Act"; the same property may be subject to taxation identical in character in more than one province, and the exclusive right to tax property locally situate within the province, which section 92 (2) was undoubtedly meant to confer, is non-existent. The case of *Rex* v. *Lovitt* (1), is cited as opposed to this view and no doubt certain passages from Lord Robson's judgment are in conflict with it. With great respect, however, his Lordship, in applying the decision in *Harding* v. *Commissioners of Stamps for Queensland* (2), would seem to have momentarily overlooked the fact that no restriction of its powers of taxation similar to that imposed upon Canadian provincial legislatures (taxation within the province) applied to the Legislature of Queensland. But all that the *Lovitt Case* (1), determined was that a debt (to which English law attributes a local situs at the residence of the debtor), held upon the facts to be payable at the St. John, New Brunswick, branch of the Bank of B.N.A., was liable to a New Brunswick tax which, in the opinion of the Judicial Committee, was assimilated to a probate duty. For that the *Lovitt Case* (1), is authority, but for nothing more. As Lord Moulton says of it in *Cotton* v. *Rex* (3), at p. 196:—

> In the case of *Rex* v. *Lovitt* (1) no question arose as to the power of a province to levy succession duty on property situate outside the province. It related solely to the power of the province to require as a condition for local probate on property within the province that a succession duty should be paid thereon.

I would dismiss the appeal.

(1) [1912] A.C. 212. (2) [1898] A.C. 769.
(3) [1914] A.C. 176; 15 D.L.R. 283.

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BRODEUR J.—This is a question of succession duty on the bank shares which the late Mr. Wiley Smith had in the Royal Bank. The deceased had his domicile in Nova Scotia. The Royal Bank has its head office in Montreal, in the Province of Quebec, and has a branch in Halifax, in the Province of Nova Scotia. According to the provisions of the "Bank Act" (sections 43-4), it had opened in the latter place a share registry office at which the shares of Mr. Smith had to be registered and were registered. A stated case had been submitted by the Smith estate and by the Provincial Government of Nova Scotia for the opinion of the court as to whether those shares are subject to the payment of succession duty for the use of the Province of Nova Scotia.

The Supreme Court of that province decided that those shares were subject to that duty.

An appeal has been made by the estate to this court, and the Attorney-General of the Province of Quebec has intervened to support that appeal. He contends with the appellant that the Royal Bank, in establishing a share registry office in a province, does not change the situs of the shares from the head office of the bank to the place where the registry office is kept.

The appellant and the intervenant contend also that if the section of the "Bank Act" bears that construction, it is to that extent beyond the powers of the Federal Parliament. But that constitutional aspect of the case was simply mentioned at bar and not pressed.

The "Succession Duty Act," of 1912, of Nova Scotia enacts that

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for the purpose of raising a revenue for provincial purposes * * * there shall be levied and paid for the use of the province a duty * * * upon all property * * * passing on the death of any person * * *

By section 3 of that Act it is declared that the words "passing on the death" should be construed as meaning passing immediately on the death or after an interval either certainly or contingently and either originally or by way of substitutive limitation, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere.

By section 6 it is provided that all property situate in Nova Scotia is subject to duty. We have then to find out whether these Royal Bank shares belonging to the Smith estate are situated in Nova Scotia.

The law of the domicile of the owner governs movable property. But when it comes to determining the distinction or nature of the property, the contestation as to the possession or the rights of the Crown, the law of the situs governs. If it were a question of tangible movable property, there would be no difficulty. But when it comes to intangible property, like simple contract debts, specialty debts, bonds and bank shares, the question is more complicated.

It has been decided that specialty debts owing by persons outside of the jurisdiction are assets where the instrument happens to be. *Stamp Commissioner* v. *Hope* (1).

Simple contract debts, whether the title is evidenced or not by bills of exchange or promissory notes, are assets where the debtor resides; *Attorney-General* v. *Pratt* (2); *Attorney-General* v. *Bouwens* (3); *Rex* v. *Lovitt* (4).

In the case of bank shares, it was decided in the case

(1) [1891] A.C. 476.
(2) L.R. 9 Ex. p. 140.
(3) 4 M. & W. p. 171.
(4) [1912] A.C. 212.

of *Attorney-General* v. *Higgins* (1), that where by statute the evidence of title to shares is the register of shareholders the property is located where the register is.

I think that the latter decision has a great bearing upon the question at issue in this case because it determines conclusively that the situs of bank shares is the place where they are registered.

Formerly the banks could open branch offices in different parts of the country and could open also share registry offices where shares could be registered and transferred. Under the provisions of that Act, it was decided in a case of *Hughes* v. *Rees* (2), that shares in a bank whose head office was in Ontario, but which were registered in Quebec, were situate in Ontario. The reason of the judgment was that the change had been made by the bank for convenience sake, but that the bank stock was, however, virtually situate in Ontario.

A similar decision was also rendered in the following case of *Nickle* v. *Douglas* (3).

But it is submitted that sec. 43, subsec. 4, of the "Bank Act" has changed the law in that respect because it enacts that shares *shall* be registered at agencies within the province in the case of shares owned by residents of that province. The banks are not bound to open those branch offices, but once they have done so the law declares that all the shares of the shareholders resident within the province shall be registered at that office at which and not elsewhere such shares may be validly transferred.

It is argued that in this case it is not a question of transfer; it is a question of transmission of shares by death.

(1) 2 H. & N. 339. (2) 5 O.R. 654.
(3) 35 U.C.Q.B. 126; 37 U.C.Q.B. 51.

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I do not think that this constitutes any difference. Section 50 of the "Bank Act" says that if the transmission of shares is made by intestacy the probate of the will or the letters of administration should be produced and left with the general manager, or other officers or agents of the bank. That manager or agent shall then enter in the register of shareholders the name of the person entitled under the transmission. It may be that for convenience sake the documents shewing the title to the shares would have to be referred to the head office of the bank; but the transmission should be entered in the register of shareholders where those shares were entered. In this case the documents might have been sent to Montreal to be examined by the authorities of the bank there, but they had been entered in Halifax, where the shares were entered in the share registry office.

In the case of *Attorney-General* v. *Sudeley* (1), the Master of the Rolls said that the head office of the railway company in question in that case was in Scotland and that the shares were, therefore, payable in Scotland.

The case of *In re Clark* (2) is conclusive on the point.

In that case a testator domiciled in England by his will bequeathed all his personal estate in the United Kingdom to certain persons whom he calls his home trustees upon certain trusts, and he bequeathed all his personal estate in South Africa to certain other persons whom he calls his foreign trustees upon other trusts. At the time of his decease, the testator was possessed of bonds payable to bearer of a waterworks company in South Africa, and of shares in mining companies in South Africa. The mining companies were constituted

(1) [1896] 1 Q.B. 354. (2) [1904] 1 Ch. 294.

according to the laws of Transvaal and Orange Free State, and had their head office in South Africa where the registry of shareholders was kept and where the directors met; but they also had an office in London, where a duplicate registry was kept and the shares could be transferred. The testator's name was on the London register of the company and all his bonds and share certificates were at his bankers in London.

It was held that the shares passed under the bequest to the home trustees.

Lord Justice Farwell, deciding the case, said:—

> The property I have to deal with is a share and that is represented by a certificate without which no transfer can take place. The actual effective transfer can be done equally effectually in South Africa or in England, and the only conceivable distinction that I can discover in point of locality is the possession of the certificate which for this purpose is essential to complete the title to the shares. Therefore I hold that where the certificates of the shares in these companies were in England they passed under the gift of property situated in England, and not under the gift of property in South Africa.

In the case of *Clark* (1) the transfer could have been made in two places, in South Africa and in England. In this case, I think, under a proper construction of the "Bank Act," that the transfer could be made only at Halifax where the shares were already registered. I may quote in support of that contention *Stern* v. *The Queen* (2); *Winans* v. *Attorney-General* (3); *Attorney-General* v. *New York Breweries* (4).

For these reasons I have come to the conclusion that the situs of those bank shares was in Halifax and that they were liable to succession duty in the Province of Nova Scotia.

The appeal should be dismissed with costs.

(1) [1904] 1 Ch. 294.
(2) [1896] 1 Q.B. 211.
(3) [1910] A.C. 27.
(4) [1898] 1 Q.B. 205.

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Mignault J.

MIGNAULT J.—This is an appeal from a judgment of the Supreme Court of Nova Scotia *in banco*, on a stated case submitted by the respondent (plaintiff in the court below) and the appellants (defendants in the court below), under the provisions of the Nova Scotia "Judicature Act," order 33. The Attorney-General of the Province of Quebec (claiming to have an interest in the question at issue) has intervened before this court and prays for the reversal of the judgment.

The whole question is whether succession duty can be claimed by Nova Scotia in respect of 2,076 shares of the Royal Bank of Canada, which the late Wiley Smith, of the City and County of Halifax, in the Province of Nova Scotia, owned at the time of his death. Wiley Smith died intestate at Halifax on the 28th February, 1916, and the appellants are his administrators. At the time of his death, and ever since, the head office of the Royal Bank was in Montreal, Province of Quebec, but the bank had in Nova Scotia a share registry office, where the shares of shareholders resident within that province were required to be registered under section 43 of the "Bank Act," and the shares in question were duly registered there at and before Smith's death. The Provincial Treasurer of Nova Scotia, under the provisions of the Nova Scotia 'Succession Duty Act," 1912 (2 Geo. V. ch. 13), claims to be entitled to the payment of succession duty on these shares, and the question submitted, and which the court below has answered in the affirmative, is whether, under the said Act, succession duty is payable upon the said shares.

The provisions of the Nova Scotia "Succession Duty Act," 1912, so far as pertinent to the present inquiry, may be briefly stated.

It is provided by section 2 that

For the purpose of raising a revenue for provincial purposes, save as is hereafter otherwise expressly provided, there shall be levied and paid for the use of the province, a duty at the rates hereinafter mentioned upon all property which has passed on the death of any person who has died on or since the 1st day of July, 1892, or passing on the death of any person who shall hereafter die, according to the fair market value of such property at the death of said person.

Section 3 defines certain terms. I will quote two of these definitions given respectively by subsections (*a*) and (*b*).

(*a*) The words "passing on the death" mean passing either immediately on the death or after an interval either certainly or contingently, and either originally or by way of substitutive limitation, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere.

(*b*) "Property" includes real and personal property of every description and every estate and interest therein, capable of being devised or bequeathed by will or of passing on the death of the owner to his heir or personal representatives.

By section 6 it is provided:—

6. The following property, as well as all other property subject to succession duty, shall be subject to duty at the rates hereinafter imposed:

(1) All property situate in Nova Scotia, and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere.

(2) Debts and sums of money due and owing from persons in Nova Scotia to any deceased person at the time of his death, on obligation or other specialty, shall be property of the deceased situate in Nova Scotia without regard to the place where the obligation or specialty shall be at the time of the death of the deceased.

It is also provided by section 9 as follows:—

9. Any portion of the estate of any deceased person, whether at the time of his death such person was domiciled in Nova Scotia or elsewhere, which is brought into this province to be administered or distributed, shall be liable to the duty in this chapter imposed.

The concluding portion of section 9 need not be given here. Its effect is merely to provide that if the property so brought into the province has paid succession duty elsewhere equal to or greater than the duty payable in Nova Scotia, no duty shall be paid; if the amount so paid elsewhere is less than that payable in Nova Scotia, the difference in amount has then to be paid.

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It is under these provisions that succession duty is claimed on the bank shares owned by the intestate, who at the time of his death was domiciled in the Province of Nova Scotia.

The court below decided that inasmuch as the shares were registered in Nova Scotia, they were property situate in Nova Scotia, and subject to succession duty under the Nova Scotia "Succession Duty Act," 1912.

After due consideration I have come to the conclusion that this is a case where the rule of law *mobilia sequuntur personam* applies. This rule has been followed in England in cases where the question to be decided was whether personal property in Great Britain accruing on the death of its foreign owner was subject to succession duty or legacy duty, properly so called, in Great Britain.

Thus in the case of *Thompson* v. *Attorney-General* (1), the testator, who was domiciled in Demarara, where the Dutch law prevailed and no legacy duty existed, had loaned money in Scotland, and the House of Lords applied the rule *mobilia sequuntur personam* to this money to the exclusion of provisions imposing legacy duty in the United Kingdom. This decision was followed by Lord Cranworth L.C. in a subsequent case, *Wallace* v. *Attorney-General* (2).

This affords a simple solution of the problem submitted to this court, and it would not be necessary to decide the question whether, in view of the fact that the bank shares were registered in Nova Scotia, they acquired an actual situs in that province. But as this latter question was argued at great length by the learned counsel of the parties, it has seemed to me advisable that I should give it full consideration.

(1) 12 Cl. & F. 1.

(2) 1 Ch. App. 1.

The bank shares owned by Mr. Smith at his death were registered in the Nova Scotia share registry office of the Royal Bank, as required by section 43, subsection 4, of the "Bank Act," while the head office of the bank was in Montreal.

Subsec. 4 of sec. 43 is in the following terms:—

4. The bank may open and maintain in any province in Canada in which it has resident shareholders and in which it has one or more branches or agencies a share registry office to be designated by the directors at which the shares of the shareholders resident within the province shall be registered and at which, and not elsewhere, except as hereinafter provided, such shares may be validly transferred.

This is a comparatively recent amendment of the "Bank Act," and prior to its enactment it was optional for a shareholder to have his shares registered either at the head office of the bank or at any share registry office which the bank had opened elsewhere for the convenience of its shareholders.

Independently of the new enactment of subsec. 4 of sec. 43 of the "Bank Act," I would be of the opinion that if bank shares, being intangible or incorporeal property, can have any actual situs other than the domicile of their owner, this situs should not be placed at the share registry office where the shareholder has chosen to cause his shares to be registered.

Nor do I think, because it is now compulsory to register bank shares at the share registry office established in the province where the shareholder resides, that the situs of the shares, which previously might have been registered elsewhere, is in any way changed by the fact that they must now be registered at the provincial share registry office. It is entirely optional for the bank to open such an office, and after opening it, it may close it. Moreover, a bank might change the location of a provincial share registry office from one city to another in the same province, and then, under subsection 4, the shares of shareholders resident

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within the province would have to be registered at the new location. To maintain that the situs of the shares would thus, on account of their registration, be shifted from one place to another, while the head office and the residence of the shareholder remain unchanged, would require the support of more conclusive authority than that on which the court below relied to decide that the place of registry of the shares determines their location.

The principal authority cited by Mr. Justice Chisholm is the case of *Attorney-General* v. *Higgins* (1). There the testator domiciled in England owned shares in railway companies in Scotland, the head offices of which were also in Scotland. The Attorney-General argued that

> the chief offices of these railways are in Scotland and therefore the shares in question are personal property in Scotland.

The court was composed of Chief Baron Pollock and Barons Martin and Watson. Baron Martin said that the argument of the Attorney-General had perfectly satisfied him. He added:—

> It is clear that by the 19th section of the 8 & 9 Vict. sec. 17, the evidence of title to these shares is the register of shareholders, and that being in Scotland, this property is located in Scotland.

Neither of the two other judges expressed any opinion as to the register of shareholders determining the locality of the shares, and it is obvious that the Attorney-General merely relied on the fact that the head office was in Scotland and that, therefore, the shares were also in Scotland. If this authority has any effect, it would support the contention that shares in such a company are located at the head office, rather than the claim that their situs is at a share registry office which may have been established elsewhere.

(1) 2 H. & N. 339.

The case of *In re Clark* (1), is not more conclusive than the *Higgins Case* (2). The testator was domiciled in England and bequeathed his personal estate in the United Kingdom to certain persons whom he called his "home trustees," and his personal estate in South-Africa to other persons whom he termed his "foreign trustees." He possessed bonds and shares in South Africa companies which had offices, share registers and directors both in London and in South Africa. The testator's name was on the London register, and all his bonds and share certificates were at his bankers in London. Mr. Justice Farwell said that as between England and South Africa, the only conceivable distinction that he could discover in point of locality is the possession of the certificate which is essential to complete the title to the shares. The certificates being in England, he held that the shares went to the home trustees.

The case of *Attorney-General* v. *The New York Breweries Co.* (3), does not support the conclusion adopted in the court below that the situs of the shares was at the share registry office. This was a case where probate duty—entirely different from succession duty—was claimed on the shares of an English company, whose head office and register of shares was in England. To deal with these shares and transfer them some act had to be done in England, and this sufficed to render the shares subject to probate duty.

I find, therefore, no conclusive authority for the proposition that where a share registry office of bank shares is established in a province other than the province in which the head office of the bank is situated, the shares are located at the place where the share

(1) [1904] 1 Ch. 294. (2) 2 H. & N. 339.
(3) [1898] 1 Q.B. 205; [1899] A.C. 62.

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SMITH v. THE PROVINCIAL TREASURER FOR THE PROVINCE OF NOVA SCOTIA AND THE PROVINCE OF QUEBEC.

Mignault J.

registry in which they are registered is kept. I would think that the authorities to which I have referred would lend more support to the contention that the shares are located at the head office of the bank rather than to the claim that their situs is at the share registry office.

It is, however, unnecessary to choose between the head office of the bank and the provincial share registry office, because the intestate being domiciled in Halifax where the share registry office was kept, the shares, in so far as liability for succession duty is concerned, must be considered as situate at his domicile under the rule *mobilia sequuntur personam.*

I would, therefore, basing my opinion on this rule, answer the question submitted in the affirmative. The appeal should be dismissed with costs against the appellants. The intervention should also be dismissed with a recommendation that the respondent be paid his costs on the same.

Appeal dismissed with costs.

Solicitor for the appellant: *W. A. Henry.*
Solicitor for the respondent: *Stuart Jenks.*

UNITED STATES PLAYING CARD COMPANY (PLAINTIFFS)..... APPELLANTS;

AND

A. O. HURST (DEFENDANT)..... RESPONDENT.

1918
*Dec. 2.
1919
*Feb. 4.

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

Trade mark — Playing cards — "Bicycle" design — Infringement — Passing off—Intent—Damages.

The word "Bicycle," as the name given to a certain class of playing cards, may become a valid trade-mark.

The sale by other manufacturers of cards described as "Bicycle Series" with the word "Bicycle" occupying a line in letters larger than "Series" is an infringement of the right in the trade mark. Idington J. dissenting.

The finding of the trial judge that a foreign manufacturer and its agent in Canada conspired to defraud the owner of its trade name, and the profits to be derived therefrom, should not be interfered with on appeal. Idington J. dissenting on the ground that the evidence did not justify such finding.

In an action asking for an injunction to restrain the defendant from passing off its cards for those of the plaintiff

Held, that though there is no evidence of actual passing off by the defendant the injunction should be granted if the defendant has offered for sale cards which could be passed off for those of the plaintiff, and there is sufficient evidence of an intention to do so.

The plaintiff's relief in such case would be a judgment for nominal damages with an inquiry at its own risk if it claimed to be entitled to substantial damages. *A. G. Spalding Bros.* v. *A. G. Gamage Co.* (113 L.T. 198) fol.

Judgment of the Appellate Division (39 Ont. L.R. 249); 34 D.L.R. 745), reversed in part and that of the trial judge (37 Ont. L.R. 85; 31 D.L.R. 596) restored in part.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), varying the judgment at the trial (2), in favour of the plaintiff.

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

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 39 Ont. L.R. 249; 34 D.L.R. 745.

(2) 37 Ont. L.R. 85; 31 D.L.R. 596.

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The Chief Justice.

D. L. McCarthy K.C. and *Britton Osler* for the appellant.

Moss K.C. and *Heighington* for the respondent.

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

IDINGTON J.—In regard to the claim herein made, and so far as founded upon mere passing off, the appellant obtains by the judgment in question herein all it is entitled to on the evidence presented for our consideration, and, I incline to think, a little more.

There is not, in my view of the evidence, enough therein to maintain a case merely of passing off, as defined and applied in such recent cases as *A. G. Spalding Bros.* v. *A. W. Gamage* (1); *Horlick's Malted Milk Co.* v. *Summerskill* (2); *Universal Winding Co.* v. *George Hathersley & Sons* (3); *Singer Mfg. Co.* v. *Loog* (4); *Standard Ideal Co.* v. *Standard Sanitary Manufacturing Co.* (5), at page 86.

I am unable to agree with the learned trial judge that there was evidence of a conspiracy such as he finds between respondent and his employers. Indeed, the use, by the Goodall Company, as evidenced by their catalogue, 1898-1899, of the pictorial representation of a bicycle design on one of their cards, five years before the respondent entered their employment, seems destructive of the basis of such finding and none the less when we are assured by appellant's counsel that the production of that catalogue is the result of industrious search on the part of appellant.

There is indeed evidence of a somewhat earlier use by Goodall & Co. of the pictorial design of a bicycle.

(1) 113 L.T. 198.
(2) 61 S.J. 1148; 33 Cut. P.C. 108.
(3) 32 Cut. P.C. 479.
(4) 8 App. Cas. 15 at p. 18.
(5) [1911] A.C. 78.

Like much else in this case the inquiry suggested by these facts does not seem to have been prosecuted. It may be, as suggested by counsel for respondent, his misfortune arising from war conditions rather than his fault. Be that as it may we are limited to what is before us.

Again I am unable to accept the theory put forward in argument that by reason of the mere word "bicycle" having been appropriated as a trade mark by appellant, the respondent was debarred thereby from the use of any design into which entered the pictorial representation of a bicycle or any part thereof, or of either coupled with a rider thereon, or anything else to attract the eye.

It is the right of every one of His Majesty's subjects to decorate his goods with any symbol he pleases, so long as that symbol has not become, by use or by virtue of registration, the individual property of another. It is equally his right to use language descriptive thereof so long as deception is not intended or likely to arise therefrom.

Yet it is mainly by disregard of these rights that the case for appellant has been built up; and largely by a confusing mass of evidence, much of it by leading witnesses who evidently had no correct appreciation of the matters they were talking about. In many parts of their evidence they confuse the design on the card with the trade mark which they seek to establish.

Nevertheless if we could properly find as a fundamental fact that there was a conspiracy of the kind claimed to have existed, then, even such unsatisfactory evidence might be made more or less properly serviceable to prove the actual execution of the purpose of such a conspiracy.

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I admit that from circumstances attendant upon the execution, or even attempted execution, of an unlawful purpose, we may occasionally be able to infer the existence of a conspiracy.

But here I can find nothing sufficiently substantial in the respondent's acts and the circumstances relied upon to demonstrate either the existence of such a conspiracy or a course of conduct which can only be attributable to the purpose of illegally depriving appellant by means of deception of that property it had in the goodwill or prosperity of its business, or whatever the legal right in question may be.

Nor can I find in the evidence that degree of probability of injury having been, or at the institution of this action, being, suffered by the appellant, from anything done by the respondent, which is necessary in order to maintain the action for a passing off, when there is not a vestige of direct evidence on the point.

There would not, in my opinion, have been the slightest chance of any wholesale dealer, or retailer buying from him, being deceived by reason of all that which is put forward in this case, and alleged to be a means of deception, into buying the Goodall cards instead of the appellants'.

And those buying from the retail dealer cards for use are not of the stupid variety of mankind whose eyes, when cast upon a card, are likely to be readily misled.

In so far, therefore, as this case rests upon a passing off, as claimed, I think it should have been dismissed.

In regard to the claim by appellant for an infringement of its trade marks, which are but an artificial means, as it were, for the protection of the rights which are liable to be invaded by a passing off, the exact nature in law of what such a trade mark is must be

correctly appreciated before we proceed to consider the proof of infringement.

It may be still held in a passing-off action (as I have assumed for that part of this case) to have a meaning and effective force independently of that assigned it in our "Trade Mark and Design Act" but in light of section 20 thereof, which reads as follows:—

20. No person shall institute any proceeding to prevent the infringement of any trade mark, unless such trade mark is registered in pursuance of this Act,

I think all the appellant can complain of herein, resting alone upon its claims for infringement of its trade marks, must fall within the meaning of Part I. of said Act.

In expressing my assumption that for the purposes of this case I have considered the trade mark as if possibly an effective force, had there been anything coupled therewith to make out a case of passing off, I must not be taken as having formed a decided opinion. The imperative language of prohibition in the section just quoted may, in a passing-off case, some day be argued as depriving a plaintiff, or as enough to deprive him, of any support to be derived from a trade mark, unless it had been registered in course of what is alleged in the case.

On the principle that a man cannot do indirectly what he is forbidden to do directly, why should he get the benefit of an unregistered trade mark?

Section 4 defines and differentiates "general" from "specific" trade marks.

All those in question herein are of the latter class, which is defined as follows:—

(b) "Specific trade mark" means a trade mark used in connection with the sale of a class merchandise of a particular description.

Then follows section 5 (which has a marginal note "What shall be deemed to be a trade mark") and reads as follows:—

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5. All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation, or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trade marks.

Section 19 of the Act reads as follows:—

19. An action or suit may be maintained by any proprietor of a trade-mark against any person who uses the registered trade mark of such proprietor, or any fraudulent imitation thereof, or who sells any article bearing such trade mark or any imitation thereof, or contained in any package of such proprietor or purporting to be his, contrary to the provisions of this Act.

We are confined by virtue of Part 1 of the Act, and especially by these two sections, to an enforcement only of the rights which may be rested upon a correct interpretation and construction of the language therein.

The question raised herein must, therefore, be whether or not the respondent has in fact used in the manner indicated in the said section 19, any of the appellant's registered trade marks, or any "fraudulent imitations" thereof.

I observe the change in the language in the first part of the section dealing with the use of the mark, to that in the second part dealing with him who sells any article bearing such trade mark, or any imitation thereof.

I incline to hold that the meaning of the word "imitation" in any case resting upon either branch of the section must be a "fraudulent imitation."

The registration by appellant of the word "bicycle" took place on the 17th day of July, 1906, and that seems to be the most important of the four trade marks in question, if we take the attention devoted to it in the case as a measure of its relative importance.

Now it is only the use of that word itself by respondent in the like manner to that which section 5 indicated to be the measure of appellant's right, that can be complained of as an infringement.

And, by the express terms of section 5, it must be a use falling within the words,

> for the purpose of distinguishing any manufacture, etc. * * * manufactured * * * applied in any manner whatever either to such manufacture, etc., * * * or to any package, parcel, case, etc., * * * of any description whatscever containing the same,

that can be the basis of the right of action given in section 19.

I do not think these words can be stretched to cover the use of the word "bicycle" in an advertisement as alone sufficient to found an action upon.

Much less can they be held to cover any pictorial representation of a bicycle or of any part thereof.

Eliminate these two grounds of alleged offence and I find nothing in what respondent has done since the registration by appellant of the word "bicycle" which can fall within the meaning of the words in section 5 of the Act.

It is only by a confusing use of the word "bicycle" so as to make it cover any and every sentence in which that word can be found and thus extend the meaning of the trade mark beyond its limitations that the appellant can hope to succeed on this ground of complaint relative to the word "bicycle."

As to the objection taken by appellant founded upon the use of pictorial representation of a bicycle or any part thereof as an equivalent of the word, its own acts of registration furnish a complete answer by way of argument.

Before registering "bicycle" as a word, it had registered same day a representation of a bicycle and

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a rider thereon, and followed both by another pictorial representation of a bicycle and much else.

If the single word "bicycle" should be applied to cover all sought for it to cover herein, such a proceeding must have been useless.

True these trade marks are alleged in evidence and argument to be respectively applicable to different grades of cards. Assuming that to be so and possible within the meaning of the Act I imagine there should be something on record to distinguish what is intended to be covered.

There does not seem to be anything more than an intended use in the sale of playing cards indicated in the applications for these several trade marks in question. I doubt much if that is a compliance with the Act and fulfils the purpose thereof, but in my present view I need not follow that suggestion.

As to the other trade marks in question I can find no actual imitation thereof much less a fraudulent imitation. Indeed the Goodall Company, as already indicated, in dealing with the other phase of this complicated case, had been using for seven or eight years before these registrations cards having its own pictorial designs thereon.

Before parting with this case I may say that during the argument I had a decided impression that Mr. Moss's objection that a design on the back of a card could not properly be registered as a trade mark was unfounded. Much reading of evidence herein which exhibits the mind of those engaged in the manufacture of cards, and a further consideration of the Act, led me to doubt the propriety of such registrations.

I need not say any more in view of the conclusions I have reached and expressed.

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I think the appeal should be dismissed with costs here and below; the cross appeal allowed and action dismissed with costs, but as there were no costs by reason of a cross-appeal as such—as sometimes is found to exist—this should mean only one set of costs.

ANGLIN J.—My subsequent study of this case has confirmed the impression left on my mind by the argument that the findings of the learned trial judge, most of them confirmed in the Appellate Division, cannot be disturbed. Where the Appellate Division has interfered the evidence and the reasonable inferences from it, in my opinion, so far support the trial judge's conclusions of fact that they should be restored. He held, upon facts which, if they did not compel, at least warranted, such a finding that

> the proper inference from all the evidence is that Hurst and the Goodalls conspired together to defraud the plaintiff of its trade name and of the profits legitimately its, as the result of its advertising and enterprise,

I am not inclined to differ from the learned judge who saw the witnesses on the question whether the defendant was an honest man or not, and where there is a finding such as we are here confronted with I am little disposed to make nice refinements or subtle distinctions in order to cut down what has seemed to an experienced trial judge to be necessary for the protection of the holder of a trade mark. *Perry & Co.* v. *Hessin* (1), at pages 527-8, 532.

The only question on which I think there is room for any doubt is whether the plaintiffs did not adopt the word "bicycle" as a grade, quality or style mark rather than as a trade mark—(*U.S. Playing Card Co.* v. *Clark* (2)). If this question be open under our statute (R.S.C., ch. 71, secs. 5 and 13 (2) and 19), I

(1) 29 Cut. P.C. 509.

(2) 126 U.S. Patent Office Gazette 2190; 132 U.S. Patent Office Gazette 681.

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think the better conclusion is that the finding of the trial judge in favour of the trade mark, affirmed in appeal, should not upon the evidence before us be disturbed.

The amendment to the 4th paragraph of the judgment made by the Appellate Division, however, is probably quite proper. The infringement therein dealt with would seem to have been of the specific trade mark mentioned by Mr. Justice Hodgins rather than of the several trade marks set out in paragraph 5 of the judgment of the trial court. Moreover, the judgment, as varied by the Appellate Division in this respect, seems to afford full protection to the plaintiffs.

But I cannot say the same of the amendments made to paragraphs 1, 5 and 7. These would seem to open the door to use of the word "bicycle" (for instances in the phrase "Bicycle Series" as used by Goodalls, the word "Bicycle" being in large letters on one line and the word "Series" in smaller letters on the next line), quite inconsistent with the measure of protection necessary to insure to the plaintiffs the full benefit and enjoyment of their trade mark for that word. In my opinion the declaration and injunction granted by the trial judge were not too wide for that purpose (*Singer Manufacturing Co.* v. *Loog* (1); *Apollinaris Co.* v. *Norrish* (2), and should be restored.

There remain the questions as to passing off and the assessment of damages.

It is common ground that no instance of passing off has been shewn. But in the opinion of the learned trial judge intention to pass off was abundantly proved and all means necessary to facilitate passing off were provided. These circumstances, in his view, made it

(1) 8 App. Cas. 15. (2) 33 L.T. 242.

unnecessary for the plaintiffs to shew that the opportunity thus afforded had been actually taken advantage of. In the Appellate Division it was thought on the other hand that the presence of the manufacturer's name on cards (the ace of spades), tuck cases and cartons would so probably preclude even retail customers being taken in that evidence of actual passing off was essential and that the plaintiffs should fail on this branch of the case because they had not established "a reasonable probability of deception." In this connection the evidence of Donald Bain, a leading retail stationer in Toronto, is important:

Q.—Do you remember whether any card of Goodall's during the time you were in business had any bicycle design on it or anything of that kind? A.—Latterly they brought out a card with a bicycle design, more after the design of the American card, to take its place.

Q.—Would you say when that was? A.—I would not like to say the year.

His Lordship:—About how many years ago? A.—Of course, that is about fifteen years ago.

Mr. McCarthy:—About fifteen years ago they brought out—do you know how they graded that card—what they called it? A.—I think they called it, if I remember rightly, the "Bicycle" card, too.

Q.—Then what was the result as far as the trade was concerned, with regard to using the word "Bicycle" when they brought that out? A.—There was a good many of their cards sold, if you were a smart enough clerk, you could sell them in place of the American cards.

Q.—If you were a smart enough clerk, you could sell them instead of the American card—in the trade what was meant by the "Bicycle" card after Goodall brought out his? A.—It was an infringement.

While it would, no doubt, have been more satisfactory had there been evidence by several men engaged in the business similar to that given by Mr. Bain, and, better still, if actual passing off had been proved, I incline to accept Mr. Justice Middleton's view that enough was shewn to establish a reasonable probability of deception, which would suffice to sustain his judgment. *A. G. Spalding* v. *Gamage* (1), at pages 199, 203; *Saxlehner* v. *Apollinaris Co.* (2); *Iron-Ox Remedy*

(1) 113 L.T. 198. (2) 14 Cut. P.C. 645, 654.

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Co. v. *Co-operative Wholesale Society* (1); *Liebig's Extract of Meat Co.* v. *The Chemists Co-operative Society* (2); *Claudius Ash Sons & Co.* v. *Invicta Mfg.* Co. (3), at pages 475, 476; *Albion Motor Car Co.* v. *Albion Carriage & Motor Body Works* (4).

As to the damages, with great respect, the fixing of them at $250 would seem to have been purely conjectural and arbitrary. It is true that the defendant's interests were in a measure protected by the offer of a reference at his own risk as to costs—a provision of which its omission from the formal judgment indicates that he declined to avail himself. But although the proof of infringement and the establishment of a case of passing off entitle the appellants to nominal damages, and the probability that actual damages were sustained entitles them to inquiry at their own risk, that, I think, is the full measure of relief that should be accorded. *A. G. Spalding Bros.* v. *A. W. Gamage, Ltd.* (5), at page 199. The formal judgment of the Appellate Division directing a reference would seem to indicate that the appellants had accepted the provision made by Mr. Justice Hodgins for an inquiry, should they desire it, with a reservation of costs. The case of *Provident Chemical Works* v. *Canada Chemical Manufacturing Co.* (6), cited by the learned judge, is scarcely in point, however, because, as Mr. Justice Moss points out, it there

> appear(ed) from the evidence that no purchaser had been misled into buying the defendants' product instead of the plaintiff's.

Here this negative has not been established.

With the modifications indicated I would restore the judgment of the trial judge. The appellant should

(1) 24 Cut. P.C. 425, 430.
(2) 13 Cut. P.C. 635, 644.
(3) 29 Cut. P.C. 465.
(4) 33 Times. L.R. 346.
(5) 113 L.T. 198.
(6) 4 Ont. L.R. 545, 553.

have its costs of the appeal to this court and the cross-appeal should be dismissed with costs.

BRODEUR J.—This is an appeal from a judgment of the Appellate Division of Ontario varying a judgment of the Supreme Court rendered by Mr. Justice Middleton.

The action had been brought to restrain certain alleged infringements by the respondent of the trade marks claimed by the appellant with respect to playing cards and to restrain the respondent from passing off the respondent's playing cards as cards of the plaintiff. These trade marks consisted of the word *Bicycle* applied to playing cards and in three designs called respectively, *Safety*, *Expert* and *Acorn*, on which the bicycle was a characteristic feature.

Mr. Justice Middleton held that those trade marks had been infringed upon and the injunction prayed for was maintained.

The Appellate Division confirmed the injunction as to passing off and as to the trade marks, *Safety*, *Expert* and *Acorn*. As to the trade mark "Bicycle," the Appellate Division varied the judgment by deciding that the cards bearing a design representing a bicycle were not an infringement of the patent and that the use also of the words *Bicycle Series* did not constitute an infringement; but that the defendants should be retrained from using the word bicycle on tucks and cartons and should use the words *bicycle cards* generally. The nominal damages which had been granted by Mr. Justice Middleton were set aside by the Appellate Division. The plaintiff appeals to this court from the judgment of the Appellate Division and, on the other hand, the respondent cross-appeals and, therefore, all the questions which had been raised by the pleadings are now in issue before this court.

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The evidence shews that in 1885 the appellant company was manufacturing four grades of playing cards which were known respectively as Tigers, Tourist, Army and Navy, and Congress. Those cards were of different prices, qualities and finish, two of those grades being expensive cards and two of a cheaper kind.

It was found advisable, in order to satisfy the demand in the trade for a playing card of another grade lying intermediate between the expensive and the cheap grade, to create a fifth grade. A name had to be given to that card; and, as at that time the use of the bicycle was becoming very popular, they thought of giving the name of *Bicycle* to that grade; and, as the requirements of the trade demanded, different designs of bicycles were used on the back of the cards; and in that way the *Acorn*, the *Expert* and the *Safety* were manufactured and put on the market. Some other designs of the bicycle idea were also put on the market; some were successful and were maintained, like the Expert, the Safety and the Acorn; some others were less successful; and in 1906 trade marks were applied for and obtained.

About the time those designs were registered as trade marks another trade mark was obtained by the appellants for the word *bicycle*. It appears that large sums of money were spent by the appellant company to advertise their cards, and particularly the bicycle card. The result was that those bicycle cards were in great demand on the Canadian market and also in the United States, where, in all probability, the appellant company were the largest manufacturers.

In Canada one or two companies manufactured some playing cards; but it does not appear by the evidence that it was done on an extensive scale. The sales of playing cards appear, on the contrary, to be

divided on the Canadian market between the appellant company and the large English firm of Charles Goodall & Co.

Hurst, the respondent, was a traveller for a wholesale stationery firm of Toronto; and, as such, was selling playing cards of the appellant company and of the Charles Goodall Company, and he was thoroughly familiar with the playing card trade in Canada. In 1901 he solicited from Charles Goodall & Co. the Canadian agency for the sale of their cards; and, having obtained that agency, he devoted himself entirely to it.

It appears that before that date the Goodall firm had in some cases also used the word "bicycle" in connection with their playing cards; but it was done in a very quiet way and the Canadian trade did not seem affected at all by it; but after Hurst became their sole Canadian agent their hesitation in that respect seemed to cease and they began to use extensively the word "bicycle" in connection with their cards, called the "Viceroys" and the "Imperial Club." Their sample books began to display in a conspicuous way the word "bicycle." It became pretty clear that the use of this word either by Goodall or by Hurst interfered with the trade of the appellant company; and the present action was instituted to restrain Hurst in connection with his playing cards.

It is contended that playing cards are not a proper subject matter of trade mark registration. There is absolutely nothing in the statute which prevents the word "bicycle" or the designs mentioned in those trade marks from being the subject of a trade mark. It cannot be claimed that the word was descriptive of the article to which it was applied. It was a fancy word which certainly could be used in connection with the

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playing cards. The respondent himself admits that the term "bicycle" used in connection with the playing card trade had a definite meaning as referring to the manufacture by the appellants.

Our statute states, (ch. 71, sec. 5), that all marks, names, labels, packages or devices which are adopted for use by any person in his trade for the purpose of distinguishing any goods manufactured by him be considered and known as trade marks. The word "bicycle" and the design in question had been in use for a great number of years by the appellant company. They were known in the trade as such and I have no doubt that they could be made the subject of a trade mark.

On that ground the trial judge and the Court of Appeal express the same view in which I concur.

If the Goodall Company had used, previous to the registration, the word "bicycle," it could not have affected the rights of the plaintiff company which had been using this description of goods for a great number of years and had established a trade by which those cards came to be known as *bicycle cards*. I am unable to agree with the Appellate Division in its variation of the decision of the trial judge. If the word "bicycle" has become known in the trade as connected with the goods of the appellant company, it seems to me that the word used in some way or other by some competitive firm would be illegal. Whether the respondent would claim the Goodall cards to be part of the Bicycle Series or whether designs would be put on the back of those cards representing a bicycle, I think that either would constitute an infringement upon the trade mark of the appellant company. Sebastian

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on Trade Marks (5 ed.), p. 147; *Johnston* v. *Orr Ewing* (1); *Read Bros.* v. *Richardson & Co.* (2); *Edelsten* v. *Edelsten* (3).

In those circumstances, I am of the opinion that the action of the plaintiff should be maintained, that the appeal should be allowed with costs of this court and of the court below, and that the cross-appeal should be dismissed with costs.

MIGNAULT J.—I concur in the opinion of Mr. Justice Anglin.

Appeal allowed with costs.

Solicitors for the appellants: *Osler, Hoskin & Harcourt.*
Solicitors for the respondent: *Fetherstonhaugh & Co.*

(1) 7 App. Cas. 219. (2) 45 L.T. 54.
(3) 1 De G. J. & S. 185.

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DAVID DIAMOND (PLAINTIFF).....APPELLANT:

AND

THE WESTERN REALTY COMPANY AND OTHERS (DEFENDANTS)..} RESPONDENTS.

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

Contract—Sale of land—Right of resale—Sales at stated periods—Power to cancel contract—Waiver—Estoppel.

A land company agreed to sell and D. agreed to buy certain lots of land at a specified price per lot. By clause six of the contract D. had the right to sell said lots, remitting to the company half of every payment by a sub-purchaser until the whole price of his purchase was paid and the balance due on any sale when a deed was demanded by the sub-purchaser; the company to have the right, each month, to examine D.'s books. By clause nine, if D. did not sell fifty lots every six months from December 1st, 1914, the company could cancel the agreement and then neither party would have any recourse against the other except that D. would be liable for the balance due on any of his sales for which a deed was demanded. In the six months ending 31st May, 1916, D. did not sell fifty lots. On 4th July the company wrote him demanding payment of arrears due on sales and threatening to cancel if adjustment was not made by the 15th. On 5th July they wrote saying that by D.'s statement for June, which included sales made in that month, $53 should be added to the amount demanded. On 19th July they gave notice of cancellation.

Held, Davies C.J. and Brodeur J. dissenting, that the notice of cancellation was invalid.

Per Idington and Mignault JJ., Davies C.J. and Brodeur J. *contra* that the company, by demanding in July payment of moneys due knowing that a part of the same was for sales made in June, had elected not to cancel the agreement for default in the six months ending 31st May:

Per Anglin J. The company having in July intentionally demanded payment of monies received in June in the exercise of their rights under clause six, which rights could be exercised only while the contract was in force, that unequivocal act was an election to recognize it as still subsisting which precluded cancellation for default on May 31st.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial by which the action was dismissed.

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

C. C. Robinson and *Cohen* for the appellant.

A. C. MacMaster for the respondents.

THE CHIEF JUSTICE (dissenting).—This was an appeal from the judgment of the Appellate Division of Ontario dismissing an appeal from the judgment of the trial judge which dismissed plaintiff's action and directed judgment to be entered on defendant's counterclaim for $400.

The only point upon which I entertained any doubt as to the correctness of the judgment appealed from arose out of the contention by Mr. Robinson for the appellant that there had been an election on the part of the defendant company which destroyed the defendant company's right of cancellation of the agreement made by them with plaintiff for the sale of certain lands to him by the company, to be resold by him to purchasers on the terms and conditions in the agreement specified.

The right to cancel the agreement for default on the part of the plaintiff in reselling a stipulated number of the lots sold to him by the company defendant accrued on the 31st May, 1916. No immediate action was taken by the company regarding cancellation, but at the beginning of July the president of the company made an inspection of the plaintiff's books at Niagara Falls, and on the 4th July wrote plaintiff a letter stating the result of such inspection and demanding payment in accordance with the agreement of the instalments of purchase moneys which had been

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received by the plaintiff from the sub-purchasers and intimating that if a "satisfactory adjustment" was not made with the company by the 15th of the month they would avail themselves of their right of cancellation of the agreement. On the following day, the 5th July, the president of the company again wrote plaintiff saying he had received from the Niagara Falls office a statement for the month of June and found that according to that statement $53 had to be added to the total amount given in his letter of the previous day as due to the company by the plaintiff.

The letter does not state, and there is no evidence shewing, whether $53 which had been received in the month of June were on account of sales made in June or previously.

The contention is now made that this demand made after the date when the company became entitled to cancel (31st May) constituted an election not to cancel. I cannot agree with that. The company had notified the plaintiff on the 4th that they would give him till the 15th to adjust accounts with them and that failure on his part to do so would result in their then cancelling the agreement. That was a reasonable concession, and though accompanied with a demand for payment of the amount which the president's inspection and the Niagara Falls statements shewed as being due to them from plaintiff, that demand in no way could be construed as an election not to cancel. The formal cancellation was made as threatened on the 19th, four days after the date fixed, and I am quite unable to see how the previous demands of the 4th and 5th July can be construed as an election not to cancel or as in any way affecting their right to cancel. Such right to cancel was one dependent entirely upon plaintiff's failure to sell a stipulated number of lots. It had no

reference to the non-payment of moneys he might have received on the lots he did sell, and plaintiff's letters expressly stated that the right of cancellation would be exercised if a satisfactory adjustment of the balance due was not made.

The formal cancellation, the plaintiff having failed to adjust his accounts with the company, was, in pursuance of the notice they had given him, made on the 19th. It took effect then and did not relate back or have any reference to default on plaintiff's part in paying over moneys he had received. No such action in demanding payment of the moneys can be construed as an election to continue the agreement and destroy the company's express right of cancellation.

Under these circumstances I am of opinion that Mr. Robinson's able argument as to election arising out of the demand for payment of the moneys due the company cannot be accepted, nor can the defendant company's express right of cancellation arising out of failure on plaintiff's part to sell a stipulated number of lots within a given time, be affected.

I would dismiss the appeal with costs.

IDINGTON J.—The appellant entered into an agreement, dated 6th November, 1914, to purchase from respondent, the Western Realty Limited, at $65 a lot, a little over four hundred lots in a subdivision known as Lundy Park, in the Township of Stamford, of which said respondent was the owner subject to a mortgage to respondent Davidson and one Huntler who were parties to the agreement. It was a speculative venture based on the expectation that the purchaser would resell said lots at the rate of at least fifty each six months after said date.

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The appellant bound himself to expend within the first six months from said date, $500 of his own money for advertising and expenses in connection with the said resales and to produce proof thereof to said company.

The company bound itself to spend $500 in other ways preparatory to and for the purpose of promoting such resales, and also to pay taxes on the whole up to and inclusive of the year 1917.

The appellant was not only to have the right to resell to sub-purchasers any or all of said lots, but also to have a conveyance made to any of such sub-purchasers freed from said mortgage so soon as $90 a lot paid said company for any lots in a specified district, and for the rest at the rate of $65 a lot until the total price owing the company was paid.

The company was not to get interest on any part of the price until after three years from said date.

The appellant was to get the first $15 a lot out of the purchase moneys got on his resales, and the company the next $15 a lot thereout, and thenceforward the balance to be divided as specified in the agreement.

To secure due observance of the foregoing terms and others I am about to set forth, the company had expressly given it a right to examine and check the books

and accounts and agreements of the appellant once a month in order to verify the amount payable by the

appellant to the company.

In fact, accounts were rendered to facilitate this.

The appellant engaged respondent Bettel to assist him in carrying out the scheme of resale as designed and he was in charge of said business until the events I am about to advert to.

The agreement contained the following clause:—

9. If the Party of the Second Part does not sell at least fifty Lots of the said Lots during the six months beginning with the 1st of December, 1914, or if commencing with the month of June, 1915, the Party of the Second Part does not sell at least fifty of the said Lots during each and every succeeding six months' period thereafter until the whole of the said Lots are sold by the Party of the Second Part, the Company has the right to cancel this agreement forthwith by notice in writing addressed to the Party of the Second Part at Number 70 Victoria Street, in the City of Toronto. And the Party of the Second Part has the right at any time after the expiration of six months from the date hereof to cancel this agreement by notice in writing to the Company addressed to the Company, c/o Hunter & Hunter, Temple Building, Toronto. Upon the termination of this agreement none of the parties hereto shall have any recourse against the other or others of them, except that the Company shall be entitled to collect from the Party of the Second Part at the time any sub-purchaser is entitled to and demands a conveyance and discharge of the Lot or Lots purchased by him the balance of the amount necessary to discharge the said Lots according to the terms of discharge and conveyance set forth in paragraph Number 7 hereof.

The appellant was so successful that during the first year and a half he had sold a total of over a hundred and fifty lots, but unfortunately fell short a few less than fifty in the last six months of that period, which expired on the 31st May, 1916, though taking the whole period he made that average of fifty lots per each six months.

He had entered on the fourth six-monthly term and made four sales in June, fell ill in July, and was in the hospital when complaint reached him from the company that he was falling behind. Despite his appeal for delay till he had recovered, the company served, on the 19th July, 1916, appellant with a notice claiming under, and by virtue of, the above quoted clause to terminate the agreement.

The respondents proceeded to try and get the fruits of appellant's labour and expenses by forcing or inducing sub-purchasers from him to surrender his agreements and respectively accept agreements from the company in substitution thereof.

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The company, and Davidson, who was its vice-president, took part in such proceedings and induced respondent Bettel to enter the employment of the company to conduct in the future the business in question.

Hence this action for restraining the respondents from asserting that the agreement has been terminated and pursuing such a course of conduct and for damages.

The objection is now made by counsel for the appellant that the notice served on the appellant was too late to be effective and, in any event, that the respondent company had, before such notice, by the unequivocal act of accepting and crediting appellant with proceeds of sales made in June, 1916, when the fourth six-monthly period had been entered upon, had elected in law to overlook the non-observance of the literal terms nominated in the bond, and hence could not so late as 19th July, 1916, rescind or terminate the agreement.

I think the point is well taken and the notice void.

I have no doubt of respondent company's knowledge of the fact of the sales in June. They had no right to accept a dollar of proceeds of any such sales affirming thereby the continuance of the contract, and then attempt to terminate it by such a notice as now in question.

When we find that a successful effort to do so would deprive appellant of all he earned and would yet be entitled to receive out of the proceeds of his resales, which would amount to $8,000 or over, and for which the rigorous terms of this contract would deprive him of any recourse against respondent company, one cannot see how, as suggested below, this is a one-sided contract giving the advantage only to the appellant.

It seems to me rather a case of diamond cut diamond.

The contract binds the respondent company to observe the rights of the appellant as against his sub-purchasers and all that is implied therein, even though he might have had no recourse against the company in the event of a successful termination under above quoted clause. With those rights it had no right to attempt to interfere.

Each of the sub-purchasers was accountable to appellant and should have been amply protected in claiming from the company such conveyance as the agreement in question entitled them to.

The action is not, as the court below seemed to assume, brought for specific performance.

The appeal should be allowed with costs throughout as against the company and Davidson, and the injunction granted as prayed for against all concerned, with nominal damages against Bettel.

There should be a reference to take accounts as prayed for if the parties cannot agree, and also to fix the damages done the appellant by the acts of the respondent company and Davidson, to be assessed separately as against each of the two lastly named parties if so desired by either.

Further directions should be reserved until the report of the referee.

The judgment entered for $400 against appellant should be set aside.

There was no agreement to return such money to the company.

I think the utmost that can be said as to that is that in the ultimate accounting it might be chargeable against the appellant as intimated in the correspondence, and I would allow it to be set off in taking the

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accounts between the parties which seems to be a necessary result of this appeal.

ANGLIN J.—The facts of this case sufficiently appear in the reports of it in the Supreme Court of Ontario (1).

Mr. Robinson's admirably lucid and concise argument in support of the plaintiff's claim that the attempted cancellation by the defendants of their agreement with him was ineffectual failed to convince me that default had not been made by his client which entitled the defendants, on the 1st June, 1916, or within a reasonable time thereafter, to exercise their option to cancel. I thought he also failed to establish the estoppel which he urged because of lack of evidence of any change of position by the plaintiff induced by the defendants' conduct. But he satisfied me that the letter of their president of the 5th July demanding payment of $53 shewn to be due to them by the plaintiff's statement of the June payment made by his sub-purchasers, as an unequivocal act in affirmance of the continued existence of the agreement, amounted to an election not to exercise the right of cancellation which had accrued to them under its terms on the 1st of June.

The argument that there had been such an election by the letter of 5th July was based on two distinct grounds: (a) the demand of moneys payable in respect of sales made in June; (b) the demand under clause 6 of the agreement of moneys received by the plaintiff in June in respect of sales whenever made.

(a) By knowingly claiming proceeds of sales made by the plaintiff in June, the defendants would have

(1) 12 Ont. W.N. 226; 14 Ont. W.N. 94.

unequivocally recognized his right to act under the agreement notwithstanding his default during the period ending on the 31st May and would have precluded themselves from exercising their right to cancel the agreement for that default.

Mr. Robinson urged that the inference from the documents (the president's letter of 4th July shewing the result of his inspection of the plaintiff's books made on the 24th June, and the plaintiff's statement of June receipts, coupled with the admission of counsel that the McCully sales shewn in it had been made in June) that the defendants' president, when writing the letter of 5th July, had "a conscious appreciation" of the fact that the moneys thereby demanded included proceeds of sales made in June is irresistible. No doubt a powerful case is made in support of that inference. But, although the president was examined as a witness at the trial, he was not confronted with it. While it may be urged that, under the circumstances, the burden was on the defendants to shew that the letter of July 5th was written in ignorance of this vital fact, yet it the appellant intended to rely upon the inference that he now seeks to have drawn, not having pleaded it, it was his duty at least to have directed attention to it at the trial—if not to have cross-examined Mr. Metcalfe in regard to it—in order that an opportunity for explanation might be afforded. Not having done so, he should, in my opinion, not be allowed now to rest a claim of election upon that inference which might, had opportunity been afforded, have been shewn to be unwarranted.

Confronted with this difficulty, Mr. Robinson contended that knowledge of the June sales was not essential—that the right to elect to cancel rested solely on the December-May default, and that knowledge of

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it was indisputable and sufficed to make the letter of 5th July conclusive as an election. In support of this contention he relied on a distinction drawn by Mr. Ewart in his recent work on "Waiver Distributed" (pp. 75-6) between facts giving rise to the right to elect and facts calculated to influence the exercise of that right, and urged (again citing Mr. Ewart's book, pp. 84-88) that if the act relied on as constituting the election be unequivocal, the intention with which it is done is immaterial. *Scarfe* v. *Jardine* (1). But we are here dealing not with what Mr. Ewart terms an "influencing fact," but with a fact which is relied upon to give significance and character to the act set up as an election. It may be that even ignorance of such a fact cannot be invoked to negative an election which would be indubitable and incontrovertible had it been known. I desire to leave this an open question finding it unnecessary now to pass upon it because, in my opinion, the alternative ground on which Mr. Robinson rests his assertion of the election is unanswerable.

(b) There can be no doubt that the demand for payment in the letter of the 5th July was made, and consciously and intentionally made, in the exercise of the defendants' rights under the 6th clause of the agreement. I think it is equally clear that those rights could be exercised only while the agreement was subsisting and in force. Upon cancellation entirely different rights would arise under the 9th clause. Instead of the plaintiff's obligation being from time to time to hand over to the defendant certain portions of payments made to him by sub-purchasers, as it was while the agreement was in force, upon cancellation he would have been obliged to make payment to the

(1) 7 App. Cas. 345, at p. 361.

defendants only when a sub-purchaser should be entitled to a conveyance and then of "the balance of the amount necessary to discharge" the lot or lots to be conveyed. If it was intended that any rights under clause 6 might be preserved after cancellation, not only is that intention not expressed, as it should have been, but the words of clause 9 express the contrary intention,

> upon cancellation none of the parties * * * shall have any recourse against the other or others of them except, etc.

as above indicated.

The defendants were fully aware of the facts entitling them to cancel and of their right to elect to do so. They knew that the moneys demanded by their letter of July 5th were on account of June payments—the fact which gave character and significance as an election to that demand for payment under clause 6. Their president made that demand deliberately. Having done

> an act which would be justifiable if he had elected one way (not to cancel) and would not be justifiable if he had elected the other way (to cancel)—the fact of his having done that unequivocal act to the knowledge of the person concerned is an election. *Per* Lord Blackburn in *Scarfe* v. *Jardine* (1).

Other authorities are cited in Ewart on "Waiver Distributed" *loco cit.*

I am, for these reasons, of the opinion that the attempted cancellation was ineffectual and that the appellant is entitled to judgment declaring the acts of the respondents of which he complains unwarranted and illegal, for an accounting by them in respect of moneys received from his sub-purchasers and for damages sustained by him as a result of their wrongful interference with his rights under subsisting agreements with sub-purchasers and also with his right to

(1) 7 App. Cas. 345 at p. 361.

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continue the sale of lots until his agreement with them was duly terminated. The last item may involve only a negligible amount.

If any of his agreements with sub-purchaser are still in such a position that they can be enforced he is entitled to have them delivered up to him and to an injunction restraining interference with his enforcement of them.

There is nothing to sustain the defence of abandonment by the plaintiff.

I should, perhaps, add that, if I had been of the opinion that the attempted cancellation was effectual, on the construction of clause 9 I should have held the appellant entitled to the like damages, accounting, etc., in respect of the agreements of sub-sale which were subsisting at the time it took place. There is no provision entitling the respondent company to deprive him of the benefit of these agreements.

For the reasons given in the Appellate Division I think the judgment for the respondents upon their counterclaim for $400 should not be disturbed.

The appellant is entitled to his costs throughout.

BRODEUR J. (dissenting)—One of the questions raised on this appeal is whether or not the respondent company could cancel the agreement of the 6th November, 1914.

That agreement provided for the sale to the appellant Diamond by the Western Realty Company of a subdivision known as *Lundy Park* for the price of $65 a lot. The purchaser was bound to sell at least fifty lots during the six months commencing with the month of June, 1915, and fifty lots during each and every succeeding six months until all the lots would be sold; and if he did not sell that number of lots

during one of those six months' periods the vendor had the right to cancel the agreement.

During the six months from December, 1915, to May, 1916, the purchaser sold only 14 lots, and on the 19th of July, 1916, the vendor cancelled the agreement.

The evidence shews that Diamond had intimated that he could not go on with the carrying out of his contract. He had left Ontario to go and reside in Detroit, and the few sales he had made in the six months' period above mentioned shewed that the sale of those building lots could not be successfully carried out.

The parties went into negotiations to put an end to the agreement of sale; but those negotiations fell through as to the terms on which the sub-purchasers should be dealt with and the money due by Diamond on his purchase price should be paid. Then the company had to exercise the right of cancellation.

It is claimed by the appellant that the company had no right to cancel the agreement because there had been a substantial performance of the contract.

It is true that during the two first six-months' periods Diamond sold a certain number of lots but most of those sales had been cancelled, likely for failure of payment on the part of sub-purchasers. It is also in evidence that during the last period of six months Diamond sold only fourteen lots and was then far from carrying out the obligation which he undertook in the contract to sell during each of these six months' periods at least fifty lots.

I am convinced that if Diamond had made to the company the remittance which he was bound to give under his contract out of each sale of lots which he had made, the company would not have exercised its right to cancel the agreement. But Diamond was in

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arrears in his payments, had practically left the province to go and reside in the United States, and had told the company that he was unable to meet his obligations.

There is no doubt that the terms stipulated were of the essence of the contract, as the purchaser had to pay by handing over to the company a part of what he would have received from his sub-purchasers.

It is contended also on the part of the appellant that the company had waived its right to cancel and had elected not to exercise that right.

I am unable to find in the evidence any such waiver or any such election. It is true that the last six months' period expired on the 31st May, 1916, and that the cancellation was made on the 19th July of the same year; but negotiations were pending to bring about a settlement which would be satisfactory to both parties. The appellant should certainly not take advantage of those negotiations to say that there was on the part of the company waiver when this delay occurred just for the purpose of helping him to raise money which he had to pay to the respondent company.

As to the election which is alleged by the appellant, that contention is based upon six sales made in June which sales, according to the appellant, were known to the company. He relies in that respect on a statement of account handed over to the company for the June collections.

It is not clearly and conclusively shewn that the company in making a claim with regard to those payments knew that a small sum of money was coming from sales made after the 31st May, 1916. Of course, if the company had known that such sales had taken place after the 31st May, the situation might

be different; but I am unable to find in the evidence the necessary element to shew that they possessed that knowledge. I am then of opinion that the company had the right to cancel the contract in question; and in that regard the appeal should be dismissed.

But another question comes up with regard to the right of the appellant concerning the contracts made with the sub-purchasers and the moneys paid by the latter. When the contract was cancelled the company obtained, through one of the respondents who was the clerk of Diamond, the agreement covering these sub-purchasers and they started to collect the money due under those agreements or to make some new contracts with those sub-purchasers.

The provisions of the contract between Diamond and the Western Realty Company do not disclose very clearly what should be done with sub-purchasing agreements in case the contract would be cancelled. That right of cancellation was stipulated not only in favour of the vendor but also in favour of the purchaser. Diamond had himself the right, after three months, to cancel the agreement if he did not find it satisfactory. On the other hand, as I have already said, the company had the right to cancel, if the purchasers did not sell so many lots during each of the six months' periods.

It had been provided in the contract that Diamond had the right to sell any of the lots to sub-purchasers and the money collected from those sub-purchasers was practically to be divided between Diamond and the company until the amount of $65 per lot would be paid; and it was stipulated that the amount in excess of $65 per lot should be applied upon the balance of the purchase money payable.

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Now the contract having been duly cancelled by the vendor, who has the right to collect the money from the sub-purchaser?

I am of opinion that this money should be collected by Diamond. He is bound to hand over that money to the company until all the lots have been paid for; but if there was enough money due by those purchasers in order to cover the old purchase price which he owed to the company, then that balance would come to him.

In those circumstances, I think that the company had no right to interfere with those sub-purchasers and that it should render an account to Diamond of the money which it had received from those sub-purchasers since the cancellation of the contract.

The appeal should be allowed to that extent, each party paying his own costs.

MIGNAULT J.—I can entertain no doubt that, assuming the respondent had the right to cancel its agreement with the appellant under clause 9, for failure of the appellant to sell at least fifty lots during the six months' period ending on the 31st May, 1916, the respondent could not take possession of the contracts which the appellant had made with persons to whom he had sold lots, and give to the latter notice to pay to the respondent and not to the appellant amounts due the appellant under these contracts. Clause 9 of the agreement provided that:—

> Upon the termination of this agreement none of the parties hereto shall have any recourse against the other or others of them, except that the company (the respondent) shall be entitled to collect from the Party of the Second Part (the appellant) at any time any sub-purchaser is entitled to and demands a conveyance and discharge of the lots or lot purchased by him the balance of the amount necessary to discharge the said lots according to the terms of discharge and conveyance set forth in paragraph number 7 hereof.

In so far, therefore, as the respondent interfered with contracts made by the appellant with sub-purchasers—and it did so interfere—it was clearly wrong and the appellant can demand to have these contracts delivered up to him and is entitled to an injunction to prevent the respondent from interfering with the sub-purchasers.

The question whether the respondent had effectually exercised its right of cancellation under clause 9 of of the agreement is not so free from doubt. I think that the letters of the president of the respondent company, written to the appellant on July 4th and July 5th, 1916, should be read together. It is noticeable that neither of these letters refer to the only ground upon which the respondent could cancel its contract with the appellant, *i.e.*, the failure of the latter to sell, during the six months' period ending on the 31st May, 1916, at least fifty lots. On the contrary, the letter of the 4th July mentions the obligation assumed by the appellant under clause 6 to make remittances to the respondent on sales made by him, and alleges that the appellant is indebted in the sum of $370 for lots sold by him, besides a claim for taxes and amounts received on account of lots resold. It intimates that unless a satisfactory adjustment be made by the 15th July, the respondent will avail itself of its right of cancellation. And the president's letter of the 5th July, based on the appellant's June statement, claims $53 in addition. The June statement mentioned new sales made by the appellant in June, 1916, the respondent's counsel in the court below admitting four new sales in June.

Reading, therefore, together the letters of July 4th and 5th, the respondent is in the position that it demanded from the appellant payment of all moneys

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received by him to June 30th, including payments received by him on at least four sales of lots made by him in June, and notified him that if he did not make this payment, the contract would be cancelled.

It is obvious that, under the agreement, the right of cancellation could not be exercised by reason of the appellant's failure to make remittances to the respondent of the portion of the moneys due to it out of payments received by him from sub-purchasers. So when the respondent now seeks to justify its notice of cancellation of the 19th July on the ground that the appellant had not made the required number of sales in the six months' period ending the 31st May, 1916—the notice of cancellation of the 19th July made no such complaint—it is, in my opinion, prevented from so doing because, by demanding payments on sales made in June by the appellant and claiming benefit thereunder, it had acquiesced in the continuation of the agreement after the 31st May, notwithstanding that the appellant had not made the required number of sales during the six months' period ending on that date.

The complaint now made by the respondent that the appellant had failed to make the required number of sales seems to me to be an afterthought, probably suggested by counsel, but I cannot think that it was present in the president's mind when he wrote the letters of July 4th and 5th. It does not appear in the correspondence that the respondent ever made such a complaint to the appellant. What seems evident is that the respondent assumed that if the appellant did not make the remittances demanded within the delay specified in the letter of the 4th July, it could on that ground cancel the contract. Unfortunately for its notice of cancellation, it had been preceded by a demand

of payment of moneys received on account of June sales, and in view of this fact, I think that the respondent could not, on the 19th July, cancel the contract because the appellant had not made at least fifty sales between the 1st December, 1915, and the 31st May, 1916.

The appeal should, therefore, be allowed with costs, but I would not disturb the judgment of the trial court on the counterclaim of the respondent.

Appeal allowed in part with costs.

Solicitor for the appellant: *Abraham Cohen.*
Solicitors for the respondents: *Hunter & Hunter.*

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J. BURTON MITCHELL.....APPELLANT;

AND

E. S. TRACEY AND GEORGE H. FIELDING.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Prohibition—"Criminal charge"—R.S.C., c. 139, ss. 39 (c) and 48 "Supreme Court Act"—8 & 9 Geo. V. c. 7, s. 3.

An appeal from the court of final resort in any province except Quebec in a case of prohibition under sec. 39 (c) of the "Supreme Court Act" will not lie unless the case comes within some of the provisions of sec. 48 as amended by 8 & 9 Geo. V. ch. 7, sec. 3.

Sec. 39 (c) allows an appeal from the judgment in any case of proceedings for or upon a writ of prohibition "not arising out of a criminal charge."

Held, per Davies C.J. and Anglin and Mignault JJ. that application for a writ of prohibition to restrain a magistrate from proceeding on a prosecution for violating the provisions of the "Nova Scotia Temperance Act" arises out of a criminal charge and no appeal lies from the judgment thereon.

Per Mignault J. in Chambers.—An order to stay proceedings on a judgment of the Supreme Court of Canada for purposes of a proposed appeal to the Privy Council will not be granted in a case in which the Court has determined that it is without jurisdiction to hear the appeal.

APPEAL from an order of the Acting Registrar refusing to affirm the jurisdiction of the court and approve the security.

The reasons given by the Acting Registrar for refusing the order are the following:—

ACTING REGISTRAR.—"Application before me as Acting Registrar to affirm jurisdiction and approve of bond filed as security for costs. The applicant, a licensed vendor of liquor in Halifax under the 'Nova Scotia Temperance Act,' was charged before a magistrate

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

with unlawful selling of liquor contrary to the provisions of the Act. The charge was heard but judgment was stayed pending an application for a writ of prohibition to restrain the magistrate from convicting. The writ was refused and from such refusal the applicant seeks to appeal to this court.

"Two questions are raised affecting the right to appeal to this court. The 'Supreme Court Act,' section 39 (c), allows an appeal in a case of *habeas corpus* or prohibition not arising out of a criminal charge. The first question then is whether or not the charge in this case was a 'criminal charge' within the meaning of section 39 (c).

"This question came before the Supreme Court in the case of *In re McNutt* (1). In that case the appellant, Mrs. McNutt, had applied for discharge by *habeas corpus* from imprisonment on conviction for an offence under the same Act as in this case, the 'Nova Scotia Temperance Act.' The case was heard by the six judges of the court. Three of them held that the application for the writ arose 'out of a criminal charge;' one held that it did not and one seriously doubted that it did; the remaining judge expressed no opinion on the point but quashed the appeal on another ground.

"Sir Charles Fitzpatrick, one of the three who held that it was criminal, is no longer a member of the court. If this case, then, should come before the present bench of judges the position would be that two of them are on record as holding that the charge was criminal, practically two that it was not, and two whose views are entirely unknown. I consider, therefore, that the question is at large and my personal opinion being in accord with that of Mr. Justice Duff,

(1) 47 Can. S.C.R. 259; 10 D.L.R. 834.

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I would be prepared to affirm the jurisdiction so far as this first question is concerned.

"The second question is one of greater difficulty for the applicant. At the last session of Parliament, section 48 of the 'Supreme Court Act,' which had previously been confined to appeals from Ontario, was extended to cover appeals from all the provinces except Quebec. It is necessary, therefore, to decide whether or not the case before us is governed by that section.

"It is settled by authority that it is so governed. Not only has the court held, before the amendment, that an appeal in an Ontario case of mandamus must comply with the requirements of section 48 (*Attorney-General* v. *Scully* (1)), and also in the case of a municipal by-law (*Town of Aurora* v. *Markham* (2)), as to both of which the appeal is allowed by section 39, but it has lately held that an appeal in a case of prohibition from the Province of Quebec must comply with the requirements of section 46, the counterpart, for Quebec, of section 48. (*Desormeaux* v. *Village of Ste. Thérèse* (3).

"As the case before me does not come within the terms of section 48 there is no appeal as of right, and the motion to affirm jurisdiction must be dismissed. No costs. If the jurisdiction was affirmed the bond filed is sufficient.

"C. H. MASTERS,
"*Acting Registrar.*"

The applicant appeals from this decision to the Supreme Court.

(1) 33 Can. S.C.R. 16. (2) 32 Can. S.C.R. 457.
(3) 43 Can S.C.R. 82.

Power K.C. for the appellant.
Bethune for the respondent.

THE CHIEF JUSTICE.—As to the meaning of the language "not arising out of a criminal charge" in sub-section (c) of section 39 of the "Supreme Court Act," I adhere to the opinion I expressed in *In re McNutt* (1).

And as to the appellant's right of appeal to this court *de plano* as taken in this appeal and which right the appellant sought to have affirmed by the Assistant Registrar, I am of opinion that this officer was right in refusing to affirm our jurisdiction to hear the appeal.

That jurisdiction is defined and limited by section 48 of the "Supreme Court Act" and appellant failed to bring himself within its provisions, *Aurora* v. *Markham* (2). Sections 37, 38 and 39 must be read and construed together with section 48 and subject to it.

In the present case there is no amount involved in the appeal or other ground which could possibly give a right of appeal under that section.

IDINGTON J.—I do not think this appeal should be allowed inasmuch as the amendment of the "Supreme Court Act" contained in 8 & 9 Geo. V. ch. 7, seems to forbid it.

As to leave to appeal the application is too late for this court to grant and can only be given now by the court sought to be appealed from.

ANGLIN J.—I have seen no reason to change the view which I expressed in *In re McNutt* (1), as to the construction of the phrase "not arising out of a criminal charge" in section 39 (c) of the "Supreme Court Act."

(1) 47 Can. S.C.R. 259; 10 D.L.R. 834. (2) 32 Can. S.C.R. 457.

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Section 48 of the "Supreme Court Act," made applicable by the legislation of 1918 to all the provinces other than Quebec, is, in my opinion, conclusive against a right of appeal *de plano* in this case. Sections 37, 38 and 39 are subject to section 48 just as they are subject, in Quebec appeals, to section 46. *Desormeaux* v. *Ste. Thérèse* (1); *Bouchard* v. *Sorgius* (2). That would be so without the introductory words "except as hereinafter otherwise provided" found in each of these sections. But the presence of that phrase leaves no room for argument.

In *Trusts and Guarantee Co.* v. *Rundle* (3), very much relied upon by Mr. Power, section 48 was not and could not have been invoked, the amount involved in the appeal being over $1,000, viz., $1,068.27, expenditure allowed in the Surrogate Court and disallowed by the Court of Appeal, and $100 of the guardian's remuneration fixed by the Surrogate Court, likewise disallowed.

The appeal from the order of the Acting Registrar fails on both grounds and should be dismissed with costs.

The application for special leave to appeal is too late. *Goodison Thresher Co.* v. *Township of McNab* (4).

BRODEUR J —This is a motion by way of appeal from an order of the Registrar declaring that the court has no jurisdiction to hear this case.

The court below refused a writ of prohibition in a prosecution against the appellant for selling liquor contrary to the "Nova Scotia Temperance Act" and he now wants to appeal to this court. One of the

(1) 43 Can. S.C.R. 82.
(2) 55 Can. S.C.R. 324; 38 D.L.R. 59.
(3) 52 Can. S.C.R. 114; 26 D.L.R. 108.
(4) 42 Can. S.C.R. 694.

objections made to his right to appeal is that section 48 of the "Supreme Court Act," as amended in 1918, precludes him from entering this appeal.

By section 39 of the "Supreme Court Act" an appeal to the Supreme Court in cases of prohibition is given but that appeal is limited and controlled by section 48 of the same Act which declares that no appeal will lie unless the judgment *a quo* relates to title to real estate, affects the validity of a patent, puts in controversy a matter exceeding $1,000, or relates to an annuity.

None of these conditions are to be found in that judgment.

Applying the decisions rendered by this court in *Attorney-General* v. *Scully* (1); *Desormeaux* v. *Ste. Thérèse* (2); and in *Bouchard* v. *Sorgius* (3), I am strongly of the view that the appellant has no right to ask this court to adjudicate on his writ of prohibition.

Another ground urged against this appeal s that under section 39 the appeal lies in proceedings for a writ of prohibition "not arising out of a criminal charge" and that the writ of prohibition in this case has reference to a criminal charge.

The statute in violation of which the appellant has been prosecuted is a provincial statute; and in deciding the point raised we might curtail the legislative powers of the provinces without giving an opportunity to the provinces to be heard.

In view of the conclusions I have reached on the first point above mentioned, I do not see any reason for me to express my views upon the second point.

The appellant asks also in the alternative that he should be granted leave to appeal.

(1) 33 Can. S.C.R. 16. (2) 43 Can. S.C.R. 82.
(3) 55 Can. S.C.R. 324; 38 D.L.R. 59.

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It was decided in *Goodison Thresher Co.* v. *McNab* (1), that after the expiration of sixty days from the pronouncing of the judgment *a quo* this court is without jurisdiction to grant special leave.

The motion should be dismissed with costs.

MIGNAULT J.—Two questions arise under this appeal from the decision of the Acting Registrar refusing to affirm jurisdiction in favour of the appellant:

1. Do the appellant's proceedings for a writ of prohibition arise out of a "criminal charge?"

2. Assuming that this first question be answered in the negative, has the appellant a right of appeal to this court, in view of the provisions of section 48 of the "Supreme Court Act?"

First question.—In the case of *In re McNutt* (2), in which six judges sat, three judges, Fitzpatrick C.J. Davies and Anglin JJ. expressed the opinion that a trial and conviction for keeping liquor for sale contrary to the provisions of the same Act, the "Nova Scotia Temperance Act," were proceedings on a "criminal charge" within the meaning of section 39 (c) of the "Supreme Court Act." Mr. Justice Duff was of the opinion that the proceedings did not arise out of a "criminal charge," within the meaning of that sub-section, and Mr. Justice Idington and Mr. Justice Brodeur expressed no opinion on this point. The learned Acting Registrar, therefore, considered the question as being an open one, although he rejected the motion of the appellant to affirm jurisdiction upon the second ground above referred to.

Under the circumstances, I think it is incumbent on me to express my opinion upon both these questions

(1) 42 Can. S.C.R. 694. (2) 47 Can. S.C.R. 259; 10 D.L.R. 834.

which were fully argued by the learned counsel for the appellant.

It is almost unnecessary to say that the jurisdiction of this court is statutory, that is to say, that it must appear in any case brought before this court that the statute properly construed confers jurisdiction, and if this is not shewn jurisdiction is negatived.

The "Supreme Court Act" refers several times to "criminal charges" and to "criminal cases," and the answer to the question I am considering depends upon the construction to be placed upon these words. I will refer very briefly to some of the provisions of the Act.

In the first place, the introductory section 35 states that this court has "civil and criminal jurisdiction" within and throughout Canada.

As the words "civil" and "criminal" are here employed in contradistinction to each other, they must certainly be understood as being used *lato sensu*, and, therefore, "criminal" matters comprise all matters which can come under the general term according to the well-known test that

> the proper definition of the word "crime" is an offence for which the law awards punishment. *Per* Littledale J. in *Mann* v. *Owen* (1), at p. 602.

When, therefore, in the next section, section 36, we find the general right of appeal granted by section 35 restricted by the proviso that no appeal lies from a judgment

> in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge,

the ordinary rules of construction would give to the word "criminal" the same meaning as in section 35, and, therefore, I would say that it is here used in the

(1) 9 B. & C. 595.

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wide sense, according to the test I have indicated above.

Sub-section (b) of section 36 further states, as a part of the same proviso, that

> there shall be no appeal in a criminal case except as provided in the Criminal Code.

This is a reference to sec. 1024 of the Criminal Code by the terms of which the right of appeal is restricted to convictions for indictable offences affirmed on an appeal taken under sec. 1013 of the Code, to the Court of Appeal, where the latter court is not unanimous in affirming the conviction. Whatever restricted meaning, therefore, might be given to the words "criminal case" in sub-section (b) by reason of the reference to the Criminal Code, cannot, in my opinion affect the construction of the words "criminal charge" as used in sub-section (a).

Coming then to the words "criminal charge" in sub-section (c) of section 39, where it is said that an appeal shall lie to the Supreme Court

> from the judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition not arising out of a criminal charge,

there can be no doubt whatever that the words "criminal charge" must receive the same construction as in sub-section (a) of section 36, and, therefore, my opinion is that they are used in the wide sense as allowing an appeal in matters of prohibition merely when they arise out of "civil" as distinguished from "criminal" proceedings.

We next find the words "criminal case," already met with in sub-section (b) of section 36, in section 62 which says that

> every judge of the court shall, except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the court or judges of the several provinces for the purpose of

an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

It is to be observed that the words "criminal case," which otherwise would be of general application, are qualified here by the addition of the words

under any Act of the Parliament of Canada.

It would not appear to me that because we have an express qualification here, we should read that qualification into the previous sections where the expression "criminal" is used without any qualifying words On the contrary, I find that when it was desired to qualify or restrict the generality of the term "criminal," parliament has used apt words to express the qualification, and I know of no rule of construction that would authorize me to imply that qualification in cases where it is not expressed.

In section 67, sub-section 4, there is a provision that this section—which governs the removal of cases from the provincial courts to the Supreme Court where the constitutionality of an Act of Parliament or of a legislature is in question—

shall apply only to cases of a civil nature.

The word "civil" is here used *lato sensu* and excludes anything that can come under the description of "criminal" matters, which seems to me to harmonize with the restriction expressed in sub-section (a) of section 36, and in sub-section (c) of section 39.

The only remaining provision of the "Supreme Court Act" where the word "criminal' is used is section 75 with reference to security for costs which is not required, *inter alia*, as to appeals "in criminal cases." These criminal cases are obviously those referred to in sub-section (b) of section 36, and in section 1024 of the Criminal Code.

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I would, therefore, conclude—and I also rely on the reasoning of Fitzpatrick C.J. and of Davies and Anglin JJ. in the *McNutt Case* (1)—that the words "criminal charge" in sub-section (a) of section 36, and in sub-section (c) of section 39, are used in a wide and not a restricted sense. No question whatever as to the power to legislate with respect to criminal law under the "British North America Act" arises here, and no consideration of the respective powers of parliament and of the legislatures with regard to criminal or penal matters can be of any assistance in the construction of the sections of the "Supreme Court Act" to which I have referred and which undoubtedly, however wide may be their application, are *intra vires* of the Canadian Parliament.

I, therefore, answer the first question in the affirmative, and consequently I hold that this court has no jurisdiction to pass on the appeal which the appellant seeks to bring before it, for the proceedings he has taken arise out of a criminal charge.

Second question. There can be absolutely no doubt, under the previous decisions of this court, that even assuming that I could answer question 1 in the negative, the appellant cannot appeal to this court inasmuch as his case does not come within the ambit of section 48. This section was amended in 1918 by 8 & 9 Geo. V., ch. 7, and now applies to all the provinces, with the exception of Quebec. It is the counterpart of section 46 with respect to Quebec appeals, and this court held in *Desormeaux* v. *Ste. Thérèse* (2), and more recently in *Montreal Abattoire, Limited* v. *City of Montreal* (unreported, 14th November, 1918), that no appeal lies to the Supreme Court from a judgment of a court

(1) 47 Can. S.C.R. 259; 10 D.L.R. 834. (2) 43 Can. S.C.R. 82.

in the Province of Quebec in any case of proceedings for or upon a writ of prohibition, unless the matter in controversy falls within some of the classes of cases provided for by section 46. Similarly an appeal in the case of proceedings for or upon a writ of prohibition in Nova Scotia does not lie to this court unless the matter in controversy, even though it were not excluded by sub-section (a) of section 36, or sub-section (c) of section 39, falls within some of the classes of cases provided for by section 48, which, since the amendment of 1918, applies to that province. The second question should be answered in the negative.

I think, therefore, that the appeal from the decision of the Acting Registrar should be dismissed with costs.

The appellant asked that should this court be of opinion that he cannot appeal as of right, he be granted special leave to appeal under sub-section (e) of section 48.

I think the answer I have given to the first question would preclude me from granting leave to appeal in a case where, in my opinion, the right of appeal is expressly taken away by the statute. But for another reason the prayer of the appellant cannot be granted by this court inasmuch as more than sixty days have elapsed since the judgment *a quo* was rendered. *Goodison Thresher Co.* v. *Corporation of McNab* (1).

Appeal dismissed with costs.

MOTION FOR STAY OF PROCEEDINGS.

The appellant then applied to Mr. Justice Mignault in chambers for an order staying further proceedings in this court until an application could be made to the Judicial Committee of the Privy Council for leave to

(1) 42 Can. S.C.R. 694.

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appeal to that Board. The order was refused for the following reasons:

MIGNAULT J.—In this matter I am of the opinion that inasmuch as this court has declared that it has no jurisdiction to entertain the appeal of the appellant from the judgment of the Supreme Court of Nova Scotia, Crown side, herein, and has dismissed the appeal taken by the appellant from the decision of the Acting Registrar refusing to affirm jurisdiction, I cannot grant the stay of proceedings asked for by the appellant.

Moreover, the affidavit of the appellant does not shew whether he intends to take a direct appeal to the Judicial Committee of the Privy Council from the judgment of the Supreme Court of Nova Scotia, or whether he purposes to apply to the Judicial Committee for leave to appeal from the judgment of this court dismissing his appeal from the decision of the Acting Registrar refusing to affirm jurisdiction, and under these circumstances I am of the opinion that a proper case has not been made out for granting a stay of proceedings.

The motion of the appellant is dismissed with costs.

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CAVEAT — *Statute—Construction—Agreement for sale—Assignment—Assignor giving mortgage—Caveat by assignee—Lapse of—Knowledge by mortgagee—Priorities—"The Land Titles Act," Sask. S.*, 1917, *2nd sess., c.* 18, *s.* 194, *R.S. Sask.*, 1909, *c.* 41, *s.* 162.] In April, 1912, the owner made an agreement to sell a lot of land to P. for a price payable by instalments, and in May, 1913, P. assigned to B. his interest in this agreement. This assignment was not registered, but in June, 1913, B. filed a caveat. In September, 1914, P., having paid the purchase price, was registered as owner of the land subject to the caveat. Subsequently P. executed a mortgage of the land, and when it was registered the mortgagee was made aware of B.'s caveat. In June, 1915, the registrar, under section 136 of "The Land Titles Act" of Saskatchewan, notified B., at the request of the mortgagee, that his caveat would lapse at the expiration of a certain delay, unless continued by order of the court; and, by a subsequent order, B.'s caveat was con-